

9-1-2022

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Recommended Citation

Bernick, Evan D. (2022) "Fourteenth Amendment Confrontation," *Hofstra Law Review*. Vol. 51: Iss. 1, Article 2.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol51/iss1/2>

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FOURTEENTH AMENDMENT CONFRONTATION

*Evan D. Bernick**

I. INTRODUCTION

Mr. Haley is one of the most memorable villains in all of American fiction. A “coarse” slave-trader whose “swaggering air of pretension”¹ enrages readers of Harriet Beecher Stowe’s *Uncle Tom’s Cabin* from his appearance in the opening scene, Haley does his part to fulfill the novel’s purpose of strengthening the abolitionist cause.² He is also not entirely fictional, and his creation is part of the constitutional history of the United States.

The real Haley was John Caphart, a slave-catcher hired by John DeBree of Norfolk, Virginia to capture Shadrach Minkins—an enslaved man who in 1851 fled from Virginia to Boston. Minkins was arrested and held at a Boston courthouse.³ Hundreds of antislavery activists crowded the courthouse, calling for his release.⁴ He was rescued by about twenty people who broke through the doors and shepherded him through the streets; abolitionists then helped him escape to Canada.⁵ The rescue of Shadrach led to the prosecution of the alleged perpetrators under the Fugitive Slave Act of 1850; Caphart served as a witness in the

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1. HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN OR, LIFE AMONG THE LOWLY* 5 (Harvard Univ. Press 2009).

2. See Robert S. Levine, *Uncle Tom’s Cabin in Frederick Douglass’ Paper: An Analysis of Reception*, 64 AM. LIT. 71, 74 (1992).

3. GORDAN S. BARKER, *FUGITIVE SLAVES AND THE UNFINISHED AMERICAN REVOLUTION: EIGHT CASES, 1848–1856*, at 42–43 (2013).

4. See GARY LEE COLLISON, *SHADRACH MINKINS: FROM FUGITIVE SLAVE TO CITIZEN* 116 (1997).

5. R.J.M. BLACKETT, *THE CAPTIVE’S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY* 409–10 (2018).

trial of Robert Morris, the second Black lawyer admitted to practice in Massachusetts.⁶

Critics of *Uncle Tom's Cabin* charged that Stowe had exaggerated Haley's coarseness and cruelty. In a book-length reply, Stowe included a record of abolitionist defense lawyer Richard Dana's cross-examination of Caphart—provided by Dana himself:

Question. Is it a part of your duty, as a policeman, to take up colored persons who are out after hours in the streets?

Answer. Yes, sir.

Q. What is done with them?

A. We put them in the lock-up, and in the morning they are brought into court and ordered to be punished,—those that are to be punished.

Q. What punishment do they get?

A. Not exceeding thirty-nine lashes.

Q. Who gives them these lashes?

A. Any of the officers. I do, sometimes.

Q. Are you paid extra for this? How much?

A. Fifty cents a head. It used to be sixty-two cents. Now it is fifty. Fifty cents for each one we arrest, and fifty more for each one we flog.

Q. Are these persons you flog men and boys only, or are they women and girls also?

A. Men, women, boys and girls, just as it happens.⁷

Dana's cross-examination shed little light on whether Morris was part of the rescue party. Indeed, while Morris's participation remains disputed,⁸ half a dozen witnesses testified that they saw him on the escape route.⁹ But that was not the point of crossing Caphart. The cross-examination served as a means of securing Caphart's liberty and a form of democratic address—to the jury, and to the broader political community concerning the injustice of the law that empowered people like Caphart. Dana's defense produced an acquittal;¹⁰ in the hands of Stowe and others, the cross-examination record helped build the antislavery movement. It is no surprise, then, that abolitionists insisted upon the right to face-to-face cross-examination of witnesses and

6. See JOHN D. GORDAN III, *THE FUGITIVE SLAVE RESCUE TRIAL OF ROBERT MORRIS: BENJAMIN ROBBINS CURTIS ON THE ROAD TO DRED SCOTT* 45 (2013).

7. HARRIET BEECHER STOWE, *A KEY TO UNCLE TOM'S CABIN PRESENTING THE ORIGINAL FACTS AND DOCUMENTS UPON WHICH THE STORY IS FOUNDED. TOGETHER WITH CORROBORATIVE STATEMENTS VERIFYING THE TRUTH OF THE WORK* 7 (Bedford, Applewood Books 1853).

8. See Laurel Davis & Mary Sarah Bilder, *The Library of Robert Morris, Antebellum Civil Rights Lawyer and Activist*, 111 L. LIBR. J. 461, 488-89 (2019).

9. Gary Collison, "This Flagitious Offense": *Daniel Webster and the Shadrach Rescue Cases, 1851-1852*, 68 NEW ENG. Q. 609, 619 (1995).

10. *Id.* at 620.

denounced the Fugitive Slave Act for violating the Sixth Amendment right of criminal defendants “to be *confronted with the witnesses against [them]*.”¹¹

This history of confrontation is absent from the Supreme Court’s Confrontation Clause opinions.¹² It is absent from *Crawford v. Washington*,¹³ initially heralded¹⁴ as a much-needed invigoration of the Confrontation Clause. This is the first Article to explore it. In it, I demonstrate that confrontation rights would emerge stronger from an inquiry into antebellum confrontation that the Court has recently invited. And I provide a framework for implementing confrontation—as it was understood, not only in 1791 but in 1868 when the right to confront witnesses was made binding on the states through the Fourteenth Amendment.

Part II summarizes *Crawford* and subsequent developments in the law of confrontation. I then canvass criticism of *Crawford*’s claims about the original meaning of confrontation and explain why that criticism matters to *Crawford*’s continued vitality. Part III sets forth the methodology of this Article, which is consistent with *Crawford*’s own. It consists in inquiry into the original public meaning (or “letter”) of the Constitution’s provisions and the original functions (or “spirit”) of the specific rights that it protects. I also summarize a broader debate about whether to incorporate the 1791 or 1868 meaning of confrontation against the states.

Part IV explores the content of confrontation rights. I contend that when the Sixth Amendment was ratified, confrontation entailed the face-to-face appearance of witnesses before the accused in open court, before a jury and subject to cross-examination. What we now call “hearsay” statements by absent declarants that were offered to prove the defendant’s guilt were generally excluded from criminal trials absent confrontation, with two important exceptions. Those exceptions were (1) dying declarations; and (2) sworn testimony under what were known as the “Marian procedures.” There was no distinction between “testimonial” hearsay, given with intent to aid the prosecution, and “nontestimonial” hearsay. *Crawford* was wrong to hold that only testimonial hearsay is covered by the Confrontation Clause.¹⁵

11. U.S. CONST. amend. VI.

12. See Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 984 (2012).

13. 541 U.S. 36 (2004).

14. See Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1866-67 (2012) (summarizing *Crawford*’s scholarly reception as “a victory not just for criminal defendants, but for the Constitution as well”).

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

I then trace confrontation's development over the course of the antebellum period. I find that by the time that the Fourteenth Amendment was ratified, dying declarations constituted the *only* exception to the general rule that out-of-court statements by witnesses evincing a criminal defendant's guilt could not be admitted absent a face-to-face appearance and an opportunity for cross-examination. I further find that confrontation was regarded as an immensely important right by Black people—both free and enslaved—and their White allies against slavery. The Fugitive Slave Act of 1850's provision for proceedings that treated statements by absent enslavers as conclusive of fugitive status inspired outcries and appeals to confrontation rights by opponents of slavery.

Part V investigates the purposes that confrontation was originally understood to serve. I find that *Crawford*'s emphasis on confrontation's capacity to discover factual truth is unwarranted. Confrontation was regarded as a means of respecting human dignity; promoting fairness; protecting liberty; and facilitating democratic contestation of criminal punishment.¹⁶ What critics of *Crawford* have long highlighted as a vice—its exclusion of reliable evidence—is a qualified virtue, and explains why the Fourteenth Amendment's confrontation requirements are more demanding still.

In Part VI, I integrate my findings into confrontation doctrine. I propose changes in confrontation doctrine—two required by original meaning, two inspired by the original spirit of confrontation. As to original meaning: (1) *Crawford*'s limitation to “testimonial hearsay” should be redefined to focus attention on what use is made of hearsay by the prosecution, not any intentions at work in its production; and (2) the Court should hold unconstitutional “notice-and-demand” statutes that require defendants to affirmatively invoke their confrontation rights in order to trigger the government's obligation to produce witnesses for face-to-face cross-examination. As to original spirit: (1) the Court should provide for pretrial depositions in which face-to-face cross-examination can take place; and (2) enable defendants at sentencing to cross-examine witnesses who speak to past acts and events not addressed during trial or included in any plea bargain. I conclude with a normative argument for broadening and strengthening confrontation rights in this way. Specifically, I argue that they can be used to shift power over a criminal punishment system that is the subject of intense, widespread moral concern, to those most directly impacted by it.

16. See *infra* Part V.

II. CRAWFORD'S "REVOLUTION"

A. *From Roberts to Crawford*

The Confrontation Clause's text is sparse and simple; the questions it raises are complex, owing to its interaction with a particularly vexed area of evidence law. Perhaps the narrowest interpretation of its language ever articulated holds that confrontation requires only that a criminal defendant have an opportunity to cross-examine a witness who testifies at trial.¹⁷ But the Supreme Court has, since 1895, held that confrontation requires the exclusion of certain out-of-court statements by witnesses who do not testify at trial.¹⁸ Accordingly, confrontation doctrine has been bound up in the law of hearsay, which governs the admission of out-of-court statements that are taken for the truth of the matters which they assert.¹⁹ Federal and state rules of evidence specify a variety of exceptions to the general rule that hearsay is inadmissible.²⁰ How, if at all, does confrontation interact with these exceptions?

In *Ohio v. Roberts*,²¹ the Court tethered confrontation's content to the law of hearsay. Statements by witnesses who were unavailable to testify were admitted if the statements bore adequate "indicia of reliability."²² Evidence admitted under "firmly rooted" hearsay exceptions included in the Federal Rules of Evidence—among them, business records, excited utterances, present-sense impressions, and statements by co-conspirators—were conclusively deemed reliable.²³ The reliability of hearsay evidence admitted under state hearsay law was determined on a case-by-case basis, based on the presence or absence of

17. See JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 1755 (1st ed. 1904) ("The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein.").

18. See *Mattox v. United States*, 156 U.S. 237, 243-44 (1895).

19. See FED. R. EVID. 801(c); ILL. R. EVID. 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

20. See 28 U.S.C. art. VIII advisory committee's introductory note, at 397 (describing, "a general rule excluding hearsay" that is "subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness," and adopting that approach for these [the federal] rules).

21. 448 U.S. 56 (1980).

22. *Id.* at 65-66.

23. *Id.* at 66; see also Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1017 (1998) (detailing how "the Supreme Court's decision to impose an unavailability requirement in the confrontation context has closely paralleled the imposition of an unavailability requirement by the hearsay rules of the Federal Rules of Evidence").

“particularized guarantees of trustworthiness.”²⁴ An exception was considered trustworthy if “adversarial testing would be expected to add little, if anything, to the statements’ reliability.”²⁵

Crawford rejected this approach. It arose from the admission in a trial for armed assault of a tape-recorded statement by Sylvia Crawford, who delivered the statement to police.²⁶ Her husband, Michael, had stabbed Kenneth Lee, who allegedly tried to rape Sylvia; the police arrested Michael the same night, and interrogated both Michael and Sylvia twice.²⁷ Although Sylvia’s statement undermined Michael’s self-defense claim, Washington’s marital privilege rendered Sylvia “unavailable”—she could not testify against her husband.²⁸ Accordingly, the prosecution sought the benefit of a hearsay exception for statements contrary to Sylvia’s own penal interest.²⁹ The trial judge rejected a confrontation challenge on the ground that the statement was reliable.³⁰

A unanimous Supreme Court reversed. Justice Antonin Scalia’s opinion for the Court centers “the original meaning of the Confrontation Clause,” and makes three principal claims about that meaning.³¹ First, the “confront” includes an opportunity for cross-examination.³² Second, only some hearsay statements—“testimonial” statements—need to be confronted.³³ Third, there exist some historically rooted hearsay exceptions that are not implicated by the Confrontation Clause.³⁴

Scalia acknowledged ambiguity in the text of the Sixth Amendment.³⁵ Drawing upon Noah Webster’s 1828 *Dictionary of the English Language*, he stated that “[o]ne could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial . . . those whose statements are offered at trial . . . or something in-between.”³⁶ He sought to dissolve the ambiguity by focusing on English common law, which he took to be “[t]he founding generation’s immediate source of the concept.”³⁷ What distinguished the common-law tradition from the continental civil-law tradition, argued Scalia, was “live testimony in

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

25. *Lilly v. Virginia*, 527 U.S. 116, 125 (1999).

26. *Crawford v. Washington*, 541 U.S. 36, 38-40 (2004).

27. *Id.* at 38.

28. *Id.* at 38-40.

29. *Id.* at 40.

30. *Id.*

31. *Id.* at 42-43.

32. *Id.* at 54.

33. *Id.* at 51-53.

34. *Id.* at 55-56.

35. *See id.* at 42 (“The Constitution’s text does not alone resolve this case.”).

36. *Id.* at 42-43.

37. *Id.* at 43.

court subject to adversarial testing,” the absence of which had led to paradigmatic examples of abusive prosecution.³⁸

The example to which Scalia devoted most attention was the 1603 trial of Sir Walter Raleigh for treason. Raleigh’s alleged accomplice, Lord Cobham, implicated him in a pretrial examination.³⁹ Raleigh demanded that Cobham be called to appear, believing that Cobham would recant.⁴⁰ The judges rejected his demands, the jury convicted, and Raleigh was executed.⁴¹

Scalia drew as well from colonial history. He described complaints against governors for privately examining witnesses and opposition to the taking of testimony by deposition and private judicial examination in admiralty courts that adjudicated Stamp Cases offenses.⁴² He also canvassed objections by “Anti-Federalist” opponents of the proposed federal Constitution about the omission of confrontation rights.⁴³ He emphasized complaints about written testimony; the importance of cross-examination in discovering truth; and concerns about an oppressive Congress.⁴⁴ Finally, he looked to post-ratification case law and treatises, which he took to show that the admissibility of prior testimony “depended on a prior opportunity for cross-examination.”⁴⁵

From this history, Scalia drew two inferences about the meaning of the Confrontation Clause. First, he inferred that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure . . . particularly its use of *ex parte* examinations [without the accused present] as evidence against the accused.”⁴⁶ The “principal evil” Scalia identified served as an interpretive guide. Because Scalia saw *ex parte* examinations conducted before a magistrate without the presence of the accused as the primary target of the Confrontation Clause, he reasoned that “not all hearsay implicates the Sixth Amendment’s core concerns.”⁴⁷ These examinations did not capture “off-hand, overheard remark[s]”; accordingly, Scalia concluded that the Confrontation Clause did not cover off-hand, over-heard remarks.⁴⁸

38. *Id.*

39. *Id.* at 44.

40. *Id.*

41. *Id.*

42. *Id.* at 47-48.

43. *Id.* at 49.

44. *Id.*

45. *Id.* at 50.

46. *Id.*

47. *Id.* at 51.

48. *Id.*

The formal nature of the targeted examinations inspired Scalia's selection of one of several definitions of "witnesses" from Webster's dictionary.⁴⁹ Scalia's chosen definition described a witness as someone who "bear[s]" testimony, understood as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."⁵⁰ Scalia did not articulate a comprehensive list or set of necessary-and-sufficient conditions for "testimonial" statements; he did, however, determine that "[s]tatements taken by police officers" counted as "testimonial under even a narrow standard" because they "bear a striking resemblance to examinations by justices of the peace in England."⁵¹

Scalia's second inference was that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."⁵² Scalia did not deny that "the Clause's ultimate goal is to ensure reliability of evidence."⁵³ The problem with *Roberts* was not its focus on reliability but its neglect of the original meaning of the Confrontation Clause and its invention of its own reliability-determining mechanism. Its "unpardonable vice" was its "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."⁵⁴

Scalia also identified *nontestimonial* evidence that could be admitted in criminal cases. He provided two examples: "business records" and "statements in furtherance of a conspiracy," both long established in hearsay law.⁵⁵ He also raised the possibility that one form of testimonial evidence—dying declarations—might not have to be confronted and acknowledged "the rule of forfeiture by wrongdoing," stating that the latter "extinguishes confrontation claims on essentially equitable grounds."⁵⁶

B. Fissures in the Crawford Coalition

Crawford did no more than identify a few examples of "testimonial hearsay" and issue a promissory note for the future development of the concept. That note was only partially redeemed two years later in *Davis*

49. *Id.*

50. *Id.*

51. *Id.* at 52.

52. *Id.* at 53-54.

53. *Id.* at 61.

54. *Id.* at 63.

55. *Id.* at 56.

56. *Id.* at 56 n.6, 62.

v. Washington,⁵⁷ which consolidated two cases involving witness statements to law enforcement.

In the first case, Michelle McCottry told a 911 operator that her former boyfriend, Adrian Davis, was “jumpin’ on [her] again” and, when prompted, provided his first and last name.⁵⁸ Adrian was charged with felony violation of a domestic violence no-contact order; because Michelle did not appear, the prosecution successfully moved to admit the recording of her exchange with the 911 operator.⁵⁹ The second case arose from domestic disturbance at the home of Amy and Hershal Hammon. Police kept Hershal in the kitchen while interviewing Amy.⁶⁰ Amy subsequently signed a battery affidavit in which she described how Hershal shoved her down on broken glass and hit her, attacked her daughter, and broke various household objects.⁶¹ Like Michelle, Amy did not appear; her battery affidavit was admitted over a confrontation challenge on the ground that it was an “excited utterance.”⁶² Both Adrian and Hershal were convicted.

The Court upheld Adrian’s conviction but reversed Hershal’s. Writing again for a unanimous Court, Justice Scalia acknowledged that *Crawford* “did not define” the term “testimonial” because the statements at issue in that case qualified under any reasonable definition.⁶³ Because the character of the statements admitted in *Davis* and *Hammon* was less clear, Scalia found it necessary to be more precise concerning the testimonial-nontestimonial distinction. But he declined again to “produce an exhaustive classification.”⁶⁴

Crawford described as the “core” of the Confrontation Clause “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.”⁶⁵ Scalia now characterized such statements as establishing a “perimeter”—that is, nothing beyond it implicated confrontation rights.⁶⁶ He adduced no new historical evidence. But he stated that he was “not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined.”⁶⁷

57. 547 U.S. 813 (2006).

58. *Id.* at 817-18.

59. *Id.* at 818-19.

60. *Id.* at 819-20.

61. *Id.* at 820.

62. *Id.* at 820-21.

63. *Id.* at 822.

64. *Id.*

65. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

66. *Davis*, 547 U.S. at 824.

67. *Id.*

He then provided a framework for identifying one class of testimonial statements and one class of nontestimonial statements:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁶⁸

Scalia found *Davis* relatively straightforward. The 911 operator's interrogation initially had the primary purpose of "enabl[ing] police assistance to meet an ongoing emergency"; she was not "not acting as a witness" until she "told McCottry to be quiet, and proceeded to pose a battery of questions" evidently designed to elicit incriminating evidence.⁶⁹ *Hammon* was still easier because the testifying officer expressly acknowledged that his questions to Amy were "part of an investigation into possibly criminal past conduct."⁷⁰

In closing, Scalia acknowledged and responded to arguments by Michelle, Amy, and amici that "the nature of the offenses charged in these two cases—domestic violence—requires greater flexibility in the use of testimonial evidence" because it is "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial."⁷¹ Scalia began by unequivocally stating that "[w]e may not . . . vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."⁷² But he then argued that the latter effect would be unlikely to materialize in the most concerning cases. *Crawford* referenced and "accepted" without substantial discussion the "rule of forfeiture by wrongdoing," which holds that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation."⁷³ Now, Scalia expressly endorsed a forfeiture-by-wrongdoing exception to confrontation and directed attention to the existing standards for demonstrating forfeiture—codified in Federal Rule of Evidence 804(6)—albeit without committing the

68. *Id.* at 822.

69. *Id.* at 828.

70. *Id.* at 829.

71. *Id.* at 832-33.

72. *Id.* at 833.

73. *Id.*; *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

Court to a “position on the standards necessary to demonstrate . . . forfeiture.”⁷⁴

The following year, the Court solidified its approach to identifying exceptions to *Crawford*’s rule. *Giles v. California*⁷⁵ dealt with a domestic-violence report that was admitted into evidence in a murder trial. The trial court relied upon California law that permitted admission of out-of-court statements that described the infliction or threat of physical injury on an unavailable declarant, where the prior statements are deemed trustworthy.⁷⁶ The California Court of Appeal and the California Supreme Court upheld the admission, reasoning that *Crawford* and *Davis* recognized a doctrine of forfeiture by wrongdoing.⁷⁷

This time, Justice Scalia wrote for a divided Court; three Justices dissented, and one section of Scalia’s opinion commanded only a plurality. A majority remained committed to using historical analysis, not only to determine whether a claimed exception to the right of confrontation is in fact part of the Constitution’s original meaning but to determine the scope of the exception. Again, sifting English cases, Founding-era treatises and dictionaries, and antebellum cases, Justice Scalia concluded that forfeiture by wrongdoing encompassed only deliberate witness tampering.⁷⁸ Accordingly, California’s forfeiture-by-wrongdoing rule was unconstitutionally permissive.

C. Fracture

Crawford’s appearance of unanimity was deceptive. Chief Justice William Rehnquist and Justice Sandra Day O’Connor disagreed with the Court’s decision to overrule *Roberts* on both historical and consequentialist grounds. As a historical matter, they doubted the merits of the distinction between testimonial and nontestimonial statements and the categorical nature of the exclusion of the former.⁷⁹ As a practical matter, they urged that “thousands of federal prosecutors and . . . tens of thousands of state prosecutors need answers” to what kinds of statements are testimonial.⁸⁰

Justice Clarence Thomas articulated a distinctive understanding of confrontation in *Davis*. He contended that statements “require some

74. *Davis*, 547 U.S. at 833.

75. 554 U.S. 353 (2008).

76. *Id.* at 357.

77. *Id.*

78. *Id.* at 357-64.

79. *Crawford v. Washington*, 541 U.S. 36, 69-75 (2004) (Rehnquist, C.J., concurring).

80. *Id.* at 75.

degree of solemnity” before they can be called testimonial—thus, informal police questioning ought not be covered.⁸¹ He argued as well that inquiry into the “primary purpose” of an interrogation would give “no predictable results to police and prosecutors” because interrogations seldom have only one purpose.⁸² *Giles* yielded five opinions, with Justice Stephen Breyer—writing for himself, Justice John Paul Stevens, and Justice Anthony Kennedy—disputing the historical contours of the forfeiture-by-wrongdoing rule and raising consequentialist concerns about the effect of the majority’s understanding on the prosecution of domestic violence cases.⁸³

A quartet of cases decided in the early 2010s left the *Crawford* coalition in tatters. *Melendez-Diaz v. Massachusetts*⁸⁴ held unconstitutional the admission in a drug trial of affidavits that reported the results of forensic analysis. The affidavits were sworn to by a notary public by analysts who did not testify in person; the affidavits reported that substances that were seized by the police and connected to the defendant contained cocaine.⁸⁵ Justice Scalia wrote for a narrow, 5-4 majority.

For Scalia, *Melendez-Diaz* was easy. *Crawford* mentioned affidavits twice as examples of core testimonial evidence; the analysts’ affidavits performed precisely the function that live, in-court analyst testimony would have performed; and the analysts could not possibly be unaware of the affidavits’ evidentiary purpose “since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves.”⁸⁶ The dissenters sought to distinguish the analysts’ statements on the ground that they were not “ordinary witnesses” and “witnessed nothing to give them personal knowledge of the defendant’s guilt.”⁸⁷ At far greater length, however, they emphasized the ruling’s disruptive potential.

Writing for the dissent, Justice Anthony Kennedy argued that it would be extremely difficult to determine who is a “witness” under the Confrontation Clause in drug cases, given “how many people play a role in a routine test for the presence of illegal drugs[,]” and declared that the costs of confrontation may effectively prohibit the use of scientific tests in drug trials, under the Court’s new rule.⁸⁸ More strongly, he went on to

81. *Davis v. Washington*, 547 U.S. 813, 836 (2006) (Thomas, J., concurring).

82. *Id.* at 838-40.

83. *See Giles*, 554 U.S. at 385-400 (Breyer, J., dissenting).

84. 557 U.S. 305 (2009).

85. *Id.* at 308-09.

86. *Id.* at 311.

87. *Id.* at 330-31 (Kennedy, J., dissenting).

88. *Id.* at 331-33.

charge the Court with “meddling with the Confrontation Clause at a dear price” that includes not only taxpayer dollars but “[g]uilty defendants . . . go[ing] free, on the most technical grounds,” such as analysts not making it to the court house in time, being ill or out of the country, or some other contingency unrelated to the truth-finding process.⁸⁹

And for what? Justice Kennedy articulated two “purposes of the Confrontation Clause” and doubts whether either is furthered by the Court’s decision. The first: “A witness, when brought to face the person his or her words condemn, might refine, reformulate, reconsider, or even recant earlier statements.”⁹⁰ It seems doubtful that an analyst would do any of these things upon seeing a defendant. The second: “[T]o alleviate the danger of one-sided interrogations by adversarial government officials who might distort a witness’ testimony.”⁹¹ Because “an analyst performs hundreds if not thousands of tests each year,” cross-examination is unlikely to reveal whether an analyst was pressured to alter one particular test.⁹²

Scalia provided assurances that these costs were overstated. To the claim that the use of controlled-substance analyses at trial would be disrupted, he responded that there are few trials anyway—“95% of convictions in state and federal courts are obtained via guilty plea[s].”⁹³ Most notably, he observed that many states “permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution’s intent to use a forensic analyst’s report.”⁹⁴ He addressed directly the dissent’s concerns that these “notice-and-demand” statutes would be undercut by the majority’s reasoning, stating that these “burden-shifting statutes” in fact “shift no burden whatever” because “[t]he defendant *always* has the burden of raising his Confrontation Clause objection.”⁹⁵

Scalia’s first post-*Crawford* dissent in a confrontation case came in 2011. *Michigan v. Bryant*⁹⁶ held nontestimonial a statement delivered to police officers by a mortally wounded man, Anthony Covington, in which Anthony identified and described the shooter. Writing for a six-Justice majority, Justice Sonia Sotomayor found “[i]mplicit in *Davis* . . . the idea that because the prospect of fabrication in statements

89. *Id.* at 342-43.

90. *Id.* at 338.

91. *Id.* at 338-39.

92. *Id.*

93. *Id.* at 325 (majority opinion) (internal citation omitted).

94. *Id.* at 326.

95. *Id.* at 326-27.

96. 562 U.S. 344 (2011).

given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject[ed] to the crucible of cross-examination.”⁹⁷ Dissenting with Justice Ruth Bader Ginsburg, Justice Scalia attacked both the Court’s characterization of the police interrogation and the suggestion that the Court would in future cases except statements from the Confrontation Clause if they were sufficiently reliable. Justice Scalia took the latter move to either reflect a deep confusion or an intention to “resurrect *Roberts* by a thousand unprincipled distinctions without ever explicitly overruling *Crawford*.”⁹⁸

Later that year, the Court decided another forensics case, *Bullcoming v. New Mexico*,⁹⁹ again by a 5-4 margin. In an opinion that only Scalia joined in full, Justice Ginsburg determined that the introduction in a trial for driving while intoxicated of a laboratory report certifying that the defendant, Donald Bullcoming, was above the threshold for an aggravated DWI, violated Bullcoming’s confrontation rights.¹⁰⁰ The testimony was given by an analyst who was familiar with the laboratory’s testing procedures but neither participated in nor observed it.¹⁰¹

Once again, Justice Kennedy wrote for the dissenters, and once again he stressed that the Court’s approach to confrontation drained “[s]carce state resources” and “impose[d] an undue burden on the prosecution” without yielding any reliability-related benefits.¹⁰² This time citing *Bryant*, he repeated that the Confrontation Clause is “designed to ensure a fair trial with reliable evidence” and also contended that the Court’s testimonial focus undermines reliability—that a statement that is “more formal . . . [is] less likely to be admitted.”¹⁰³ He concluded with a critique of *Crawford* itself, reminding readers that “the *Crawford* approach was not preordained” and that it was “at odds with the sound administration of justice.”¹⁰⁴ Like the *Melendez-Diaz* majority, the *Bullcoming* majority minimized prosecutorial costs by observing that notice-and-demand statutes could “reduce burdens on forensic laboratories” and that few cases actually proceed to trial.¹⁰⁵

97. *Id.* at 361.

98. *Id.* at 393 (Scalia, J., dissenting).

99. 564 U.S. 647 (2011).

100. *Id.* at 652.

101. *Id.* at 651.

102. *Id.* at 683-84 (Kennedy, J., dissenting).

103. *Id.* at 678.

104. *Id.* at 684.

105. *Id.* at 666 (majority opinion).

The Court's next major confrontation decision did not yield a majority and produced four opinions, three of which focused on evidentiary reliability. *Williams v. Illinois*¹⁰⁶ considered whether an analyst at the laboratory where a DNA test was performed could interpret the test at trial even if they had not performed it. Justice Alito's plurality opinion described the "strong circumstantial evidence about the reliability" of the lab's work;¹⁰⁷ Justice Breyer worried that prosecutors might be "force[d] . . . to forgo forensic DNA analysis in cases where it might be highly probative" if the analyst who performed the test was considered a "witness."¹⁰⁸ In dissent, Justice Kagan drew attention to a laboratory labelling error that was made in a previous case by an analyst from the same facility that produced the test in *Williams* and stated that the Confrontation Clause was a "mechanism for catching such errors."¹⁰⁹ Still more strongly associating confrontation with reliability, she said that "[f]orensic evidence is reliable only when properly produced, and the Confrontation Clause prescribes a particular method for determining whether that has happened."¹¹⁰

The most thorough empirical analysis of confrontation decisions by lower federal courts—one spanning 2004 to 2021—found that *Crawford* is largely redundant to nonconstitutional hearsay rules.¹¹¹ That is not to say that *Roberts* has returned; whereas once relatively informal hearsay statements—like casual statements to friends and acquaintances—are more likely to be excluded as unreliable, now relatively formal statements—like affidavits—are more likely to be excluded as testimonial.¹¹² Still, there has been no *Crawford* revolution to celebrate or execrate.

Giles' approach to identifying exceptions to *Crawford* remains intact, for now. In *Ohio v. Clark*,¹¹³ the Court upheld a three-year old's identification of his abuser, not because it was reliable but because it was "clearly . . . not made with the primary purpose of creating evidence for [the] prosecution."¹¹⁴ In *Hemphill v. New York*,¹¹⁵ the Court rejected an exception to confrontation in cases where a defendant "opens the

106. 567 U.S. 50 (2012).

107. *Id.* at 76.

108. *Id.* at 98 (Breyer, J., concurring).

109. *Id.* at 119 (Kagan, J., dissenting).

110. *Id.*

111. See Jeffrey Bellin & Diana Bibb, *The Modest Impact of the Modern Confrontation Clause*, 89 TENN. L. REV. 67, 69-70, 72 (2021).

112. *Id.* at 125.

113. 576 U.S. 237 (2015).

114. *Id.* at 246.

115. 142 S. Ct. 681 (2022).

door” to uncontroverted evidence. At Darrell Hemphill’s murder trial, prosecutors tried to admit into evidence uncontroverted statements from a plea allocution (not Hemphill’s) on the ground that the statements were necessary to rebut a misleading impression given by Hemphill’s testimony.¹¹⁶ Writing for the Court, Justice Sotomayor stated that “the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution’s procedures for testing the reliability of that evidence are followed.”¹¹⁷ Because the state did not deny either that the statements were testimonial or that an opening-the-door exception existed at common law, the Court concluded that those procedures had not been followed.¹¹⁸

D. Criticism

In *Crawford* and subsequent cases, Justice Scalia claimed to be following the original meaning of the Confrontation Clause. But scholars assailed his historical claims early and often, and even those friendly to his project have raised critical questions about it.

None of Scalia’s antagonists have been as fierce as Thomas Davies.¹¹⁹ Davies amassed evidence that certain kinds of testimonial hearsay were admissible at the Founding absent an opportunity for cross-examination in many states.¹²⁰ In these states, justices of the peace were required to make written records of the sworn depositions of a witness of a felony at the time of arrest.¹²¹ An opportunity for cross-examination was not required at these “Marian procedures”—named for the English statutes on which they were based.¹²² Further, Davies contended that Scalia’s limitation of statements requiring

116. *Id.* at 686.

117. *Id.* at 692.

118. *See id.* at 691.

119. *See, e.g.*, 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, 107 (2005) [hereinafter Davies, *What Did the Framers Know?*]; Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 557-58 (2007) [hereinafter Davies, *Reply to Kry*]; 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, 349-51 (2007) [hereinafter Davies, *Framers’ Design*]; Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles’s Forfeiture Exception to Confrontation Were or Were not “Established at the Time of the Founding”*, 13 LEWIS & CLARK L. REV. 605, 615 (2009) [hereinafter Davies, *Selective Originalism*].

120. *See* Davies, *What Did the Framers Know?*, *supra* note 119, at 178.

121. *See id.* at 128-29.

122. *Id.*

confrontation to testimonial statements was ahistorical.¹²³ The general rule at the Founding was that all hearsay statements were “no evidence” in criminal trials, full stop, with only two exceptions: (1) testimony under the Marian procedures; and (2) dying declarations by the victim of a homicide about the identity of the killer.¹²⁴

Randolph Jonakait has attacked Justice Scalia’s concentration on British history, at the expense of state experience with confrontation rights.¹²⁵ On Jonakait’s account, the latter experience saw the development of an adversary system in which the confrontation right, the right to counsel, and the right to trial by jury together enabled effective criminal defense.¹²⁶ This system was late in developing across the Atlantic. Scalia’s failure to recognize this cast doubt upon both his history and his account of confrontation.¹²⁷

Gary Lawson has taken to Scalia to task for focusing on the wrong constitutional text and the wrong timeframe.¹²⁸ Although he applauds Scalia’s account of the original meaning of the Sixth Amendment, he emphasizes that *Crawford* was a state case.¹²⁹ It is historically uncontroversial that—as the Court held in *Barron v. Baltimore*¹³⁰—the first eight amendments (now called the Bill of Rights) did not apply to the states when ratified in 1791. If any of the rights listed in the first eight amendments constrain the states, they do so through the Fourteenth Amendment. The Fourteenth Amendment, however, was enacted some eighty years after the Sixth, in 1868. Even assuming that the Fourteenth Amendment applies confrontation rights to the states, it is not clear whether the content of those rights circa 1791 or 1868 should be decisive. Scalia did not consider this at all.¹³¹

Scalia’s account of confrontation has its defenders. *Crawford* cites Richard Friedman and Akhil Amar,¹³² who had elaborated historical and textual cases for something resembling the testimonial-hearsay

123. See *id.* at 190-92.

124. Davies, *Selective Originalism*, *supra* note 119, at 638.

125. See Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 227-28 (2005).

126. See Randolph N. Jonakait, *Commentary on Professor Berger’s Article: The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 621 n.25 (1992); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 81-82 (1995).

127. See Jonakait, *supra* note 125, at 221-23.

128. Gary Lawson, *Confronting Crawford: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism*, 84 UNIV. CHI. L. REV. 2265, 2285-86 (2017).

129. See *id.* at 2274.

130. 32 U.S. 243 (1833).

131. See Lawson, *supra* note 128, at 2288.

132. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

limitation. Both scholars were concerned with government manipulation—Amar would have limited confrontation to live testimony and statements recorded for use at trial;¹³³ while Friedman took a slightly broader view, holding that all statements delivered “with the anticipation that, in all likelihood, the statement will be presented to the factfinder at trial” ought to be covered.¹³⁴ And Robert Kry defended *Crawford* against Davies’s criticism, relying heavily—though not exclusively—on post-1791 materials attesting to a cross-examination rule.¹³⁵

Lawson’s criticisms anticipated an emergent anxiety on the Court about the content of rights incorporated against the states. In *N.Y. State Pistol & Rifle Ass’n v. Bruen*,¹³⁶ Justice Thomas flagged “an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope.”¹³⁷ And he cited several cases in which the Court “assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.”¹³⁸ One of them was *Crawford*.¹³⁹ By reserving the question whether the 1791 or 1868 content of enumerated rights binds the states through the Fourteenth Amendment, *Bruen* broadened the scope of inquiry into the historical foundations of a diminished precedent. How would *Crawford*—and confrontation—fare under an inquiry into the latter’s 1868 content?

III. TOWARDS THE LETTER AND THE SPIRIT OF CONFRONTATION

Crawford holds itself out as a decision that is dictated by the original meaning and function of the Confrontation Clause, and subsequent decisions have analyzed confrontation questions in similar ways. To argue that confrontation doctrine ought to change in some way

133. See Akhil R. Amar, *Foreward: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 693-94 (1996); Akhil R. Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045-46 (1998).

134. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1039 (1998); see also Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 561 (1992) (arguing that “[h]earsay statements procured by agents of the prosecution or police should . . . stand on a different footing than hearsay created without governmental intrusion”).

135. Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 551 (2007).

136. 142 S. Ct. 2111 (2022).

137. *Id.* at 2138.

138. *Id.* at 2137.

139. *Id.* at 2137-38.

requires acknowledging, if not accepting, the expressed methodological commitments of the Justices who have developed it and have shaped doctrine to reflect those commitments.

But perhaps our confrontation doctrine is very morally unattractive precisely because it is originalist. Perhaps it is very bad because it has professed originalism but not actually delivered results consistent with original meaning. Or perhaps accurately capturing the original meaning of confrontation would make matters worse still.

Accordingly, I start but do not stop with original meaning. I accept *Bruen*'s invitation to explore confrontation in 1791 and 1868. The next Part explains how I will take up that invitation. I will return to the moral merits of implementing what I find after detailing where the evidence leads.

A. *The Letter: Original Public Meaning*

As used here, “original public meaning” refers to the publicly accessible concepts that most users of the English language originally associated with the Constitution’s words, phrases, and symbols in the context in which they first appeared together.¹⁴⁰ I identify these concepts

140. See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* 5 (2021). Precisely what public meaning is, is controversial among originalists. Compare Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1440 (2014) (“[T]he true, original public meaning of the language employed . . . is . . . the objective meaning the words would have had, in historical, linguistic, and political context, to a reasonable, informed speaker and reader of the English language at the time they were adopted.”) with Christina Mulligan, *Diverse Originalism*, 21 PENN. J. CON. L. 380, 409 (2018) (“Once we start jettisoning some actually-held and publicly-understood meanings, we are engaged in a normative enterprise—determining which actually-held meanings are better, more justified, more logical, more consistent When we seek that kind of reasonable meaning, we are no longer asking a descriptive question about what the text meant to the public.”).

Like Mulligan, I regard the use of an idealized “reasonable” framer, ratifier, or reader as a convenient fictive entity to which one attributes the shared constitutional understanding of *all* members of the public as an invitation to “distort through unconscious bias.” Mulligan, at 406. More generally, incautious efforts to capture a *unitary* public meaning can risk erasing contributions to constitutional history of what James Fox (borrowing from Nancy Fraser) has called “counterpublics.” See James W. Fox Jr., *Counterpublic Originalism and the Exclusionary Critique*, 67 ALA. L. REV. 675, 716 (2016). In criticizing Jürgen Habermas’s conception of a bourgeois public sphere in which people reason together towards a common good, Fraser contended that “virtually from the beginning, counterpublics contested the exclusionary norms of the bourgeois public, elaborating alternative styles of political behavior and alternative norms of public speech.” Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25 SOCIAL TEXT 56, 61 (1989). Similarly, Fox charges that originalists have in their search for a unitary public meaning “excluded meanings developed in counterpublics” with the result of imposing artificially narrow meanings on text shaped by both publics and counterpublics, in contestation with one another. Fox, at 719. In my presentation, abolitionists are a counterpublic

by investigating how language is used during relevant time periods. I distinguish between the original concepts expressed by the text and what particular entities, activities, and phenomena fall within the scope of those concepts—whether a particular “this” is a kind of “that.” Within originalism, this distinction is often expressed as the distinction between meaning and application.¹⁴¹

To take an easy example, no one seriously argues that the Fourth Amendment’s protections against unreasonable searches and seizures of “houses” protect only houses in existence in 1791 when the Fourth Amendment was ratified. *Of course*, the meaning of the text includes houses that would be built in the future—structures that meet whatever criteria were used in 1791 to distinguish houses from not-houses. The difference between those original criteria and the houses that meet them—whenever they might be built—is the difference between meaning and application.

But how can we identify the original criteria in the first place? We could pick up a dictionary from the relevant time period. But the dictionary definition may lack sufficient precision for us to determine whether (say) a recreational vehicle with living quarters counts as a house. And all definitions abstract from the particulars of language use. People in a linguistic community learn by doing and illustrate their knowledge of what concepts are by the way in which they use them.¹⁴² Observers centuries removed, too, can learn by studying linguistic practice, even where the participants in a practice do not define the words that they are using.

Of course, linguistic communities are not homogenous and different groups within a broader community of English speakers may adhere to different linguistic conventions. Consequently, to speak of “public meaning” is to invite the further question—*which* public? Certain terms may carry different meaning for different publics—groups with distinctive socially situated experiences and linguistic practices informed by those experiences. One example is “terms of art”—think “black hole” (for scientists) or “summary judgment” (for lawyers)—that

whose understanding of confrontation eventually became shared by political and legal elites. It is worth highlighting, not merely because it is representative but as a matter of justice to the historically excluded and a potential source of inspiration to those who claim continuity with their struggle. *See id.* at 680-81 (arguing that originalism “offers a modern discourse where voices from the past are treated with respect and a measure of authority[]” and that “the opportunity to include the voices, ideas, and experiences historically excluded from such authority should be embraced”).

141. *Id.* at 9.

142. On the contribution of use to meaning, see LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 65–67 (G. E. M. Anscombe trans., Blackwell Publ’g 3d ed. 2001) (1953). Even if meaning isn’t identical to use, it’s often the best evidence we have.

carry technical or specialized meanings that can be appreciated by others through a linguistic division of labor.¹⁴³ Basically, those to whom words are unfamiliar or seem to be arranged in unusual ways ask people whom they think might be more familiar with them what the words mean.

Such terms are everywhere in the law, and there are some uncontroversial examples of legal terms of art in the Constitution. Take the phrase “letters of marque and reprisal.”¹⁴⁴ On Larry Solum’s account, an ordinary person confronted with this term will

defer to the understanding . . . that would be the publicly available meaning to those who were members of the relevant group (for example, lawyers) and those who shared the understandings of the members of the relevant group (for example, other citizens who consulted lawyers about the meaning of the term of art).¹⁴⁵

That is, they will ask a lawyer or someone familiar with the language of the law.

Whether a particular constitutional word or phrase is a term of art is an empirical question. Public-meaning originalists presume that constitutional provisions are to be understood consistently with their conventional or ordinary meaning—that is, the meaning that they carried for most people when used outside of legal settings.¹⁴⁶ But that presumption can be rebutted by evidence of “linguistic practice of those learned in the law in the late eighteenth century—so long as the division of linguistic labor made the technical meaning accessible to ordinary citizens.”¹⁴⁷

B. The Spirit: Original Function(s)

Conceptual criteria are rarely so precise as to clearly distinguish all of the things that satisfy them from those that do not. Even something as simple as “chair” admits of borderline cases (is a beanbag a chair?). The inherent fuzziness of all language is a continuous source of contestation—and litigation. James Madison recognized and expounded with nearly unparalleled clarity how the limitations of language made the framing of the Constitution difficult:

143. See Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 25 (2008).

144. See U.S. CONST. art. I, § 8, cl. 11 (delegating to Congress the power to “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”).

145. Solum, *supra* note 143, at 25.

146. See BRIAN G. SLOCUM, *ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION* 1-4 (2015).

147. Solum, *supra* note 143, at 25.

The use of words is to express ideas. Perspicuity, therefore requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriated to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas. Hence it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate, by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less, according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.¹⁴⁸

Madison urged that the Framers had done the best that they could with an inherently limited medium—language—in which they needed to express particularly complex concepts. But it was nonetheless clear to him that not all had been clearly settled. We can add to his list of drivers of imprecision fierce disagreement between the framers and a corresponding incentive to delegate to the future, lest that disagreement make ratification impossible.¹⁴⁹ Confronted with such delegations to the future, even a perfectly knowledgeable interpreter would find cases in which they would not be justified in claiming that a particular “this” is an instance of “that.” The criteria for “that” just aren’t sharp enough.

Within the space left to constitutional decisionmakers by unclear text, constitutional decisionmakers cannot rely solely on original meaning. One approach to implementing unclear text has been termed good-faith construction.¹⁵⁰ It holds that where the “letter”—the original meaning of the text—is unclear decisionmakers should identify and guide their decisions by the function or functions that people originally associated with it.¹⁵¹ The public meaning of the text controls when it is clear.¹⁵²

Crawford itself is an example of good-faith construction. Justice Scalia developed a rule that replaced decades of Confrontation Clause doctrine after investigating the meaning and function of the Clause’s language. He did so by drawing upon legal history with which he

148. THE FEDERALIST NO. 37, at 183 (James Madison) (Gideon ed., 2001).

149. See Neil K. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191, 196, 201 (1987).

150. See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 33-34 (2018).

151. *Id.* at 31-32.

152. *Id.* at 52.

concluded members of the ratifying public were familiar. From that history, he concluded that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”¹⁵³ And he used that evil to formulate a rule of exclusion that applied only to “testimonial” hearsay.

To say that Scalia engaged in good-faith construction is not to say that he did well, or that he arrived at the right conclusions, either in identifying original meaning or developing a means of implementing it. Even the most well-intended effort to identify original meaning may go astray, particularly if important evidence is lacking. Further, rules of construction that are developed with care and in the hopes that they will deliver results that are consistent with a provision’s spirits may fail to do so. The spirit may have been misidentified; the rule itself may be flawed. A rule that is effective at one juncture may be ineffective if conditions change.¹⁵⁴ I will consider all of these possibilities in the analysis to follow.

C. Crawford and “Fourteenth Amendment Originalism”

The view is ascendant among originalists who hold that the Fourteenth Amendment requires states to respect some or all of the individual rights listed in the first eight amendments that those rights ought to be understood *as they were understood in 1868*.¹⁵⁵ It is conceivable that the Fourteenth Amendment “incorporated” the first eight amendments as *they were understood in 1791*. But it does seem unlikely.

The Republicans who shaped and expounded the meaning of the Fourteenth Amendment held and expressed views about the antebellum Constitution that were decidedly out-of-step with the original meaning of the latter. For instance, they took the Privileges and Immunities Clause of Article IV to be not merely a guarantee of nondiscrimination against sojourning citizens but an absolute guarantee of civil rights that no state could abridge.¹⁵⁶ Akhil Amar¹⁵⁷ and Kurt Lash¹⁵⁸ have adduced

153. Crawford v. Washington, 541 U.S. 36, 50 (2004).

154. Barnett & Bernick, *supra* note 150, at 37.

155. See, e.g., AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 223 (1998); Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1443 (2022).

156. Barnett & Bernick, *supra* note 150, at 46.

157. See AMAR, *supra* note 155, at 223-24.

158. See Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. STATE L.J. 1085, 1135 (1995).

evidence that the public meaning of the guarantees of non-establishment, the freedom of speech, and the right to bear arms changed over time as well. Accordingly, we should presume that evidence closer to 1868 is more probative of the content of any rights guaranteed by the Fourteenth Amendment. That presumption could be displaced by contrary evidence—say, of a concerted effort by Republicans to guarantee confrontation-as-understood-in-1791 against the states.

I will assume for the purposes of my analysis that the Fourteenth Amendment does require states to respect some set of fundamental rights. John Harrison¹⁵⁹ and Ilan Wurman¹⁶⁰ have contended that it does not; that the Privileges and Immunities Clause—which most originalists consider the proper “hook” for fundamental rights—only prohibits states from discriminating between citizens in extending rights; states could choose to deny (say) the right to speak freely to all citizens. I have elsewhere argued that this antidiscrimination-only theory is incorrect; that the Privileges or Immunities of the Fourteenth Amendment guarantees to all U.S. citizens fundamental civil rights that are widespread, entrenched, and associated with citizenship—including but not limited to those listed in the first eight Amendments.¹⁶¹ *Bruen* suggests that even the Court’s most uncompromising originalists are not open to an anti-discrimination-only theory. Accordingly, I will not engage it here. I will, however, consider an originalist argument that the right to confront witnesses was not among them.

IV. THE LETTER OF THE CONFRONTATION CLAUSE

There is no dispute that the right to confrontation can be traced through English common law. But this is less helpful than it might seem. For one thing, the content of English common law was constantly contested and changed over the course of time. For another, we cannot assume that American lawyers understood rights with common-law origins in what English lawyers would have regarded as an accurate way at any given time. Finally, we cannot assume that the meaning that confrontation carried for ordinary members of the public at the point of ratification—of either the Sixth or Fourteenth Amendment—was the same as that which prevailed in courts of law, whether English or American. This Part seeks to ascertain the content of the right to

159. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387-88 (1992).

160. See ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* 55 (2020).

161. See BARNETT & BERNICK, *supra* note 140, at 215-16.

confrontation in 1791 and 1868 by canvassing a variety of publicly accessible materials that were part of the context of constitutional communication.

A. Common Law

Confrontation scholars generally agree that the common-law right to confrontation emerged from sixteenth-century interrogations by magistrates of prisoners and witnesses and their subsequent introduction at trial. These interrogations often took place in secret, and the depositions that they produced were offered in lieu of testimony in person. Certain of these trials became notorious, including those of Sir Walter Raleigh, Sir Nicholas Throckmorton, and John Lilburne.

I mentioned Raleigh's 1603 treason trial above. Raleigh was prosecuted almost exclusively on the basis of out-of-court statements. Witnesses testified about statements that Lord Cobham had made to officers of the Crown who examined him, as well as Cobham's answers to interrogatories. Raleigh demanded that the Crown produce Cobham, stating that "[p]roof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done."¹⁶² He appears to have been convinced that Cobham would not falsely incriminate him in his presence. Cobham's recantation would reveal that his testimony had been produced through torture—and reveal Raleigh's innocence.

By contrast with Raleigh, there was no serious question that John Lilburne was guilty of many of the charges for which he was prosecuted on numerous occasions.¹⁶³ Still, at his most-famous 1649 trial for treason, Lilburne objected to being convicted on the testimony of absent witnesses, as well as being compelled to create evidence against himself. His purpose was less to prove his innocence than to put his accusers on trial. Thus, he accused his "adversaries [and] prosecutors" of "whispering with the Judges . . . in [his] absence," describing this as "extremely foul and dishonest play."¹⁶⁴ His ultimate goal was to elicit the sympathy of the jury and convincing them to acquit him, irrespective of his guilt.¹⁶⁵

162. Berger, *supra* note 134, at 571.

163. See 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 365-67 (1883); Berger, *supra* note 134, at 576.

164. Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 233-34 (1952).

165. See Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1113 (2013).

Nicholas Throckmorton was tried in 1544 for “compassing and imagining the death of the Queen, levying war against the Queen within the realm . . . intending to depose the Queen of her Royal estate, and so to destroy her, falsely and traitorously desiring and concluding to take the Tower of London.”¹⁶⁶ The Crown’s evidence consisted largely in conspirators’ confessions, to which Throckmorton objected, pointing out that one of them was “yet living, and is here this day” and questioning why the witness was not “brought face to face to justify this matter.”¹⁶⁷ Like Raleigh, he argued that the production of the witness would reveal the truth—that the witness would “not abide by” his prior statement.¹⁶⁸ Like Lilburne, he protested the indignity of being denied a face-to-face confrontation, refused to “accuse” himself, and demanded that the prosecution prove its case without his assistance.¹⁶⁹

Such complaints, and the public response to them, yielded a common-law right on the part of the accused to demand that an accuser appear before them, face-to-face. In his 1765 *Commentaries on the Laws of England*, Sir William Blackstone touted confrontation’s truth-seeking capacity, stating that live testimony was “much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer.”¹⁷⁰ But this confrontation right was limited in scope and application.

During much of the eighteenth century, the common law knew nothing of a right to be represented by counsel; in fact, it prohibited representation for serious charges.¹⁷¹ Blackstone noted that defendants were allowed to have counsel only in misdemeanor and treason prosecution, not in felony prosecutions.¹⁷² Although a defense attorney could aid defendants in presenting legal arguments, an attorney could not examine or cross-examine witnesses.¹⁷³ The judge interrogated the accused, and rarely engaged in sustained questioning.¹⁷⁴ Juries were dominated by judges, who treated juries less as impartial fact-finders than as ratifiers of judicial views of the evidence.¹⁷⁵

166. J.W. WILLIS BUND, A SELECTION OF CASES FROM THE STATE TRIALS 157 (1879).

167. Berger, *supra* note 134, at 571 n.60.

168. *Id.* at 159.

169. 1 SAMUEL MARCH PHILLIPS, STATE TRIALS 10-12 (1826).

170. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1764).

171. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 10 (2003).

172. 4 WILLIAM BLACKSTONE, BLACKSTONE COMMENTARIES ON THE LAWS OF ENGLAND 349 (1779).

173. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, *supra* note 126, at 83.

174. *Id.* at 85-86.

175. *Id.* at 86.

Beginning in the 1730s, this system began to collapse. The prohibition on defense counsel contracted, allowing attorneys to question witnesses.¹⁷⁶ What were once functionally sentencing hearings in which guilt was presumed became contests in which interrogation by lawyers played a central role. Lawyers protested the recitation of hearsay material and denials of opportunities to probe witness statements.¹⁷⁷ Judicial power over the proceedings declined. And a robust right against self-incrimination took hold; no longer was a defendant's failure to speak taken to forfeit all defenses.¹⁷⁸

By the late eighteenth century, common-law confrontation had evolved from—at most—physical confrontation between the witness and the accused in a judge-dominated proceeding with no meaningful presumption of innocence, to a mechanism through which skilled counsel could put the prosecution to its proof.¹⁷⁹ But some old restraints continued to constrain lawyers. Participation in felony trials in England remained largely a matter of judicial grace until the passage of the Prisoner's Counsel Act of 1836.¹⁸⁰ Even when participation was permitted it was limited in scope—lawyers could examine and cross-examine witnesses and speak to rules of law but could not defend their client to the jury or contest the facts put in evidence.¹⁸¹

Things were different in the United States following independence. Twelve of thirteen states guaranteed that a defendant could be represented by counsel.¹⁸² It cannot therefore be assumed that Americans fixed in the Constitution the common-law right to confrontation. Indeed, there are strong reasons for doubt on this score.

B. Founding Era

The common-law right to confrontation emerged from political trials—that is, from the prosecution of crimes against the king. It is for that reason that confrontation rights were not immediately extended into ordinary felony prosecutions. In colonial America, however, no sharp distinction was drawn between ordinary felony prosecutions and political trials. In all cases, as Joan Jacoby has observed, “the American

176. LANGBEIN, *supra* note 171, at 110.

177. *Id.* at 237.

178. *Id.* at 278.

179. *See id.* at 266-67.

180. J. M. Beattie, *Scales of Justice: Defense Counsel and English Criminal Trials in the Eighteenth and Nineteenth Centuries*, 9 L. & HIST. REV. 221, 231 (1991).

181. *Id.* at 230.

182. FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 109-10 (Greenwood Press 1969 ed.) (1969).

system conceive[ed] of the criminal act to be a public occurrence and of society as a whole the ultimate victim.”¹⁸³ Accordingly, understanding confrontation rights in America entails study of Founding-era complaints about ordinary felony prosecutions, to a greater extent than centuries-old English political trials.

Of crucial importance was that America’s felony prosecution was conducted by public officials who were paid for their services.¹⁸⁴ Defendants in England rarely faced professional prosecution. Eighteenth century England did not have a public prosecutor; crimes were generally prosecuted by ordinary subjects, either by the victim or their friends or relatives.¹⁸⁵ The lone exceptions involved violations of the King’s rights, which were prosecuted by the King’s representatives.¹⁸⁶ What was exceptional—and deemed exceptionally one-sided—in England was common in the colonies.

The norm of public prosecution encouraged the development of checks and balances, in the form of guarantees of assistance of counsel and a number of other devices designed to protect individuals against prosecutorial power.¹⁸⁷ Local juries served as a check against judges who were suspected of being partial to the prosecution.¹⁸⁸ Judicial comment on the facts and expression of opinion concerning the credibility of witnesses was either prohibited or abandoned.¹⁸⁹ “The defendant, represented by counsel and given the power of cross-examination,” was seen as exercising a right to self-government by challenging the efforts of the prosecutor and judge to punish them.¹⁹⁰

The role of the jury in particular warrants further comment. We have seen that certain of the complaints raised during the great English political trials concerned the reliability of evidence gathered *ex parte*, out of court. But we also noted that Lilburne in particular made a

183. JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 10 (1980); Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1583 (2020) (emphasizing that today “contrary to popular understanding, a victim is not a ‘party’ to a criminal prosecution” and tracing the history of the turn from private to public prosecution).

184. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, *supra* note 126, at 99.

185. JACOBY, *supra* note 183, at 9-10.

186. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, *supra* note 126, at 98.

187. *Id.* at 100.

188. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1206-08 (1991); SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 66 (2016).

189. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, *supra* note 126, at 104-05.

190. *Id.* at 108.

barely-veiled appeal to the jury to acquit him, regardless of whether he had in fact committed the charged crimes. This early argument for nullification was taken up by Americans, who claimed the right to nullify laws that they deemed unjust or unconstitutional.¹⁹¹

Consider the 1735 trial for criminal libel of journalist John Peter Zenger. There was no dispute over whether Zenger had published the material that allegedly libeled New York Governor William Crosby. But Zenger's lawyer, Andrew Hamilton, denied applicability in America of English precedents endorsing criminal libel. He insisted that jurors "have the right beyond all dispute to determine both the law and the fact" and ought not "leave[] it to the judgment of the Court *whether the words are libelous or not*."¹⁹² These arguments prevailed; the jury found Zenger not guilty.

We will return to the question of nullification. Suffice to say there was more to the emergence of these checks and balances against public prosecution than concern with the discovery of factual truth. To be sure, the selection of local jurors was defended on the ground that the latter were more likely to be familiar with the underlying facts. But Hamilton's defense of the right of jurors to judge the law—by no means unusual for its substance, if indeed so for its eloquence—reflects a belief that the jury could and should act as a substantive limitation on what the government could punish, regardless of how convincing the factual case against a particular defendant.

Zenger's defense also speaks to colonial skepticism of the common law and cautions against any presumption that the Sixth Amendment was originally meant to track the common law. The Sixth Amendment departs in numerous, pronounced ways from the English common law in its treatment of ordinary felonies. The Sixth Amendment covers "all criminal prosecutions" and guarantees assistance of counsel in the latter—even though England forbade assistance in most felony cases.¹⁹³ It also provides that an accused person is "to be informed of the nature and cause of the accusation" against them, even though the common law denied defendants access, even at trial, to a copy of an indictment.¹⁹⁴ It guarantees "compulsory process for obtaining witnesses in [an accused person's] favor," whereas English common law did not even provide for

191. THOMAS, *supra* note 188, at 65.

192. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 78 (Stanley Nider Katz ed., Harvard Univ. Press 2d ed. 1972) (1963).

193. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, *supra* note 126, at 109 n.153.

194. U.S. CONST. amend. VI; John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH L. REV. 1047, 1058 (1994).

a right to call witnesses; the right of compulsory process was not afforded in England until late-seventeenth-century legislation.¹⁹⁵ With the possibility of divergence from the common law with regard to confrontation in mind, we can turn to the colonial record.

By the 1770s, New York had moved from the disallowance of defense cross-examination at preliminary proceedings; to authorizations of cross-examinations; to the conditioning of admissibility of any affidavits or examinations gathered during these proceedings on prior cross-examination.¹⁹⁶ Virginia went further, forbidding the introduction of depositions from witnesses who were available at trial on the ground that in-person testimony was better evidence.¹⁹⁷ Other hearsay, with the notable exception of dying declarations by murder victims about the circumstances of their death, was not admitted at all.¹⁹⁸ Many prosecutions, in Virginia and elsewhere, failed for want of witnesses.¹⁹⁹

One might expect that the impediments that such rules presented to law enforcement would have led to their relaxation. This didn't happen. States considered out-of-court statements to be generally inadmissible.²⁰⁰ Besides dying declarations, Thomas Davies has drawn attention to another exception that persisted into the nineteenth century: pretrial testimony collected under what are known as the Marian procedures.²⁰¹

These procedures—established via English statutes and subsequently used in the American colonies and early states—required a justice of the peace to record the testimony of the complainant and witnesses in felony cases where the arrestee was brought before the justice; to certify the record to the trial court; and to place the witness under recognizance to appear and testify at trial.²⁰² Prior sworn testimony under the Marian procedures by an unavailable witness about the felony being tried was deemed admissible because it was made under

195. U.S. CONST. amend. VI; Langbein, *supra* note 194, at 1055-56.

196. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, *supra* note 126, at 154-55.

197. *Id.* at 117-18.

198. *Id.* at 117.

199. See DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776 71 (1974) (reporting that in New York, thirty-seven percent of the prosecutions were never resolved); Donna J. Spindel, *The Administration of Criminal Justice in North Carolina, 1720-1740*, 25 AM. J. LEGAL HIST. 141, 148 (1981) (fifty-seven percent).

200. See Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, *supra* note 126, at 118 n.189 (“Even though the rules requiring witnesses had a detrimental effect on law enforcement, the colonies did not make it easier to proceed without oral testimony. They did not create new ways to make hearsay admissible.”).

201. See Davies, *What Did the Framers Know?*, *supra* note 119, at 127.

202. *Id.* at 127-29.

a judicial oath and committed to writing.²⁰³ There appears to have been no requirement of prior cross-examination.²⁰⁴

There was little public discussion during the framing and ratification that sheds light on confrontation. The proposed Constitution, after all, did not include a Confrontation Clause. But the absence of confrontation rights did inspire a number of protests by Anti-Federalists.

Abraham Holmes, a delegate to the Massachusetts ratifying convention, lamented:

The mode of trial is altogether indetermined—whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.²⁰⁵

We can gather from this that Holmes took confrontation to mean face-to-face confrontation and include an opportunity to cross-examine witnesses. Precisely why this face-to-face encounter and cross-examination was deemed valuable becomes clear in what follows.

Holmes situates the absence of a right to confrontation among a number of absent rights that are necessary to ensure “a trial as free and impartial as the lot of humanity will admit of.”²⁰⁶ These include the right to a trial “in the vicinity where the fact was committed, where a jury of the peers would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge the credibility of the witnesses.”²⁰⁷ They include the right against self-incrimination and the presumption of innocence. Absent these rights, Holmes urges, “we shall find congress possessed of powers enabling them to institute judicatories, little less inauspicious than . . . the *Inquisition*.”²⁰⁸

The criticism of “Brutus” of Article III’s grant of appellate power to the Supreme Court also speaks directly to the value of confrontation and the opportunity it provides for cross-examination:

203. *Id.* at 129-31.

204. Robert Kry has adduced evidence “that prisoners would have been routinely present when witnesses were deposed at Marian committal hearings.” Kry, *supra* note 135, at 495, 512-16. As Davies responds, however, that falls well short of establishing the existence of a right to be present, much less to cross-examine. Davies, *Reply to Kry*, *supra* note 119, at 604-05.

205. 2 DEBATES OF THE STATE CONVENTIONS, ON THE FEDERAL CONSTITUTION 125 (J. Elliot ed., 2d ed. 1836).

206. *Id.* at 124.

207. *Id.*

208. *Id.* at 125.

It is utterly impossible that the supreme court can move into so many different parts of the Union, as to make it convenient or even tolerable to attend before them with witnesses to try causes from every part of the United states; if to avoid the expense and inconvenience of calling witnesses from a great distance, to give evidence before the supreme court, the expedient of taking the deposition of witnesses in writing should be adopted, it would not help the matter. It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing.²⁰⁹

On Brutus's account, confrontation and cross-examination are important to "the distribution of justice" because they provide parties with "the fairest opportunity . . . to bring out the whole truth."²¹⁰ Written depositions are not dismissed as unreliable; but Brutus emphasizes the risk that something will be lost in the translation to writing, to the detriment of fairness to the accused.

Also of note is the critique by "Cincinnatus" of James Wilson's argument for ratification, which focused on the proposed Constitution's apparent allowance for "civil law process."²¹¹ Cincinnatus quoted Blackstone's defense of the "open examination of witnesses" and opined that civil law courts were "liable to infinite fraud, corruption, and oppression."²¹² Like Brutus, he raised the specter of "ecclesiastical tyranny" and contended that "common law courts, have ever cautiously guarded against its encroachment."²¹³

Finally, "The Federal Farmer" highlighted the value of cross-examination, stating that "[n]othing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question."²¹⁴ On this account, confrontation had both epistemic and moral value. It had epistemic value because "written evidence . . . but very seldom leads to the proper discovery of truth."²¹⁵

209. THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE 253-54 (Michael P. Zuckert & Derek Webb eds., 2009).

210. *Id.*

211. Cincinnatus, *Essays by Cincinnatus*, N.Y. J. (1787), reprinted in 6 THE COMPLETE ANTI-FEDERALIST 5, 15 (Herbert J. Storing ed., 1981).

212. *Id.*

213. *Id.*

214. *Letter from The Federal Farmer to The Republican* (Oct. 12, 1787), in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 469, 473 (Leon Friedman ed., 1971).

215. *Id.*

It had moral value because—in conjunction with the right to trial by jury—it ensured fairness to the defendant by subjecting witnesses to scrutiny by the local community, represented by the jury: “[I]n this enlightened country men may be probably impartially tried by those who do not live very near them: but the trial of facts in the neighbourhood is of great importance in other respects.”²¹⁶

Legal discourse concerning confrontation was little different. A draft of John Adams’s argument before the Court of Vice Admiralty in John Hancock’s 1768 smuggling trial sees Adams contending that the case ought proceed “by the Rules of the common law” rather than “civil law.”²¹⁷ That meant juries and “[e]xamination of Witnesses . . . in open Court, in Presence of the Parties, Face to Face.”²¹⁸ To dispense with confrontation, Adams maintained, “instead of favouring the Accused, would be favouring the Accuser.”²¹⁹

In a 1789 charge to a South Carolina grand jury, Judge John Grimke sounded similar themes. Grimke instructed jurors to “listen[] to no other sort of evidence than that which is delivered to you by *persons in your presence*.”²²⁰ Acknowledging that this rule was “hard indeed,” he justified it as a means of preventing “a kind of persecution unknown to the freemen of this country.”²²¹ The “substitution . . . of written evidence instead of personal testimony,” he warned “might be made the legal tool of oppression to the citizen.”²²² He acknowledged that “it is laid down in some very good authorities, that written evidence may be read in case of the death of a witness” but “doubt[ed] whether it would be suffered to be done *in a criminal cause, affecting the life, or even the character, of a fellow creature*.”²²³

Indirect light is also shed upon the value of confrontation by early cases addressing the admission of out-of-court statements in criminal trials. Judges generally held that out-of-court statements could not be admitted in criminal cases as evidence of guilt. Defense lawyers and judges defended the general prohibition on epistemic grounds and principles of “natural justice, that no man shall be prejudiced by

216. *Id.*

217. 2 JOHN L. ADAMS, LEGAL PAPERS OF JOHN ADAMS 206-07 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

218. *Id.* at 207.

219. *Id.*

220. Hon. Judge Grimke, *Charge to the Grand Jury*, GAZETTE U.S., Dec. 9, 1789, at 274, <https://panewsarchive.psu.edu/lcn/sn83030483/1789-12-09/ed-1> [<https://perma.cc/H2A6-5Tdk>].

221. *Id.*

222. *Id.*

223. *Id.*

evidence which he had not the liberty to cross examine,” averring that it would be “dangerous to liberty to admit such evidence.”²²⁴

It was not until several years after ratification that the Supreme Court interpreted the Confrontation Clause. The occasion was the 1807 trial of Aaron Burr for treason. In prohibiting the introduction by the prosecution of out-of-court statements made by the absent Harman Blennerhassett, Chief Justice John Marshall explained that “[t]he rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed a[s] essential to the correct administration of justice.”²²⁵ He could not fathom “why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him.”²²⁶ The principle at stake, Marshall emphasized, needed to be preserved, lest “life, liberty and property . . . be . . . endangered.”²²⁷

Marshall thus presented the right to confrontation as a limitation on the admission of hearsay, designed to protect underlying civil rights. He acknowledged an exception “for the purpose of proving the [existence of] conspiracy.”²²⁸ But Marshall emphasized that hearsay evidence “is not to operate against the accused, unless brought home to him by [nonhearsay] testimony drawn from his own declarations or his own conduct.”²²⁹ Because the proffered hearsay statement implicated Burr personally, Marshall excluded it.²³⁰

The common-law contours of the right to confrontation are not dispositive of the original meaning of the Confrontation Clause, given salient differences between English and American criminal procedure. There is, however, a substantial amount of overlap. On both sides of the Atlantic, confrontation entailed (1) a prosecutorial obligation to produce witnesses; (2) for a face-to-face appearance; and (3) the exclusion of hearsay absent (1) and (2). The only exceptions were sworn testimony under the Marian statutes and dying declarations of murder victims. Public discourse indicates as well that Americans considered cross-examination to be part of the right to confrontation, despite a lack of available English authorities saying so.

224. See *State v. Webb*, 2 N.C. 103, 104 (1794) (This is the earliest reported confrontation case.); *State v. Atkins*, 1 Tenn. 229, 229 (1807).

225. *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 195.

As we move into the nineteenth century, confrontation exegesis and application diminishes in probative value to original meaning where the Sixth Amendment is concerned. But it increases in value where the Fourteenth Amendment is concerned.

C. Antebellum Confrontation

Recall that Marian testimony was not subject to cross-examination and was admitted at trial without confrontation up through the Founding era. This changed in the early decades of the nineteenth century. The point may be of little practical importance—after all, Marian procedures are no longer used—but it does evince a hardening of an already hard rule barring the admission of out-of-court statements.

By 1820, influential English treatise-writers Leonard MacNally, Joseph Chitty, William David Evans, Thomas Leach, Thomas Peake, and S.M. Phillipps had endorsed a cross-examination rule.²³¹ In 1817, Lord Chief Justice Holt reported a case involving the admission in a murder trial of a deceased victim's Marian deposition. According to Holt, Chief Judge Baron Richards admitted the deposition. But he stated that "the decisions established the point, that the prisoner ought to be present, that he might cross-examine" and held the deposition admissible only because the accused was given a cross-examination opportunity and declined to take advantage of it.²³² Several years later, treatise-writer John Frederick Archbold asserted that "[d]epositions . . . to be thus given in evidence, must have been taken . . . in the presence of the prisoner, so that he [might] have [had] an opportunity of cross-examining the witness."²³³ Thomas Starkie's commentary on the law of evidence advocated that Marian depositions ought to provide for cross-examination—though he stopped short of stating that a rule *requiring* cross-examination had become settled.²³⁴

Confrontation in the United States followed a similar trajectory. In 1794, William Waller Hening's justice of the peace manual, *The New Virginia Justice* complained that the admissibility of Marian examinations denied "the accused party . . . the same advantage of cross examination, which he would possess before a court, with the assistance

231. See Kry, *supra* note 135, at 495-96 n.11 (collecting sources).

232. See *Rex v. Smith* (1817) 171 Eng. Rep. 357, 360 (1817) (Newcastle Summer Assizes).

233. JOHN JERVIS, ARCHBOLD'S SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 85 (New York, Gould & Son 1st Am. ed. 1824) (1822).

234. See 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *194-200 (Philadelphia, T. & J.W. Johnson & Co. 10th Am. ed., 1876).

of counsel.”²³⁵ But it is not until the 1830s that we encounter unambiguous applications of a cross-examination rule in cases involving state Marian statutes.²³⁶ These cases are too distant from the Founding to be probative of the original meaning of the Sixth Amendment. But they do constitute significant evidence that a once-established exception to a rule precluding the reading of out-of-court depositions against criminal defendants was eroding.

Meanwhile, the salience of confrontation rights in the United States increased among Black people and their White allies as state and federal legislation supportive of slavery took aim at traditionally protected civil rights. An editorial in William Lloyd Garrison’s weekly abolitionist newspaper, *The Liberator*, criticized Andrew Jackson for his condemnation and censorship of antislavery publications. Jackson complained that the Senate had issued a resolution stating that he had violated the Constitution by withdrawing appropriated federal funds from the Second Bank of the United States without giving him an opportunity “to meet his accusers face to face—to cross-examine the witnesses.”²³⁷ *The Liberator* demanded to know when he had “done to others, as it thus seems you would that others should do to you,” making specific reference to the denial of “fair, unprejudiced, and impartial trial[s]” to “your fellow citizens as are known as abolitionists.”²³⁸ William Jay’s widely circulated 1839 antislavery missive, *A View of the Action of the Federal Government on Behalf of Slavery*, condemned the Fugitive Slave Act of 1793 on the ground that it empowered “the slave holder . . . himself . . . [to] drag [a slave] before any Justice of the Peace . . . and if he can satisfy this judge of his own choice, ‘by oral testimony or affidavit’ . . . the wretched prisoner is surrendered to him a slave for life.”²³⁹

235. WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE IN THE COMMONWEALTH OF VIRGINIA* 148 (Richmond, T. Nicolson 1795).

236. See *State v. Hill*, 20 S.C.L. 607, 608-11 (Ct. App. L. Equity 1835) (“[I]f the accused is present and has an opportunity of cross examining the witness, the depositions, according to the rule, are admissible in evidence . . . [N]o rule would be productive of more mischief than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be admitted in evidence.”).

237. *Protest of the American Anti-Slavery Society*, *LIBERATOR*, Jan. 9, 1836, at 6.

238. *Id.*

239. WILLIAM JAY, *A VIEW OF THE ACTION OF THE FEDERAL GOVERNMENT, IN BEHALF OF SLAVERY* 31-32 (New York, J.S. Taylor 1839). This language was republished in 1852 by leading abolitionist constitutionalist William Goodell. See WILLIAM GOODELL, *SLAVERY AND ANTI-SLAVERY; A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERES; WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES* 233 (New York, J.P. Jones & Co. 1853).

Confrontation did not play a prominent role in abolitionist discourse, however, until the enactment of the Fugitive Slave Act of 1850 (“FSA”). The FSA created a federal bureaucracy dedicated to the arrest and trial of alleged fugitive slaves. Federal commissioners were delegated judicial power and given command over a new force of federal marshals.²⁴⁰ The marshals could gather posses of local citizens to arrest and detain Black people.²⁴¹

The “trials” were a sham, designed to facilitate kidnapping. Commissioners received double their fee-for-case for ruling in favor of enslavers.²⁴² There was no provision for juries.²⁴³ All that was required for a slaveholder to take home a captive was a certificate from their home state that indicated that the alleged fugitive was indeed their slave.²⁴⁴ Alleged slaves were not guaranteed counsel, could not testify on their own behalf, had no right to cross-examine witnesses who appeared, and no right to demand the appearance of witnesses who were not present.²⁴⁵

These and other features of the FSA provoked sufficient outrage in the North to create entirely new communities of resistance to a seemingly insatiable “Slave Power” that had captured the federal government. Resistance took a variety of forms, from litigation in defense of freedom to armed self-defense.²⁴⁶ Antislavery newspapers were saturated with fierce moral and constitutional critiques directed at the FSA; and the denial of confrontation rights was a major theme.

We began with the trial of Robert Morris for the rescue of Shadrach Minkins. Though unusually dramatic, it is not the only example of the power of confrontation and cross-examination to aid abolitionist struggle as illustrated by the case of Horace Preston. A Brooklyn police officer who received a tip from a man claiming to be Preston’s master arrested Preston on the pretext of petty theft and promptly contacted Busteed, the lawyer from Preston’s alleged owner; Busteed in turn contacted Reese, the alleged owner’s son.²⁴⁷ The next day, Busteed and Reese commenced process against Preston under the FSA.²⁴⁸

Daniel Farbman details how Preston received vital aid from abolitionist lawyers Erastus Culver and John Jay, who used

240. See Fugitive Slave Act of Sept. 18, 1850, § 5, ch. 60, 9 Stat. 462 (repealed 1864).

241. *Id.*

242. *Id.* § 8.

243. *Id.* § 6.

244. *Id.*

245. *Id.*

246. See BLACKETT, *supra* note 5, at 15-25.

247. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1915 (2019).

248. *Id.*

cross-examination to delay the proceedings and ultimately secure Preston's freedom.²⁴⁹ Culver and Jay successfully lobbied the Commissioner (one Morton) to recall Busteed's witnesses for further questioning and requested adjournment until the next day so that they could build their case.²⁵⁰ Morton agreed, and Culver and Jay used the opportunity to prepare a defense that depended upon political momentum outside the courts for its success.

Basically, Culver and Jay successfully picked a courtroom fight. Jay called Busteed to the stand and cross-examined him about his role in the planning and execution of Preston's arrest.²⁵¹ When Busteed refused to answer, Jay called Busteed a perjurer; when Jay called Busteed a perjurer, Busteed leaped from the witness stand and slapped Jay in the face.²⁵² Culver and Jay seized the opportunity to create procedural confusion, calling for the case to be transferred and, when Judge Betts refused to take the case, moved for dismissal for lack of evidence.²⁵³ Morton adjourned for the day. When he returned, it was to deliver Preston over to the marshal to be returned to his alleged master in Baltimore.²⁵⁴

Preston was hauled out of the city in chains and returned to slavery.²⁵⁵ But the drama garnered newspaper coverage, and that coverage made possible a campaign that would free him. Sympathetic papers denounced a process that "consisted simply in hearing the testimony on one side only; in allowing the witness on whose affidavit the arrest was made to refuse to answer on cross-examination."²⁵⁶ Abolitionist organizers published a "card" that described the case—including Morton's "refusal to compel an interested witness to answer on cross-examination"—and criticized Morton for terminating the hearing before Preston could make his case.²⁵⁷ They also published notices across the state of New York advertising the collection of funds to free Preston; Reese demanded \$1,500 for his release.²⁵⁸ After about a

249. *Id.* at 1915-16.

250. *Id.*

251. *Id.* at 1916.

252. *Id.*

253. *Id.*

254. *Id.* at 1917.

255. *Id.*

256. *The Late Slave Case*, N.Y. DAILY TIMES TRIB., Apr. 5, 1852, at 4, <https://chroniclingamerica.loc.gov/lccn/sn83030213/1852-04-05/ed-1/seq-1> [<https://perma.cc/JW4L-YYZL>].

257. *Id.*

258. *Id.*; Farbman, *supra* note 247, at 1917.

month, the money was gathered, and Preston was free to return to his family in New York.²⁵⁹

Like Robert Morris's trial, Preston's hardly vindicates confrontation as a means of discovering truth. Culver and Jay used confrontation to resist the operation of what they considered an unjust and unconstitutional law, not to glean evidence probative of their client's liability under it. Without a jury, Culver and Jay did what they could to bring popular attention to a sham proceeding designed to deprive people of their freedom and thereby rally people against the law that provided for that proceeding.

The difference between confrontation, cross-examination, and counsel and the lack thereof could make the difference between slavery and freedom. Consider the case of Jacob Dupen, who was arrested on a farm in Harrisburg, Pennsylvania and charged with escaping from Baltimore. *The Baltimore Sun* reported of the proceedings before Judge John Kane—a fervent Jacksonian, well-known in abolitionist circles for his support of slavery—“[t]here was no excitement about the court-room. There was no one present except the officers of the court and the parties.”²⁶⁰ On the testimony of a Baltimore local who claimed to have known him for 14 years and the arresting marshal, who claimed that Jacob “said that he would have gone back home, but was afraid,” Jacob was turned over to M. Edelin, a Baltimore lawyer.²⁶¹ Shortly thereafter, William Bull, a lawyer employed by a friend of Jacob to defend him, appeared and sought to reopen the case.²⁶² When Judge Kane rebuffed him, Bull asked whether “it was not unusual for cases to be heard at so early an hour in the morning.”²⁶³ Kane responded that “[i]n the fugitive slave cases, there is often an attempt made to interfere with the execution of the law, and for that reason they should peremptorily heard.”²⁶⁴

Abolitionist lawyers drew attention to the FSA's procedural deficiencies, even as they sought to make the most of what procedures were available. When in 1851 Thomas Sims was arrested in Boston and charged with escaping from James Potter of Chatham, Georgia, he was represented by Robert Rantoul and Charles Loring, who elaborated the

259. Farbman, *supra* note 247, at 1917.

260. *The Fugitive Slave Case in Philadelphia*, BALT. SUN, Dec. 21, 1857, at 1, <https://www.newspapers.com/image/372514233> [<https://perma.cc/5ZTD-8ZP4J>].

261. *Id.*

262. *Id.*

263. *A Fugitive Slave Case in Philadelphia*, LIBERATOR, Dec. 25, 1857, at 207, <https://www.newspapers.com/image/34576633> [<https://perma.cc/8BRX-ZQZ2>].

264. *Id.*

following arguments—published in the Washington, D.C. *Daily Republic*:

That the power which the Commissioner is called upon in this procedure to exercise is a judicial power, and one that could be otherwise lawfully exercised only by a judge of the United States court duly appointed, and that the Commissioner is not such a judge.

That the procedure is a suit between the claimant and the captive, involving an alleged right of property on one hand and the right of personal liberty on the other; and that either party, therefore, is entitled to a trial by jury; and that the law which purports to authorize the delivery of the captive to the claimant, denying him the privilege of such trial, and which he here claims under judicial process, is unconstitutional and void.

That the transcript of testimony taken before the magistrates of a State court in Georgia, and of the judgment thereupon by such magistrate, is incompetent evidence; Congress having no power to confer upon State courts a magistrate's judicial authority to determine conclusively or otherwise upon the effect of evidence to be used in a suit pending to be tried in another State or before another tribunal.

That such evidence is also incompetent; the captive was not represented at the taking thereof; and had no opportunity for cross-examination.

That the statute under which this process is instituted is unconstitutional and void, is not within the powers given to Congress by the Constitution; and because it is opposed to the express provisions thereof.²⁶⁵

Abolitionist constitutional arguments against the FSA were remarkably consistent across time and place. In discussing the 1851 case of Adam Gibson, sent from Philadelphia to Maryland as a fugitive slave before being freed on the ground of mistaken identity, an editorial in *The Liberator* argued that “had [the] jury sat upon the case, it is not at all probable that Adam Gibson would have been sent back to slavery” and inveighed against the FSA’s “summary manner of proceeding” that called to mind the Star Chamber.²⁶⁶ A letter on the same page stated that the FSA “break[s] down the rules of evidence, and depriv[es] a party of the essential right of cross-examination.”²⁶⁷ At the 1860 trial of Joseph Stout, indicted in Illinois for rescuing a fugitive slave, E.C. Larned argued to the jury that “if [the FSA] gave a right to have the question of

265. *The Fugitive Slave Case at Boston*, DAILY REPUBLIC, Apr. 8, 1851, at 2, <https://www.newspapers.com/image/320835927> [<https://perma.cc/P9L8-WL6D>].

266. *The Fugitive Slave Law*, LIBERATOR, Jan. 24, 1851, at 14, <https://www.newspapers.com/image/34607134> [<https://perma.cc/QM29-3HE6>].

267. *Id.*

a man's freedom tried before a jury . . . determined by legal and competent evidence, given openly and with that right of cross-examination of witnesses so essential to the discovery of truth" it would not be resisted by those in the North who "are opposed to slavery, but . . . regard it as an institution which is practically beyond their control."²⁶⁸ Before the Massachusetts Legislature the following year, leading abolitionist Wendell Phillips charged that the FSA "says that [a Black person's] liberty may be sacrificed, on the affidavit of nobody knows whom, taken nobody knows where, before nobody knows what" and provided "[n]o opportunity to cross examine that witness."²⁶⁹ He denounced the Supreme Court, in *Prigg v. Pennsylvania*,²⁷⁰ for upholding the constitutionality of the Fugitive Slave Act of 1793, invoking the "time-honored principle, for which we have fought for centuries, for which the Constitution of the United States contains a guarantee, as that a man on trial shall be confronted with his witnesses."²⁷¹

These arguments were echoed by leading Republican Senator Charles Sumner. In an 1855 speech before the Senate advocating repeal of the FSA, Sumner included among the "outrages, plentiful as words" in the FSA

the denial of trial by jury; the denial of the writ of *habeas corpus*; the authorization of judgment on *ex parte* evidence, without the sanction of cross-examination; and the surrender of the great question of human freedom to be determined by a mere commissioner, who, according to the requirements of the Constitution, is grossly incompetent to any such service.²⁷²

He declared that the law

despoils the party claimed as a slave—whether he be in reality a slave or a freeman—of the sacred right of Trial by Jury, and commits the question of Human Freedom—the highest question known by the law—to the unaided judgment of a single magistrate, on *ex parte*

268. *The Fugitive Slave Law. Its Defects and the Duties of Citizens. Speech of E.C. Larned, Esq. in the Trial of Joseph Stout in the U.S. District Court*, PRESS TRIB., Mar. 9, 1860, at 2.

269. *The Personal Liberty Bill. Argument of Wendell Phillips, Esq. Before the Legislative Committee, In the Hall of the House of Representatives*, LIBERATOR, Feb. 8, 1861, at 22, <https://www.newspapers.com/image/34578529> [<https://perma.cc/68SK-G42N>].

270. 41 U.S. 539 (1842).

271. *The Personal Liberty Bill. Argument of Wendell Phillips, Esq. Before the Legislative Committee, In the Hall of the House of Representatives*, *supra* note 269, at 22.

272. CONG. GLOBE, 33rd. Cong., 2d. Sess. 245 (1855).

evidence it may be, by affidavits, without the sanction of cross-examination.²⁷³

Following an 1862 decision by a Maryland court that it was “discretionary with them to allow cross-examination as to identity and ownership [of alleged fugitive slaves,]” Sumner read reports of the decision on the Senate floor and introduced a resolution calling for the Committee on the District of Columbia to “protect persons of African descent in Washington from unconstitutional seizure as fugitive slaves.”²⁷⁴ He declared that the holding “offends justice and common sense, and, I am happy to believe, the Constitution also.”²⁷⁵ The resolution carried.

It is not safe to assume that the meaning that a constitutional phrase carried within a beleaguered abolitionist community—even if championed by a leading Republican—was shared by *all* of the Republicans who framed the Fourteenth Amendment, to say nothing of the public that ratified it. No speech concerning the meaning of the Fourteenth Amendment may have received more public circulation than Michigan Senator Jacob Howard’s introduction of what would become the text of Section One to the Senate. It was printed in multiple national papers, and the Fourteenth Amendment became so tightly associated with Howard that it was sometimes referred to as simply “the Howard Amendment.”²⁷⁶ In explaining what the privileges and immunities of U.S. citizens are, Howard does not mention confrontation. It is worth considering why.

Howard first read a lengthy passage from Justice Bushrod Washington’s 1823 opinion in *Corfield v. Coryell*,²⁷⁷ in which Washington defined the “privileges and immunities” as rights “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”²⁷⁸ Howard then stated that “[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights

273. 2 CHARLES SUMNER, ORATIONS AND SPEECHES 400 (1850).

274. CONG. GLOBE, 37th Cong., 2d Sess. 2305 (1862).

275. *Id.* at 2306.

276. See Randy E. Barnett & Evan D. Bernick, *The Privileges and Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 502 (2019).

277. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

278. *Id.* at 551.

guarantied and secured by the first eight amendments of the Constitution.”²⁷⁹ He then provided examples of the latter “personal rights”:

such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search or seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.²⁸⁰

Confrontation is not on this list. Further, Donald Dripps has documented criticism of the rights against self-incrimination and to a grand jury that led to some notable reforms in criminal procedure.²⁸¹ Was confrontation not included in the set of fundamental rights protected by the Fourteenth Amendment?

There are several reasons not to think confrontation was excluded. Howard’s list is explicitly partial and illustrative—hence, the “such as.” Further, his omissions include a right that was among the most discussed by Republicans as an object of enslaving-state suppression and the inclusion of which among the privileges of citizenship to be protected is least doubtful: the right to the free exercise of religion.²⁸² Confrontation appears alongside other enumerated guarantees in an 1867 report from a Massachusetts Committee on Federal Relations that was quoted by *The New York Times* and which addressed the content of the “Bill of Rights”—which phrase was used by Republicans to describe what would be protected by the Fourteenth Amendment.²⁸³ Finally, there is no evidence that the criticism of common-law procedures levelled by

279. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

280. *Id.*

281. See Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 470 (2009).

282. See BARNETT & BERNICK, *supra* note 140, at 116.

283. COMMONWEALTH OF MASS. COMM. ON FED. RELS., REPORT ON THE PROPOSED FOURTEENTH AMENDMENT BEFORE THE LEGISLATIVE COMMITTEE ON FEDERAL RELATIONS, H.R. Doc. No. 149, at 2-4 (1867); *Massachusetts: The Constitutional Amendment-The Legislative Committee Divided Upon the Question of Adoption-The Minority and Majority Reports-The Colored Member, Mr. Walker, Against Adoption*, N.Y. TIMES, Mar. 2, 1867. The report is discussed in Kurt T. Lash, *The Enumerated-Rights Reading of the Privileges or Immunities Clause: A Response to Barnett and Bernick*, 95 NOTRE DAME L. REV. 591, 664-66 (2019).

reformers in the late-nineteenth century extended to confrontation. The right to confrontation was guaranteed by more than a supermajority of state constitutions.²⁸⁴

From the standpoint of constitutional doctrine, of course, it is too late in the day to revisit the application of confrontation rights to the states. It is the form in which confrontation is to be applied that is subject to contestation and negotiation. Having canvassed the above evidence, we can specify the contours of confrontation in 1868 and perceive how little risk there is that refined incorporation might—as the Court has worried—leave us with watered-down confrontation rights.

D. Summary: Confrontation's Components

Whereas the Sixth Amendment accommodated Marian procedures, the Fourteenth Amendment did not. Since neither the federal government nor the states have sought to revive the Marian procedures since their early-nineteenth-century decline, these (originally) dual tracks converge and do not raise administrability concerns. Still, because the Court has worried that incorporating the first eight amendments as they were understood at any time other than 1791 would result in “watered down” rights, it is worth underscoring that would be no issue here.²⁸⁵ Confrontation hardened over the course of the antebellum period into a general rule requiring an opportunity for in-person cross-examination—and only one, narrow exception, for dying declarations. We can stake the following claims about confrontation’s original content.

1. Witnesses

The above evidence tends to confirm criticism of *Crawford* that focuses on Scalia’s definition of “witness.” Recall that Scalia chose one of several definitions of “witness” from Webster’s 1828 dictionary on the basis of what he took to be confrontation’s aim. There are five of them:

1. Testimony; attestation of a fact or event.
If I bear *witness* of myself, my *witness* is not true. John 5:31.
2. That which furnishes evidence or proof.

284. See Stephen G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 63 (2008) (specifically, thirty-two out of thirty-seven states).

285. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1398 (2020).

Laban said, this heap is a *witness* between me and thee this day. Genesis 31:44.

3. A person who knows or sees any thing; one personally present; as, he was witness; he was an eye-witness. 1 Peter 5:1.

4. One who sees the execution of an instrument, and subscribes it for the purpose of confirming its authenticity by his testimony.

5. One who gives testimony; as, the witnesses in court agreed in all essential facts.²⁸⁶

Scalia chose the fifth, paired it with Webster's definition of "testimony," and called it a day.²⁸⁷ But the third is a better fit. Even if Scalia were right that the Sixth Amendment incorporated the common-law content of confrontation, the testimonial distinction was as foreign to the common law as it was to popular discourse during the Founding era.

Thus understood, "witnesses" would include not only people whose statements are included in formal materials like affidavits but informal commentary by observers of "any thing." It would thus cover Anthony Covington's statement to police in *Bryant* as much as it would cover the affidavit of the forensic analyst in *Bullcoming*. It would also cover statements that take the form of unknown-and-unimaginable-at-the-Founding "electronic utterances" via text, email, social media, and body camera, if used by the prosecution to establish a defendant's guilt.²⁸⁸

As Raymond Jonakait has observed, interpreting "witnesses" thus broadly also makes more sense within the Sixth Amendment than Scalia's own interpretation. The Compulsory Process Clause—which appears nine words after the Confrontation Clause—provides: "[T]he accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."²⁸⁹ Obviously, these "witnesses" are not people who *have given* testimony; accordingly, they are not witnesses at all for the purposes of Scalia's definition. The counterintuitive result of Scalia's definition is that a defendant has a Sixth Amendment right to compel the appearance of someone whom they do not have the Sixth Amendment right to confront!²⁹⁰ That the witnesses in question for

286. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), <https://webstersdictionary1828.com> [<https://perma.cc/QA7V-VGQS>].

287. That definition being: "A solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*; see *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

288. See Jeffrey Bellin, *Applying Crawford's Confrontation Right in a Digital Age*, 45 TEX. TECH. L. REV. 33, 34 (2012).

289. U.S. CONST. amend. VI.

290. See Josephine Ross, *After Crawford Double-Speak: "Testimony" Does Not Mean Testimony and "Witnesses" Does Not Mean Witnesses*, 97 J. CRIM. L. CRIMINOLOGY 147, 162 (2006) (explaining that due to *Crawford*, the words testimonial and witness are "flip sides of the

confrontation purposes must be witnesses *against* a defendant avoids a concern raised by Akhil Amar about subjecting anyone, anywhere, who may know or “see[] anything” to compulsory appearance and cross-examination.²⁹¹

2. Face-to-Face

Even before *Crawford*, Justice Scalia had raised objections to the Confrontation Clause doctrine that failed to acknowledge what he regarded as the clear command of the constitutional text: Confrontation must take place *face-to-face*. Dissenting in *Maryland v. Craig*,²⁹² in which the Court allowed a child witness to testify against an alleged abuser by one-way closed circuit television, Scalia wrote: “Whatever else it may mean in addition, the defendant’s constitutional right ‘to be confronted with the witnesses against him’ means, always and everywhere, at least what it explicitly says: the ‘right to meet face to face all those who appear and give evidence at trial.’”²⁹³

The text does not *explicitly* say that. And Scalia pointed to no historical evidence that confrontation was taken to mean face-to-face confrontation at the Founding. But the evidence ultimately vindicates Scalia’s intuition. Some state constitutions that guaranteed confrontation rights included “face to face” language; others did not. But there is no evidence that the law of the states differed because of this, or of any public debate on the question.²⁹⁴

This did not necessarily mean that the witness needed to appear before the defendant *in court*. Surveying the case law in an 1868 treatise, Michigan Supreme Court Chief Justice Thomas Cooley identified several: (1) If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity to cross-examine them; (2) if there was a former trial on which the witness was sworn, a

same coin,” meaning that anyone who makes a “testimonial” statement is considered a “witness” under the Confrontation Clause, giving the defendant the right to compel appearance when he necessarily may not even have the right to confront them in the first place).

291. Amar, *supra* note 133, at 695 n.212. This point is made by Bellin, *supra* note 14, at 1885 n.109.

292. 497 U.S. 836 (1990).

293. *Id.* at 862 (Scalia, J., dissenting).

294. See, e.g., Johnston v. State, 10 Tenn. 58, 59-60 (1821) (“Our constitution is substantially the same, on the point on which this objection is founded, with the constitution of North Carolina. The expression in our constitution . . . is ‘the accused has a right to meet the witnesses face to face.’ In the constitution of North Carolina, it is . . . ‘every man hath a right to confront the accusers and witnesses with other testimony.’ The expression in both means the same thing, and any implications that might be raised on the diction in the one case, with the same and equal propriety might be raised in the other.”).

deposition is available, and the witness is either dead, insane, sick and unable to testify, or “kept away by the opposite party”; and (3) if the witness made a dying declaration.²⁹⁵ None of these exceptions, however, could excuse the absence of *some* appearance before the defendant, coupled with *some* opportunity to cross-examine the witness.

Finally, this does not necessarily mean that a witness needs to appear before a defendant *in person*. There was no way in either 1791 or 1868 for witnesses to appear face-to-face before a defendant absent their being personally present at the same time, at the same place. That is no longer so; two-way video technology enables witnesses to see and be seen by defendants, juries, judges, and anyone else in attendance at a trial, without being physically present.²⁹⁶ Original meaning does not resolve this question; but it casts doubt on the one-way arrangement in *Maryland v. Craig*, in which the witness did not face the defendant.

3. Production

Both at the Founding and in 1868, the burden of producing witnesses before a defendant and before a jury lay squarely upon the prosecution. Pamela Metzger has explained how this rule of production “reinforces two important due process concepts: first, at a criminal trial, the prosecution bears the burden of production and persuasion; second, a criminal defendant has the right to rely on the prosecution’s failure of proof.”²⁹⁷

We have seen that critics of the absence of confrontation rights from the proposed Constitution saw confrontation as reinforcing the presumption of innocence and raised concerns about inquisitorial proceedings through which declarants could be manipulated into serving prosecutorial interests. We have also seen that abolitionists recognized that forcing the prosecution in cases under the FSA to produce witnesses raised the costs of conviction. It did so directly, by providing an opportunity to cross-examine them and cast doubt upon their testimony; and indirectly, by bringing public attention to cases and exerting political pressure on adjudicators.

The costs of production to the prosecution escalated when paired with the requirement of an opportunity to cross-examine and the increased availability of counsel. Even at the Founding, it was no easy

295. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *318 (2d ed. 1871).

296. See Will Resnik, *Get with the Times: Why the Use of Live Two-Way Video Testimony Does Not Violate the Confrontation Clause*, 45 AM. J. CRIM. L. 461, 473-74 (2019).

297. Pamela R. Metzger, *Confrontation as a Rule of Production*, 24 WM. & MARY BILL RTS. J. 995, 999 (2016).

matter to locate and transport witnesses, and many prosecutions failed because of it. But neither states nor judges reduced these costs by shifting production burdens to the defense. It remained the case that the defendant could rely upon the prosecution's failure to produce witnesses, and that—as Sherman Clark has put it—confrontation was “not so much a right to confront witnesses, as a right to require witnesses to confront you.”²⁹⁸

4. Cross-Examination

A number of factors led to the development of rule requiring a prior opportunity to cross-examine of any unavailable witnesses that was tightly associated with confrontation. First, the decline of the Marian procedure—itsself a product of increasing discomfort with the absence of an opportunity for cross-examination. Second, the antislavery recognition and insistence upon the value of cross-examination. Third, and finally, the increased availability of counsel meant that cross-examination could be used more effectively to undermine the prosecution's case.

By 1868, this rule had but *one* established exception: Dying declarations. The Founding-era exception for depositions taken under the Marian statutes went away with the statutes themselves.²⁹⁹ The dying declaration exception was exceedingly narrow, being limited to statements given by a dying victim in a homicide case about the identity of their assailant.³⁰⁰

298. Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1261 (2003).

299. See 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 13 (1853) (reporting that “no deposition would be deemed admissible by force of those [Marian] statutes, unless it were taken wholly in the prisoner's presence, in order to afford him the opportunity to cross-examine the witnesses; nor then, except as secondary evidence, the deponent being dead or out of the jurisdiction; or to impeach his testimony given orally, at the trial”).

300. See FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPARING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW 670-71 (4th ed. 1857) (acknowledging an exception for “[t]he dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal injury” but stating that they are “are not admissible unless it appear to the court that they were made under a sense of impending dissolution”); THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 35 (1860) (stating that “this is an exception to a rule which is in general to be considered as absolutely essential to the ascertainment of truth” and that “it is now settled that [Marian] depositions before justices are not admissible, unless the prisoner was present, and had the benefit of cross-examination”). Cooley describes a “few” exceptions to the “general rule” that “testimony for the people in criminal cases” must be given by witnesses who are present in court. Only one of them—the dying declaration—allows for the introduction into evidence of statements by people whom the defendant has not had an opportunity to cross-examine. The other exceptions are “[i]f the witness was sworn before the examining magistrate, or before a coroner, and the accused had an

5. Exclusion

The contours of confrontation rights changed over the course of the antebellum period. But the remedy for a violation of a defendant's confrontation rights did not. The remedy was always exclusion; judges did not weigh the costs and benefits of admission despite the absence of either a prior opportunity to cross or in-court confrontation. If the witness was available, confrontation was required. If the dying declaration exception did not apply and a witness was unavailable, a prior opportunity to cross examine was required. Otherwise, the testimony did not come in.

To repeat, neither at common law nor during the antebellum period did the testimony have to be "testimonial" in the sense that the Court defined that term in *Crawford* and *Davis*. There was no inquiry into whether a witness intended to aid the prosecution. *All* of what is now considered hearsay was generally inadmissible as evidence of the guilt of criminal defendants.

V. THE SPIRIT OF CONFRONTATION

Specifying the original meaning of confrontation only gets us so far. It would be almost unfathomably difficult to catalogue all the political, legal, social, and technological changes between 1868 and the present day—to say nothing of 1791—that raise unanticipated questions about how confrontation ought to be implemented by constitutional decisionmakers. And yet, decisions must be made; and good-faith construction, as exemplified in *Crawford*, can provide guidance as to how to make them—namely, with fidelity to the original goals that confrontation was designed to serve. The history reveals that there was no single evil against which confrontation was aimed. Confrontation was discussed and used, not only by lawyers and judges but dissidents and agitators against the law and its enforcement for a variety of ends that were available to the public at the point of ratification.

opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party." COOLEY, *supra* note 295, at *317-18. In essence, absent unavailability and a prior opportunity for cross-examination, no "testimony for the people" without face-to-face appearance.

A. Truth

Crawford was not wrong to identify the discovery of truth as a leading justification for the right to confrontation. From Blackstone through Francis Wharton, treatise-writers emphasized the power of confrontation to elicit honest testimony and enable skilled counsel to raise doubts about the accuracy of even an honest witness' version of the events. The epistemic justification for confrontation was part of popular discourse during the revolutionary and founding eras; abolitionists argued that the lack of confrontation rights under the FSA made elusive the truth concerning an alleged fugitive's status.

Because of the close link between the right to confrontation and the exclusion of hearsay evidence, it should not be surprising that the reasons for one resembled the reasons for the other. Hearsay's perceived unreliability served as a justification for a general rule treating out-of-court statements as "no evidence." The right to confront witnesses ensured that any witness statements that were admitted were either actually delivered in person in a given trial or subject to prior cross-examination.

Confrontation's concern with truth is also evinced by the lone circa-1868 exception to the rule of prior cross examination of unavailable witnesses. The admission of the dying declaration of a murder victim was justified on the ground that such statements were extremely reliable; no one on the verge of meeting God would dare lie.³⁰¹ Thus, the prospect of death was thought to serve the same reliability-enhancing function as an oath. A right to confrontation concerned *only* with protecting the liberty of the defendant and giving the defendant a fair shot at resisting prosecutorial power could not accommodate such an exception. It results in the admission of testimony that is highly likely to persuade precisely because it is deemed truthful.

B. Dignity

Sir Walter Raleigh's treason trial receives more attention in *Crawford* than any other aspect of the history of confrontation. But Erin Sheley has highlighted a feature of the case that Scalia did not discuss. Raleigh describes an inherent moral asymmetry between mere "words" and "phrases," on the one hand, and his personal presence and, on the other, protestation of innocence.³⁰² In his presentation, the failure of

301. See WHARTON, *supra* note 300, at 366 (explaining the assumption that when people are on the precipice of death all temptation from lying will be gone).

302. See Erin Sheley, *The Dignitary Confrontation Clause*, 97 WASH. L. REV. 207, 230 (2022).

confrontation is an affront to the dignity of the accused. Thus Raleigh: “the life of man is of such price and value, that no person, whatever his offence is, ought to die, unless he be condemned on the testimony of two or three witnesses.”³⁰³

It would be easy enough to cast these demands as being ultimately motivated by concerns about truth—as Scalia claimed about confrontation more generally. Take Raleigh’s insistence that “Cobham be sent for; let him be charged upon his soul, upon his allegiance to the King” and his promise that he would “confess myself guilty” if Cobham accused him to his “face.”³⁰⁴ The insistence that Cobham (in modern parlance) say it to Raleigh’s face might read at first like a dignity-centered demand. Surely, Raleigh did not believe that if Cobham *did* accuse him in person the accusation would be any more truthful. But, the reference to Cobham being “charged upon his soul, upon his allegiance to the King” describes an evidentiary rule that was thought to promote truthful testimony.³⁰⁵ One who swore to divine or secular authorities to tell the truth was deemed more likely to do so.

Still, as Sheley explains, dressing Raleigh’s demand in truth-centered garb ill fits both the brunt of what he had to say and the cultural-legal reception of his case. He *did* say that he would confess if Cobham accused him in person. And the distinction that he drew between English tradition that tracked “the law of God” and the methods of “the Spanish Inquisition” were repeated during the Founding era in demands for confrontation that similarly do not sound only like complaints about evidentiary reliability. It was drawn as well by abolitionists condemning the Fugitive Slave Act.³⁰⁶

This rhetoric suggested that there were certain things that the state simply ought not to do to people. And that condemning people when they are present and protesting their innocence on the basis of the mere words of an absent person was one of those things.

C. Fairness

Related to but distinct from the imperative of treating all defendants with dignity is confrontation’s longstanding concern with giving people who are up against the state a fair shot at avoiding punishment. If dignity requires the state to afford defendants a baseline level of respect for their

303. *Id.*

304. *Id.* at 232.

305. *Id.*

306. See, e.g., *The Daily Advertiser as Counsel for Judge Curtis*, LIBERATOR, Feb. 9, 1855, 22 (comparing juryless FSA proceedings to the “inquisition”).

humanity, fairness requires something more—a meaningful opportunity to prevail.

In *Coy v. Iowa*,³⁰⁷ decided nearly two decades before *Crawford*, Justice Scalia traced confrontation’s connection to fairness through antiquity. He cited the New Testament’s *Book of Acts*, which relates that the Roman Governor Festus thus prescribed how the Apostle Paul was to be treated: “It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a *chance* to defend himself against the charges.”³⁰⁸ The notion that one ought to have a “chance”—a *meaningful* chance—to defend oneself was voiced insistently by abolitionists, including Wendell Phillips, who emphasized how high the odds were stacked against alleged fugitives under the FSA:

[The FSA] says that his liberty may be sacrificed, on the affidavit of nobody knows whom, taken nobody knows where, before nobody knows what. No opportunity to cross examine that witness . . . And on the faith of such a witness, . . . without any further proof . . . a man is to be taken from a place where has lived for twenty years,—for aught you know, where he was born,—and carried away a thousand miles, or three thousand.³⁰⁹

We can see in Phillips’s complaint how confrontation’s core concerns are interrelated. It is unfair to take someone “a thousand miles, or three thousand” on the basis of “the affidavit of nobody knows whom” and without “an opportunity to cross examine.” It is unfair *because* the evidence is so untrustworthy and insubstantial, and the defendant’s freedom is so valuable. The demand for a meaningful chance to contest the evidence cannot be separated from the costs to the defendant of failure to do so. Which leads us to confrontation’s fourth function.

D. Liberty

Confrontation prioritized liberty and enabled people to fight for it. Forcing the state to produce witnesses has always imposed a heavy cost and resulted in failures of prosecution. Once produced, at both the Founding and antebellum period confrontation afforded defendants and

307. 487 U.S. 1012 (1988).

308. *Id.* at 1015-16 (quoting Acts 25:16) (emphasis added).

309. *The Personal Liberty Bill. Argument of Wendell Phillips, Esq. Before the Legislative Committee in the Hall of the House of Representatives, Jan. 29, 1861*, *LIBERATOR*, Feb. 8, 1861, at 22, <https://www.newspapers.com/image/34578529> [<https://perma.cc/68SK-G42N>].

their counsel an opportunity to discredit witnesses and rally both juries and the broader community against the prosecution.

To be sure, concerns about untrustworthy and coerced witnesses inspired abolitionist insistence upon confrontation, as they did the revolutionary generation's demand for it in the Constitution. But confrontation's scope was broader than an exclusive focus on these concerns might lead one to expect. Witnesses failed to appear for reasons unrelated to the truth of the testimony that they might have given. Cross-examination was used to discredit truthful witnesses and to delay proceedings for the benefit of the guilty. Like the right to a jury—and in conjunction with it—it served as a means through which *factually guilty* defendants could preserve their freedom from physical restraint and punishment.

Much has been made of John Locke's influence on the content and underlying political philosophy that animated both the Bill of Rights and the Reconstruction Amendments. Alice Ristroph has argued, however, that Lockean natural-rights theory has an exclusionary edge—one that can help us understand confrontation's libertarian commitments.³¹⁰

Locke's pre-political state of nature is not a state of license. It is governed by "a law of Nature" which "teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."³¹¹ The moral legitimacy of government arises from the fact that people in the state of nature all too often do not "consult it"; and that those who exercise their right to punish "offenders" may be led by "self-love," "passion, and revenge" to be "partial to themselves and their Friends" or go "too far in punishing others."³¹² Locke gives no indication that "offenders" have a natural right to resist *just* punishment.³¹³ And they certainly do not retain such a right once a government is established.

Ristroph contrasts Locke with Thomas Hobbes, for whom the state of nature was *emphatically* a state of license. People in the state of nature have, on Hobbes's account, the right to do everything that they deem necessary to preserve their own lives.³¹⁴ And they retain that natural right of self-preservation once they have contracted to establish a

310. See Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. UNIV. L. REV. 203, 233 (2021).

311. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 107 (1823).

312. *Id.* at 110; see also Ristroph, *supra* note 310, at 233.

313. See Ristroph, *supra* note 310, at 233.

314. See Alice Ristroph, *Sovereignty and Subversion*, 101 VA. L. REV. 1029, 1035 (2015); see also Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 607-08 (2009); see also Alice Ristroph, *Criminal Law for Humans*, in HOBBS AND THE LAW 97, 104 (David Dyzenhaus & Thomas Poole eds., 2012).

government—every last one of them. As Hobbes put it: “For though a man may Covenant thus, *Unlesse I do so, or so, kill me*; he cannot Covenant thus, *Unlesse I do so, or so, I will not resist you, when you come to kill me*.”³¹⁵ No one, argued Hobbes—not even the guiltiest of murderers—can be said to have given up his right to resist the imposition of “[w]ounds, and [c]hayns, and [i]mprisonment.”³¹⁶

Ristroph has cogently argued that a number of the Constitution’s criminal-procedural guarantees, as elaborated by the Supreme Court, can be profitably viewed through a Hobbesian lens.³¹⁷ The exclusionary rule that the Court developed to implement the Fourth Amendment enables criminal defendants to exclude evidence that is highly probative of their guilt. Why? Certainly not because it promotes the discovery of truth—it does the opposite. Rather, it gives even the guilty an opportunity to resist punishment on the ground that the “government has overstepped its power” and thus to advance a “claim about the appropriate scope of government power.”³¹⁸ That is, it enables all people an opportunity to defend themselves, and thereby secure their liberty from “[c]hayns, and Imprisonment.”³¹⁹

Of course, the potency of the exclusionary rule has been diluted by exceptions. This dilution has been defended on the ground that exclusion can allow the guilty to go free “because the constable has blundered.”³²⁰ But the Court’s comfort in diluting it in this way is in part a function of how it has characterized it—as a judicially devised cost-benefit balance that is not required by the Constitution and can be adjusted as the Court seems fit.³²¹ Confrontation, by contrast, is incontestably required by the Constitution, and it admits of only the narrowest of exceptions. Its strength reflects a commitment to liberty not unlike that which Ristroph associates with Hobbes.

E. Democracy

But we should hesitate to call confrontation Hobbesian. Hobbes, as Ristroph acknowledges, “did not recognize enforceable constitutional

315. THOMAS HOBBS, HOBBS’S LEVIATHAN 107 (1st ed. 1909) (1651).

316. *Id.* at 101-02.

317. See Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1593 (2015).

318. *Id.* at 1563.

319. HOBBS, *supra* note 315, at 102.

320. See, e.g., *Herring v. United States*, 555 U.S. 135, 148 (2009) (Ginsburg, J., dissenting) (quoting *People v. Defore*, 242 N.Y. 13, 21 (1926) (opinion of the Court by Cardozo, J.)).

321. See *id.* at 141 (majority opinion) (“We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation . . . [W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.”).

rights, for instance, and . . . was unduly afraid that a government of separated powers would be hopelessly unstable.”³²² More generally, his commitment to democracy is uncertain at best.³²³ Confrontation’s commitment to democracy invites us to view it through the lens of a different political philosopher—one who happened to be a lens-grinder.

Three of the most familiar conceptions of democracy are deliberative, pluralist, and populist. *Deliberative* models of democracy prioritize the formation of mutually understood, publicly expressed decisions, the reasoning of which can be seen as acceptable by all who have a stake in them.³²⁴ They recognize that people have a variety of conflicting interests and convictions. But they seek to structure government so that people can reason towards a consensus that they recognize as genuinely good for all. *Pluralist* models, by contrast, prioritize competition between representatives of opposing interests within the limits of purportedly neutral procedures agreed to in advance, without regard to whether the results are seen by all as genuinely good for all.³²⁵ Finally, *populist* models separate society into two groups—the “people” and “the other”—and contend that politics should express the unitary will of the former.³²⁶

Less familiar than these models—but ascendant within public-law scholarship—is agonistic or contestatory democracy.³²⁷ As developed by Chantal Mouffe, Bonnie Honig, William Connolly, and Mark Wenman, among others, it can be first approached negatively, by explaining what

322. Ristroph, *supra* note 317, at 1593.

323. For revisionist presentations of Hobbes as a radical democrat, see JAMES R. MARTEL, *SUBVERTING THE LEVIATHAN: READING THOMAS HOBBS AS A RADICAL DEMOCRAT* 9-12 (Columbia Univ. Press 2007) (1853); RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* 87-108, 120 (2016). For criticism, see Kinch Hoekstra, *A Lion in the House: Hobbes and Democracy*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 191, 192 (Annabel Brett et al. eds., 2006); see also Quentin Skinner, *Surveying the Foundations: A Retrospect and Reassessment*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 236, 251 (Annabel Brett et al. eds., 2006).

324. See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3-4 (2004).

325. See Robert B. Talisse, *Can Democracy Be a Way of Life? Deweyan Democracy and the Problem of Pluralism*, in *TRANSACTIONS OF THE CHARLES PIERCE SOCIETY* 1, 2-4 (Peter H. Hare et al. eds., 2003) (discussing the theory of pluralism and Deweyan democracy).

326. JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 7-40 (2016).

327. See, e.g., Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *YALE L.J.* (forthcoming 2022) (manuscript at 33-34); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 *CALIF. L. REV.* 679, 689-92 (2020); Jocelyn Simonson, *Copwatching*, 104 *CALIF. L. REV.* 391, 435-38 (2016); Scott Skinner-Thompson, *Agonistic Privacy & Equitable Democracy*, 131 *YALE L.J.F.* 454, 465-67 (2021).

it rejects in alternative models.³²⁸ Against deliberative models, it denies the possibility of any stable consensus and regards efforts to create it as dangerous.³²⁹ Against pluralist models, it promotes direct public participation in lawmaking and seeks to overcome us-versus-them politics.³³⁰ Lastly, it rejects populism's claim that any one group should exercise political power.³³¹ Positively, it is committed to the recognition of ineradicable political conflict; active participation by citizens in public decisions; and the exposure and challenging of domination by any individual, group, or institution.³³²

No scholar has done more to incorporate agonistic theory into criminal law and procedure than Jocelyn Simonson. In a series of articles, Simonson has documented grassroots movements, the members of which have engaged in agonistic contestation.³³³

Consider her discussions of “copwatching”—the organized filming by uniformed local residents of local police officers. Copwatchers point recording devices at officers, ask questions about their policies and practices, gather data to be used later in adversarial proceedings, and share information via social media.³³⁴ Among the purposes of copwatching is to express to the police a communal sense of what is constitutionally permissible. Copwatchers seek, not merely to hold police to the terms of what the courts have said the Constitution requires but “to articulate a vision of a world in which police officers act differently with respect to disempowered populations.”³³⁵ But they make use of existing legal institutions to do so. For example, Simonson describes how copwatchers planned, organized, and served as plaintiffs in the lawsuit that led to the 2013 decision holding New York City's stop-and-frisk practices unconstitutional. Over the course of the litigation, “the courtroom was packed with members of a different

328. See, e.g., WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* (1991); BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 2 (1993); CHANTAL MOUFFE, *THE RETURN OF THE POLITICAL* 2 (1993); JACQUES RANCIÈRE, *DIS-AGREEMENT: POLITICS AND PHILOSOPHY* xii-xiii (Julia Rose trans., 1999); MARK WENMAN, *AGONISTIC DEMOCRACY: CONSTITUENT POWER IN THE ERA OF GLOBALISATION* (2013).

329. A useful survey of the field is provided by MARIE PAXTON, *AGONISTIC DEMOCRACY: RETHINKING INSTITUTIONS IN PLURALIST TIMES* (2019).

330. See *id.* at 130.

331. See *id.*

332. See *id.* at 11.

333. See Simonson, *supra* note 327, at 393; Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 249-50 (2019); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. UNIV. L. REV. 1609, 1609 (2017).

334. Simonson, *supra* note 327, at 393.

335. *Id.* at 412.

community group, each of which held a press conference outside of the courthouse during the lunch break.”³³⁶

Of course, copwatching groups are not themselves state-created institutions. But Simonson argues that state institutions should not only permit but be transformed to facilitate contestation of this kind, rather than meet them with resistance. Close to the context with which we are concerned, Simonson argues that courts should welcome rather than exclude “courtwatching” groups that attend bond hearings, arraignments, pleas, and trials to document everyday proceedings and use collected information to argue for changes in criminal-legal policy.³³⁷ And she frames this argument in constitutional terms, stressing that the Fifth and Sixth Amendments “guarantee the right to a public criminal adjudication.”³³⁸ On this account, the Constitution is itself agonistic—it creates institutions that enable continual challenging of their own operation, including by groups whose interests are not meaningfully represented in majoritarian politics.

Hobbes would have none of this. Although a citizen might have the natural right to resist wounds, chains, and imprisonment, Hobbes opposed the proliferation of intermediate institutions that divided or diluted the exercise of state power.³³⁹ But a contemporary of the Monster of Malmesbury can help us understand the democratic component of the right to confrontation. I speak here of Benedict Spinoza, a Dutch lens-grinder-turned-philosopher who shared certain starting points with Hobbes but reached very different political conclusions.

Like that of Hobbes, Spinoza’s starting point is a pre-political state in which people have the right to do whatever they have the power to do.³⁴⁰ For neither were the evils of the state of nature limited to harms to

336. *Id.* at 424.

337. See Simonson, *The Place of “The People” in Criminal Procedure*, *supra* note 333, at 268-69.

338. *Id.* at 285.

339. See SANDRA LEONIE FIELD, POTENTIA: HOBBS AND SPINOZA ON POWER AND POPULAR POLITICS 107-43 (2020).

340. See Spinoza, *Political Treatise*, in 2 THE COLLECTED WORKS OF SPINOZA 503, 507 (Edwin Curley trans., Edwin Curley ed., 2016) (“[E]ach natural thing has as much right by nature as it has power [potentia] to exist and have effects”); Spinoza, *The Theological-Political Treatise*, in 2 The Collected Works of Spinoza 65, 283 (stating that people in the state of nature lack “actual power to live according to sound reason” and are therefore “no more bound to live according to the laws of a sound mind, than a cat is bound to live according to the laws of a lion’s nature”); MOIRA GATES & GENEVIEVE LLOYD, COLLECTIVE IMAGININGS: SPINOZA, PAST AND PRESENT 73 (1999) (“Spinoza’s account of natural right . . . posits the right to do something as equivalent to having the power to do that thing.”).

life and limb; they included fear, distrust, and suspicion of others.³⁴¹ But Spinoza had higher aspirations than Hobbes for civic life.

For Spinoza, the principal vice of the state of nature is the inability of human beings to “live according to sound reason.”³⁴² The need for government arises, not merely from the need for continued “circulation of the blood, and other things common to all animals” but “the true virtue and life of the mind.”³⁴³ On this account, human flourishing requires reason, and reason requires politics.

Spinoza regarded conflict as an ineradicable fact of political life. Whether in or out of the state of nature, Spinoza held that people are necessarily subject to passions and never entirely abandon their power to “judge[] [according to their] affect . . . what is good and what is bad, what is better and what worse.”³⁴⁴ But, he averred that good governments are structured to promote harmonious relations between citizens; to empower, that is, to increase peoples’ capacity to produce effects (*potentia*); and to prevent domination, understood as overwhelming subjection to the power of another (*potestas*).³⁴⁵

Thus did Spinoza criticize politics in which “peace . . . depends on its subjects’ lack of spirit—so that they’re led like sheep.”³⁴⁶ And he regarded democracy as the ideal form of government because in a democracy “no one so transfers his natural right to another [so completely] that in the future there is no consultation with him.”³⁴⁷ Hobbes’s right of resistance, exercised against an undivided government that has no obligation of consultation, might amount to nothing more than a right to “kick and scream on the way to the gallows.”³⁴⁸ Spinoza’s

341. See Alice Ristroph, *The Definitive Article*, 68 U. TORONTO L.J. 140, 156 (2018).

342. SPINOZA, *Theological-Political Treatise*, *supra* note 340, at 283.

343. SPINOZA, *Political Treatise*, *supra* note 340, at 530.

344. SPINOZA, *Ethics*, in 1 THE COLLECTED WORKS OF SPINOZA 408, 522 (Edwin Curley trans., Edwin Curley ed., 1985).

345. See FIELD, *supra* note 339, at 16-19, 167. For an expressly agonistic account of Spinoza’s politics, see CHRISTOPHER SKEAFF, BECOMING POLITICAL: SPINOZA’S VITAL REPUBLICANISM AND THE DEMOCRATIC POWER OF JUDGMENT 3-5 (2018). On the state’s active role in increasing power-to-act, see Justin Steinberg, *Spinoza on Civic Liberation*, 47 J. HIST. PHIL. 35, 40-41 (2009); Sandra Field, *Democracy and the Multitude: Spinoza Against Negri*, THEORIA J. SOC. POL. THEORY, June 2022, at 24-25 (2012); There is an influential strand of Spinoza scholarship, most closely associated with Antonio Negri, that rejects all potestas—which Negri associates with Hobbes—in favor of the deinstitutionalized popular potentia. See ANTONIO NEGRI, THE SAVAGE ANOMALY THE POWER OF SPINOZA’S METAPHYSICS AND POLITICS 140 (1991). For criticism of this understanding, see FIELD, *supra*, at 24-26. For present purposes, the reader need not accept my exegesis of Spinoza to appreciate the distinction between power-to and power-over.

346. Spinoza, *Political Treatise*, *supra* note 340, at 530.

347. Spinoza, *Theological-Political Treatise*, *supra* note 340, at 289.

348. James R. Martel, *The Radical Promise of Thomas Hobbes: The Road Not Taken in Liberal Theory*, 4 THEORY & EVENT, no. 2, 2000.

recognition of conflict; his emphasis on ongoing judgment and the value of consultation; and his concern with domination can underwrite opportunities for democratic contestation of state power through state institutions well in advance of execution.

Alas, Spinoza died before completing his *Political Treatise*, which would have been the most complete expression of his political philosophy. His institutional suggestions for aristocratic and monarchical governments reflect his wariness of concentrated power and his appreciation of how those who hold it may be tempted towards domination. For instance, his prescriptions for monarchy include a lottery system for the selection of the king's counsellors that is designed to ensure that annual supply of a thousand representatives from hundreds of different, equally represented clans.³⁴⁹ But his chapter on democracy is incomplete, and he did not discuss criminal punishment in any detail. Nonetheless, his agonistic premises can help us integrate the libertarian and democratic components of the right to confrontation.

To be sure, “agonism” does not appear in the historical record. But it names a phenomenon that is well-attested in the antebellum practice of confrontation. Throughout the antebellum period, confrontation was understood to be a component of a broader adversarial process that was used to advance political arguments about the limits of state power. In Robert Morris's case, the cross-examination of Caphart may have helped convince a jury to nullify an oppressive law—notwithstanding Justice Benjamin Curtis's refusal to allow Dana to argue directly for nullification—and it certainly provided fodder for the abolitionist cause.³⁵⁰ In Horace Preston's case—for which a jury was not empaneled—abolitionist lawyers succeeded in reaching people outside the courthouse, who were persuaded to purchase Preston's freedom. In both cases, confrontation was used to secure the liberty of individuals. But it did so through appeals to fellow citizens to contest “reigning laws, policies, [and] state practices.”³⁵¹ It was a means through which people who held no political office were able to build power to effect political outcomes.

We must reckon with a marked shift in the understanding of the democratic nature of the adversarial process that took place between the Founding and the ratification of the Fourteenth Amendment. The appeal

349. See Spinoza, *Political Treatise*, *supra* note 340, at 536-37.

350. See *United States v. Morris*, 26 F. Cas. 1323, 1331, 1336 (C.C.D. Mass. 1851) (determining that “under the [C]onstitution of the United States, juries, in criminal trials, have not the right to decide any question of law; and that if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court”).

351. Rahman & Simonson, *supra* note 327, at 690.

of nullification to abolitionists did not carry over to even some of the more radical Republicans who ascended to power in the wake of the Civil War. Jonathan Bressler has documented the extensive efforts of Republicans to exclude potential nullifiers from juries in order to protect the civil rights of formerly enslaved people and their White allies.³⁵² In defending these measures, Republicans denied that juries had the right to decide any questions other than those of fact.³⁵³ So, too, did they do so in defending anti-polygamy legislation that enabled federal officials to purge from juries citizens who believed in polygamy's legality.³⁵⁴

Of course, these denials came in the context of what Republicans regarded as constitutional failings on the part of the states to provide the equal protection of the laws to all people.³⁵⁵ They were not addressing the nullification of legislation that they regarded as unconstitutional or immoral. But their arguments swept more broadly.

Charles Sumner, for instance, relied upon "a familiar illustration" in support of his argument that the Senate had the constitutional duty to remain in session over the summer in order to oversee President Johnson's actions:

Unquestionably the Senate has the power [to adjourn] . . . but it has not the right. A jury, as we know according to familiar illustration, in giving the general verdict has the power to say 'guilty' or 'not guilty,' and disregard the instructions of the court, but I need not say that it is a grave question among lawyers whether it has the right.³⁵⁶

Republican sentiment tracked developments in state law. By 1857, Wharton could report that only five states allowed nullification.³⁵⁷ Contemporaneously with the ratification of the Fourteenth Amendment in 1868, Thomas Cooley stated that the "current of authority" held that "it is the duty of the jury to receive as follow the law as it is given to them by the court" even as he acknowledged that "the jury have complete power to disregard it."³⁵⁸

352. See Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 UNIV. CHI. L. REV. 1133, 1152-53 (2011).

353. See *id.* at 1164-69, 1171-76, 1186.

354. See *id.* at 1188-89.

355. See Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 31 (2021); see also Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON UNIV. C.R. L.J. 1, 22 (2008); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON UNIV. C.R. L.J. 219, 224 (2009).

356. See CONG. GLOBE, 40th Cong., 1st Sess., 493 (1867).

357. See WHARTON, *supra* note 300, at 1124-25.

358. COOLEY, *supra* note 295, at *323.

It does not follow that confrontation, or the adversarial process became less connected to democracy than it was in 1791. Republicans insisted that they were making the country more democratic by ensuring that laws designed to protect civil rights were enforced to the letter, as well as by enabling all citizens to sit on juries.³⁵⁹ It does mean, however, that we should not view confrontation's democratic spirit as having a necessary connection to the right of *juries* to determine the law.

Neither at the Founding nor in 1868 was confrontation understood to have one function. But if we must choose a “principal” function that unites confrontation's concerns with reliability, dignity, fairness, liberty, and democracy, the shifting of power presents itself as an attractive possibility.³⁶⁰ Confrontation concretely shifted the power to make decisions about criminal law and punishment from judges and prosecutors to defendants (aided, of course, by counsel), juries, and marginalized groups and their supporters outside of the courts. In Spinozistic terms, it increases *potentia*—power to—and reduces excessive *potestas*—power over.

Even confrontation's truth-seeking function can be viewed through a power lens. David Sklansky has observed that because “[a]ccurate trials are something that democratic majorities can generally be expected to favor,” securing confrontation rights solely to ensure accurate trials does not make a great deal of sense.³⁶¹ On the other hand, Sklansky points out, “if the point of confrontation is to protect against a certain *kind* of inaccuracy, associated with the authoritarian misuse of power, it is easier to see why the mechanism deserves constitutional protection.”³⁶² Most fundamentally, confrontation is about building

359. See Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 606 (2014) (arguing that Republicans concluded that “[e]quality was worth little more than the paper it had been printed on if juries were free to promote and protect oppression through their power to review questions of law. For civil rights to survive, nullification had to die”).

360. Power is a much-contested concept in political theory. For a sampling of the literature, see, e.g., KEITH M. DOWDING, *POWER* 1-2 (1996); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 3, 5 (David Miller & Alan Ryan eds., 1997); PETER MORRIS, *POWER: A PHILOSOPHICAL ANALYSIS* 1-2 (2d. ed. 2002) (1987); STEVEN LUKES, *POWER: A RADICAL VIEW* 14-15 (2d ed. 2005) (1974); *ENCYCLOPEDIA OF POWER* xxiii, xxiv (Keith Dowding ed., 2011). It is also ascendant in public law. See, e.g., Daryl J. Levinson, *The Supreme Court 2015 Term Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 43-44 (2016); Maggie Blackhawk, *Federal Indian Law as a Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1791-93 (2019); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 792-93 (2021); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98-100 (2020); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 562-63 (2021). I do not mean to stake out a sectarian position on how power ought to be understood.

361. David A. Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1691 (2009).

362. *Id.*

power-to and limiting power-over. Restoring it to anything resembling its original scope will require rekindling that spirit.

VI. RECONSTRUCTING CONFRONTATION

It is hardly news that *Crawford* and the cases following it did not accurately establish the perimeter of confrontation, as originally understood. The foregoing historical analysis is broadly consistent with that of other critics. But what follows? How, exactly, would an account of confrontation that is consistently with the original letter and spirit of the Fourteenth Amendment differ from that articulated in *Crawford*'s? What doctrinal changes could such an account underwrite? And, would those changes be desirable?

This Part addresses those questions. It revisits *Crawford* in order to specify its major errors. It then proposes normatively several doctrinal moves within the broad outlines of *Crawford*'s framework that would make that doctrine more consistent with confrontation's original letter and spirit.

A. *Crawford*'s Compromises

Crawford reads as an uncompromising account of the original meaning of the Confrontation Clause. Justice Scalia identifies the "principal evil" against which it was directed as "the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."³⁶³ This characterization of confrontation's function served as the basis for the Court's limitation of confrontation's coverage to testimonial hearsay, as well as the Court's identification of "business records" and "statements in furtherance of a conspiracy" as outside the scope of the Confrontation Clause.³⁶⁴ Scalia also declared that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."³⁶⁵ Finally, Scalia identified only one exception to the rule—dying declarations.³⁶⁶ Subsequently, *Davis* and *Giles* would confirm a second exception—forfeiture by wrongdoing, applicable where defendants have been shown to have intentionally procured the absence of a witness.

363. *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

364. *Id.* at 56.

365. *Id.* at 53-54.

366. *Id.* at 56 n.6.

The above analysis supports longstanding critiques of the testimonial-hearsay limitation. Chief Justice Rehnquist and Justice O'Connor's concurrence had the better of the historical argument; there was no such limitation at the Founding and no reason to think that it was incorporated into the original meaning of the Sixth Amendment, much less the Fourteenth.³⁶⁷

Why did the Court embrace it? The testimonial-hearsay limitation seems to have first been suggested by the United States in an amicus brief³⁶⁸ in *White v. Illinois*.³⁶⁹ Justices Scalia and Thomas concurred separately to express general agreement with it.³⁷⁰ They were persuaded that the Confrontation Clause was aimed at a “discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process”; emphasized that a testimonial-hearsay-focused confrontation right would be more “narrow[]” in coverage than *Roberts*—which covered all hearsay; and suggested that the limitation would “greatly simplify” confrontation inquiries because it would be concerned with “formalized” evidence.³⁷¹

This amicus brief's testimonial-hearsay limitation was predicated upon the supposed existence at the Founding of what it called “well recognized and enduring exceptions” to the general rule excluding hearsay. Here is the complete list, together with the authorities:

At least the following exceptions had taken shape by the late 18th century: dying declarations, regularly kept records, co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence. See *Patton v. Freeman*, 1 N.J.L. 113,115 (N.J. 1791) (co-conspirator declarations); 5 J. Wigmore, [Evidence], § 1430, at 275 [Chadbourne rev. ed. 1974] (dying declarations); *id.* § 1518, at 426-428 (regularly kept records); *id.* § 1476, at 350 (declarations against interest by deceased persons); *id.* § 1476, at 352-358 (statements of fact against penal interest); *id.* § 1480, at 363 (pedigree and family history); *id.* § 1580, at 544 (reputation evidence); 3 J. Wigmore, [Evidence], § 735, at 78-84 (past recollection recorded).

367. See *id.* at 69-71 (Rehnquist, C.J., concurring).

368. Brief for the United States as Amicus Curiae Supporting Respondent at 19-21, 25-28, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113), 1991 WL 527595.

369. 502 U.S. 346 (1992).

370. *Id.* at 364 (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment).

371. See *id.* at 365-66.

See also 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).³⁷²

This list is a mess. Only *two* of these purported exceptions applied to criminal trials—the only context relevant to confrontation—at all. The other kinds of hearsay evidence were admitted only in civil trials.³⁷³ David Sklansky has detailed how in civil cases during the early nineteenth century the “weight of authority . . . both in England and in the United States, treated the hearsay rule as a flexible principle of preference, requiring sworn, in-court testimony when possible but allowing secondhand evidence when more reliable proof was unavailable.”³⁷⁴ As we have seen, however, this was not the case in criminal trials.

Nor was there any general “co-conspirator exception” in criminal trials. Statements of co-conspirators could be used to corroborate or impeach trial testimony as well as to prove the general existence of a conspiracy; but they could not be used as evidence of a defendant’s participation in a conspiracy or some other crime.³⁷⁵ The only “exception” on this list that (1) existed at the Founding and (2) encompassed hearsay evidence admissible to prove a defendant’s guilt, was the dying declaration.

Crawford erred as well in its treatment of the Marian procedures. Scalia’s claim that the introduction at trial of testimony gathered during Marian examinations from unavailable witnesses had been “rejected” by 1791 lacks support.³⁷⁶ This must be considered a second exception to a general rule requiring an opportunity for cross-examination, along with the dying declaration. Since the Marian procedures are no longer used,

372. As Davies notes, this claim was stated in Brief of the United States as Amicus Curiae Supporting Respondent at 14 n.5, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 22228005. See Davies, *Framers’ Design*, *supra* note 119, at 361 n.33.

373. See Davies, *Framers’ Design*, *supra* note 119, at 361 n.33.

374. David A. Sklansky, *The Neglected Origins of the Hearsay Rule in American Slavery: Recovering Queen v. Hepburn*, SUP. CT. REV. (forthcoming 2023), available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4207141. This flexible rule hardened after *Queen v. Hepburn*, a successful freedom suit in which the Circuit Court of the District of Columbia excluded crucial portions of evidence that Mina Queen’s relatives in Maryland had introduced showing that their common ancestor, Mary Queen, had come to America in indentured servitude. See *id.* at *5-7. Sklansky argues that the overall effect of limiting hearsay in civil trials was to strengthen the institution of slavery “by closing off one of the few legal avenues through which people in bondage could seek their freedom.” *Id.* at *1. The evidence here is not to the contrary; it does, however, show that in the context of criminal trials under the Fugitive Slave Act, hearsay was seen by antislavery advocates as having a different valence.

375. See Davies, *Framers’ Design*, *supra* note 119, at 392-93.

376. See *id.* at 365-67.

this error might seem practically insignificant. But *Giles* illustrates why it is not.

Thomas Davies has demonstrated that *Giles*'s recognition of a generally applicable forfeiture-by-wrongdoing exception stems from a misreading of cases that arose under Marian procedures. The forfeiture-by-wrongdoing rule applied only where (1) Marian testimony had been previously given by a witness (2) who was intentionally kept away from trial by the defendant.³⁷⁷ Unsworn, unfronted testimony—like that at issue in *Giles*—from an unavailable witness was always excluded, regardless of the reasons for the unavailability, unless it fell within the dying-declaration exception.³⁷⁸ That is to say, the forfeiture-by-wrongdoing rule was part of a broader rule admitting Marian testimony by unavailable witnesses. Had the Court had a better understanding of the relevant history, it could have cabined the application of forfeiture-by-wrongdoing to a procedure that was rejected by the time of the Fourteenth Amendment's ratification.

Crawford was more methodologically concerned with capturing the original scope of confrontation rights than *Roberts*. But *Roberts* did capture one truth about confrontation that was later lost: Confrontation was not narrowly focused on a particular kind of hearsay. An uncompromised account of the scope of confrontation in 1791 and 1868 would implicate *all* hearsay evidence of a defendant's guilt, regardless of its formality or the purposes for which it was produced. Prosecutorial abuses of out-of-court examinations certainly animated the development of confrontation rights and their inclusion in the Sixth Amendment. But *Crawford*'s emphasis on this “principal evil” led the Court to shrink confrontation's original scope.

Crawford and its successors also invited further departures of the original scope of confrontation by suggesting that *Roberts* had been correct to frame confrontation as ultimately aimed at producing reliable evidence. Thus, Scalia wrote that *Roberts*'s error had been to invite case-by-case judicial determinations of whether hearsay is reliable; he did not deny that “the Clause's ultimate goal is to ensure reliability of evidence.”³⁷⁹ On his account of the Raleigh trial, “the problem was that the judges refused to allow Raleigh to confront Cobham in court, where he could cross-examine him and try to expose his accusation as a lie.”³⁸⁰ Thus, the reason that the Confrontation Clause barred the admission of

377. See Davies, *Selective Originalism*, *supra* note 119, at 638.

378. See *id.* at 641-43.

379. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

380. *Id.* at 62.

uncrossed *ex parte* examinations was to make criminal adjudication more likely to arrive at the truth concerning culpability.

We have seen that confrontation does not have *one* goal. Moreover, of the original goals of confrontation, evidentiary reliability was and is now the most dubious and therefore vulnerable.

The developing adversary trial—of which confrontation was a part—was indeed advertised as a truth-seeking mechanism. But as John Langbein has detailed, the reality was that “we settled on our procedures for criminal adjudication at a moment when we did not want all that much truth.”³⁸¹ Specifically, English criminal law threatened so much capital punishment that judges, juries, and even prosecutors sought out means of avoiding strict enforcement of the letter of the law and of ensuring that only the worst of the worst received its sanctions.³⁸² These included the rule of lenity, the beyond-reasonable-doubt standard of proof, and the downcharging and downvaluing of goods by juries in order to defeat the death penalty.³⁸³ Claims about the truth-promoting character of the adversary process later built into the U.S. Constitution should thus be viewed skeptically. There is ample reason to regard evidentiary reliability as an incomplete explanation for the development of a defendant-centered right in a context where truth’s capacity to kill was well-appreciated—and disapproved.

Technological developments since confrontation’s emergence may also affect the truth-value of in-person testimony, as compared to other forms of evidence. Consider *Melendez-Diaz* and *Bullcoming*, holding that defendants must have the opportunity to cross-examine forensic witnesses for the prosecution. The prosecution’s failure to produce laboratory technicians who can testify concerning the results of their analysis of DNA evidence results in the exclusion of that evidence. Producing them, as William Stuntz has noted, “raises the cost to the laboratories of performing the technical analysis . . . mean[ing] less analysis.”³⁸⁴ To believe that there is a reliability gain from these rules, one would have to believe that cross-examination—or the prospect thereof—can weed out enough incompetent or fraudulent laboratory analysis to outweigh the costs of any exclusion of reliable analysis (because of the lack of available forensic witnesses) and any drop in the production of reliable analysis (because of the need for analysts to witness as well as analyze). The majority and dissenting opinions in *Melendez-Diaz* and *Bullcoming* are chock-full of cross-cutting empirical

381. LANGBEIN, *supra* note 171, at 336.

382. *See id.* at 334-35.

383. *See id.*

384. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 227 (2011).

intuitions about reliability-related costs and benefits. Defendants prevailed in both *Melendez-Diaz* and *Bullcoming*. But reliability ultimately paved the way for *Crawford*'s erosion in *Bryant* and *Williams*.

Finally, the *Crawford* cases compromised the original scope of confrontation by permitting states to avoid the burden of production that confrontation originally imposed. States have enacted notice-and-demand statutes that require defendants to specifically demand that a scientific witness appear to testify; if they do not object, the witness need not appear.³⁸⁵ The Supreme Court has not merely tolerated these statutes; it has endorsed them. And it has made no effort to ground this burden-shifting in the history of confrontation.

B. Reconstructing the Letter

For all its faults, *Crawford* got a couple of big things about confrontation right. It correctly held that the Constitution did not merely create a preference for confrontation; it imposed a mandate, enforced through exclusion. It correctly rejected *Roberts*'s reliability-based approach to exceptions from that mandate. Further, there are straightforward ways to fix its major mistakes.

1. Redefining "Testimonial"

The Court's limitation of *Crawford* to testimonial hearsay lacks historical support. It has also been a persistent source of confusion and conflict in confrontation doctrine. Expanding *Crawford* to cover *all* hearsay, however, might seem to be a cure worse than the disease.

For one thing, hearsay exceptions have proliferated since the ratification of the Sixth and Fourteenth Amendments. *Crawford* threatened only a subset of them—returning confrontation to its original scope would threaten far more. For another, confrontation preceded the development of urban, professionalized policing;³⁸⁶ the "war on drugs" and transformations in criminal punishment and policing practice that accompanied it, including the proliferation of mandatory minimums and the extensive use of confidential informants;³⁸⁷ and the emergence of

385. See Metzger, *supra* note 297, at 1022.

386. See generally SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES 1865-1915* (1983) (discussing the police institution in America and how it developed).

387. See ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 51 (2009).

plea bargaining as the primary mode of criminal adjudication.³⁸⁸ Collectively, these changes raise questions about whether whatever balance was originally struck by confrontation rights between the goals of reliability, dignity, fairness, liberty, and democracy, on the one hand, and those that have been used to justify the criminal law, on the other, would be approximated today if one did not compensate for those changes at all.

Importantly, failure to compensate for post-1791/1868 developments would not necessarily work in a straightforwardly pro- or anti-defendant direction. Confrontation rights covering all hearsay would reduce the value to prosecutors at trial of hearsay statements acquired through use of confidential informants, a seemingly pro-defendant result. But prosecutors might respond by taking advantage of the vast discretion they enjoy to increase the price to defendants of invoking their trial rights. Broad criminal liability rules, together with constitutionally unregulated prosecutorial discretion to “stack” a series of overlapping crimes, can induce defendants to plead guilty irrespective of their innocence.³⁸⁹ In theory, more trial rights can increase defendants’ bargaining leverage by giving them a greater chance of success; in practice, defendants may not be inclined to risk additional years in prison for the prospect of an effective cross-examination.

For similar reasons, failure to compensate might not be more “originalist.” Perhaps plea bargaining is itself incompatible with the original meaning of the Constitution. But absent any reason to think that the Court is going to reach that conclusion, the net result of “first-best” original confrontation rights might be to increase the number of unconstitutional (as an original matter) negotiated convictions. Prosecutors might be encouraged to drive harder plea bargains to avoid the now-higher costs of trial. In turn, that would mean fewer opportunities to actually exercise confrontation rights. It is not obvious that originalists ought to prefer the latter.

In any event, no Justice has shown an appetite for first-best confrontation originalism. More realistically, the testimonial-hearsay limitation could be reconfigured to make it less of an open invitation to police, prosecutors, and judges to take and reconstruct hearsay statements in ways that ensure their admissibility. Instead of focusing on the circumstances in which the statements were initially delivered,

388. See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 17 (2003).

389. See STUNTZ, *supra* note 384, at 263.

attention could be focused instead on how they are later put to use by the government.

This is not a new suggestion. Michael Cicchini and Vincent Rust have contended that testimonial hearsay should be redefined as “hearsay that tends to establish in any way an element of the crime or the identification of the defendant.”³⁹⁰ Doing so would expand the category of testimonial hearsay to better approximate the original scope of confrontation. And it would do so in a way that is responsive to the initial concerns about case-by-case balancing that prompted the move away from *Roberts*, as well as avoid the kind of fact-sensitive contextual inquiries that the Court’s current primary-purpose approach has necessitated. Further, it could be extended into pre- and post-trial settings. The latter moves concededly go beyond confrontation’s original scope as a trial right; they will be defended below as a gloss on original meaning that is consistent with confrontation’s original purposes.

If this seems too demanding, consider another possibility—one that would (unfortunately) allow for the admission of hearsay that the original meaning of the Constitution requires be excluded but (fortunately) raises the cost to the prosecution of securing its admission. As elaborated by Jeffrey Bellin, this possibility involves establishing a rebuttable presumption against the admission of non-testimonial hearsay—as the latter is currently defined.³⁹¹ The prosecution could rebut that presumption by demonstrating that a witness is unavailable to testify. Because determining unavailability for confrontation purposes is already required where prosecutors seek to introduce testimonial hearsay, this would not require courts to do much of anything new.³⁹²

2. Rejecting Notice-and-Demand

Before and after *Melendez-Diaz*, states have sought to escape the burdens of producing witnesses through statutes that require defendants to affirmatively commit to cross-examination. This is flatly incompatible with the original meaning of confrontation, and the Court should put an end to it.

In all criminal prosecutions, the Sixth and Fourteenth Amendments require the government to produce available witnesses. The government’s failure to produce an available witness denies a defendant

390. Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining “Testimonial,”* 10 LEWIS & CLARK L. REV. 531, 543 (2006). For a similarly use-focused proposal, see Ross, *supra* note 290, at 213.

391. Bellin, *supra* note 14, at 1893-95.

392. *See id.* at 1900-01.

the right to confront that witness. The right to confrontation includes more than the right to cross-examine, so the defendant's election not to do so does not affect the government's constitutionally required production burden.

Notice-and-demand statutes all require a defendant to take an initial step of invoking their constitutional right to confrontation before the government is obliged to honor it by producing a witness.³⁹³ Failure to do so constitutes a waiver of the right.³⁹⁴ Some notice-and-demand statutes simply require a commitment to raising a confrontation objection; others require a statement of intent to cross-examine.³⁹⁵

Notice-and-demand statutes that require statements of intent to cross-examine are the most clearly problematic. Because confrontation does not consist solely in cross-examination, a defendant who elects not to cross-examine a witness has not waived their confrontation rights. By conditioning all confrontation rights on the exercise of one of them, these "qualified" notice-and-demand statutes necessarily reduce the scope of confrontation.³⁹⁶

But even notice-and-demand statutes that require "only" that a defendant demand to see a witness testify in person offend the Constitution. We have seen that the right to confrontation was a component of an emerging adversarial system that deliberately raised the costs of the conviction and prosecution of presumptively innocent defendants. Any efforts to shift those costs should be met with the same critical attention that the Court in *Bruen* determined to be appropriate for gun regulations with no analogue in the history of the Second or Fourteenth Amendments.

The Court did not devote such critical attention to notice-and-demand statutes in any of the cases in which it has approved them. Despite obvious cost-constraints associated with witness-production that defeated many prosecutions through the Founding and antebellum eras, neither the federal government nor the states sought to condition production on a demand for confrontation. Notice-and-demand statutes emerged in the early twenty-first century and have no obvious historical analogue. *Melendez-Diaz*'s analogy to the right to the compulsory process fails because the latter right *cannot* be exercised without the defendant's initial identification of witnesses to be

393. See *id.* at 1898 n.64.

394. See Samuel M. Duncan, "Qualified" Notice-and-Demand Statutes Unconstitutionally Eliminate a Criminal Defendant's Sixth Amendment Right to "True" Confrontation—Live Testimony from Witnesses, 34 HAMLINE L. REV. 51, 54 (2011).

395. *Id.* at 54-55.

396. *Id.* at 55-56.

compelled to appear. Like the rights to a speedy trial, trial by jury, and the assistance of counsel, the right to confrontation should be regarded as attaching automatically, without a defendant having to elect in advance to exercise it.

C. Reconstructing the Spirit

Confrontation was originally regarded as a component of an adversary process that operated in the context of trials. At the Founding, its democratic function in particular depended upon the presence of a jury.

We are a long way from this world. Trials are rare, to the point where one might reasonably wonder whether restoring confrontation-as-originally-understood is worth the trouble. The following proposals are responsive to this concern; they rely upon the original functions of confrontation to extend confrontation rights into novel settings.

1. Confronting Pleas

The first reported cases of prosecutorial agreements to accept pleas to lesser crimes rather than take defendants to trial come from the 1800s.³⁹⁷ “Plea bargaining” was intensely controversial when discovered, and did not become common until the early twentieth century.³⁹⁸ Today, the overwhelming majority of criminal cases end in punishment without trial by jury.³⁹⁹ Although it is beyond the scope of this Article to probe the consistency of plea bargaining with the Constitution’s jury-trial guarantees, the question arises whether confrontation rights ought to interact, if at all, with plea bargaining.

As an initial matter, the Court has already held that the Sixth Amendment is applicable at the plea-bargaining stage.⁴⁰⁰ The Court has recognized a constitutional right to counsel at plea bargaining on the grounds that the U.S. criminal system “is for the most part a system of pleas, not a system of trials” and that “the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for

397. See CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 16 (2021).

398. *Id.*

399. Around ninety-five percent. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1228 (2016).

400. See *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

a defendant.”⁴⁰¹ William Ortman has proposed that the right to confrontation be extended pretrial.⁴⁰² The government would be required to produce the witnesses upon which it is relying to charge the defendant, and the defendant—aided by counsel—would be given an opportunity to depose and cross-examine those witnesses, in the presence of a court reporter.⁴⁰³

Ortman puts forth his proposal as a means of ensuring that “plea prices . . . more accurately track what would happen at a hypothetical trial.”⁴⁰⁴ That is, it tries to position prosecutors and defendants to make decisions about whether to propose and accept plea agreements only when the expected benefits to them of doing so exceed the expected costs. At present, prosecutors and defendants lack the information necessary about the strengths and weaknesses of the government’s case to do so.⁴⁰⁵ Cross-examination, it is hoped, will yield that information; information that will principally benefit the defendant, who has less information and less leverage as a general matter.⁴⁰⁶

These goals are consistent with confrontation’s original goals of promoting liberty and fairness. What about dignity and democracy? An acknowledged limitation of Ortman’s proposal is that depositions are not ordinarily open to the public; certainly, no juries are conveyed for them.⁴⁰⁷ The Court has also never recognized that a defendant has a constitutional right to attend a deposition, and Ortman does not call for it to do so. He leaves “to future analysis” the question of “whether adversarial testing at a deposition depends on the defendant’s personal presence.”⁴⁰⁸

As Ortman acknowledges, the Court has recognized that face-to-face appearance *at trial* is “a core component of the Confrontation Clause.”⁴⁰⁹ If confrontation requires pretrial depositions at which witnesses can be cross-examined because of the rarity of actual trials, why permit the exclusion of defendants from those depositions? Face-to-face appearance—though perhaps not presence—is no less a component of confrontation than cross-examination. Any reluctance that a witness might have to implicate the defendant could be expected to

401. Frye, 566 U.S. at 143-44.

402. William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 486 (2021).

403. *Id.* at 487.

404. *Id.* at 489.

405. *Id.* at 490.

406. *Id.*

407. *Id.* at 486 n.224.

408. *Id.* at 501 n.309.

409. *Id.*

carry over to trial. Further, given the significance of these depositions to plea bargaining—and plea bargaining’s domination of criminal adjudication—excluding defendants would be no more compatible with their dignity than excluding them from the courtroom.

As for democracy, pretrial cross-examinations at closed depositions concededly give defendants little opportunity to appeal to the broader community in opposition to either the law or its enforcement. Originally, confrontation’s performance of its democratic function depended in large part upon the presence of a jury. But pre-trial confrontation could provide more information to defendants in advance about aspects of the investigation that either the jury—in the event of a trial—or the broader community would find troubling and could use to support legal change.

2. Confronting Sentencing

Modern day trials take place in two separate stages. First, a jury determines the guilt or innocence of a defendant.⁴¹⁰ Second, a judge determines the defendant’s sentence.⁴¹¹ The stages focus on different questions and are subject to different statutory and constitutional rules. Different sentencing rules operate in different states; federal sentencing is governed by federal guidelines. But all jurisdictions empower judges to consider defendant-specific facts other than that of conviction, including recidivism, cooperation with law enforcement, and acceptance of responsibility.⁴¹²

This bifurcated process was unknown at the Founding and during the antebellum period. There was no need for a separate “sentencing” proceeding because judges did not enjoy any meaningful sentencing discretion; a defendant could predict the sentence they faced upon conviction by looking at the formal charge. John Douglass summarizes the situation thus: “[A] unitary trial and single jury verdict determined not only guilt or innocence, but life or death as well.”⁴¹³ Although the precise extent of sentencing discretion enjoyed by judges is disputed, the general consensus is that judges could not consider aggravating and mitigating factors until “indeterminate” legislative schemes emerged in the late-nineteenth century.⁴¹⁴

410. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1975-76 (2005).

411. *Id.*

412. Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 53, 53 n.22 (2011).

413. Douglass, *supra* note 410, at 2008.

414. Hessick & Hessick, *supra* note 412, at 52.

As with plea bargaining, bifurcated sentencing is entrenched—whatever its merits as a matter of original meaning. It is settled that the Sixth Amendment applies to sentencing proceedings, in the context of which judges can find facts that determine the extent of a defendant’s punishment. The Court has held that judicial discretion at sentencing is bounded by the Sixth Amendment; for instance, if a trial does take place, the Sixth Amendment’s jury trial guarantee requires that “any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁴¹⁵ The question arises whether confrontation rights, too, should apply to sentencing.

More than a half-century before *Crawford*, the Court held that the answer was “no.” In *Williams v. New York*⁴¹⁶ the Court upheld a death sentence for murder that was based on a pre-sentencing report which “revealed many material facts concerning appellant’s background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt.”⁴¹⁷ The Court rested its decision first on history, claiming that

before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.⁴¹⁸

Evidently concerned about the practical consequences of holding otherwise, the Court added that “[t]he type and extent of this information make[s] totally impractical if not impossible open court testimony with cross-examination” because it would “endlessly delay criminal administration in a retrial of collateral issues.”⁴¹⁹

Williams’s historical claim about sentencing discretion is dubious. And even if sentencing judges have “wide discretion” to “determine[] the kind and extent of punishment” to be imposed after a trial or plea, it does not follow that the defendant should be denied the ability to cross-examine any witnesses who makes factual assertions that inform the judge’s sentence. *Williams* did not elaborate as to why it would be “impossible” to cabin cross-examination to matters that had not been

415. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

416. 337 U.S. 241 (1949).

417. *Id.* at 244.

418. *Id.* at 246.

419. *Id.* at 250.

either admitted in a plea agreement or proven at trial; most particularly, statements that tend to prove “relevant conduct” that was the subject of either uncharged or dismissed prosecutions.⁴²⁰ The latter conduct can be used to increase a sentence in both state and federal courts.⁴²¹ For these reasons, I agree with Shaakirrah Sanders that confrontation should be understood to include the right at sentencing to cross-examine people who make statements concerning relevant conduct.⁴²²

Enabling defendants to cross-examine witnesses who testify as to relevant conduct can promote a number of confrontation’s original functions. Cross-examination can promote truth at sentencing by enabling defendants to challenge factual assertions about their past that were not the subject of either plea negotiations or trial. It promotes the dignity of defendants as well as fairness to them by giving them an opportunity to contest factual claims that inform judgments about their character. Sentencing facts implicate the liberty and even life of a defendant, as *Williams*—which saw the trial judge rejecting a jury’s recommended sentence—illustrates. And sentencing proceedings, unlike pretrial depositions, are generally open to the public. They have been sites for organizing in support of defendants; “participatory defense” teams have contributed to sentencing proceedings by producing videos that humanize defendants.⁴²³ Cross-examination about relevant conduct can thus engage the broader community in support of a defendant and contest the way in which the system has treated them, thereby performing confrontation’s democratic function as well.

C. Objections

I have drawn upon confrontation’s original meaning and functions to argue for broader confrontation rights, as well as their extension to new settings. One might object on procedural or substantive grounds.

As to process, even if *Crawford* is methodologically originalist, it does not follow that confrontation doctrine ought to be altered to better conform to the Constitution’s original meaning and function. Originalism is but one of many ways in which to approach constitutional

420. See Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 UNIV. MICH. J.L. REFORM 791, 821 (2014).

421. *Id.* at 822.

422. *Id.* at 823-24; see also Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 HASTINGS L.J. 1257, 1287-90 (2014); Shaakirrah R. Sanders, *The Value of Confrontation as a Sentencing Right*, 25 WIDENER L.J. 103, 162-63 (2016).

423. See Simonson, *The Place of “The People” in Criminal Procedure*, *supra* note 333, at 268-69; see also Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 719-20 (2018).

decision making, and perhaps the Court ought not perpetuate it. As to substance, it might be objected that broad confrontation rights would yield morally intolerable consequences.

1. Normalizing Originalism

It is crucially important to distinguish *originalism* from responsiveness to or use of arguments from original meaning and function. Originalism characteristically assigns priority to original meaning—it holds that “[a]ll of the communicative content of the constitutional text and its logical implications must be reflected in the legal content of constitutional doctrine.”⁴²⁴ Non-originalist methodologies characteristically consider original meaning to be one of many considerations to weigh in making constitutional decisions; they do not ignore original meaning or function entirely.⁴²⁵ A non-originalist could thus conclude in favor of following the original meaning of the Sixth and Fourteenth Amendments without embracing originalism across the board.

That being said, following original meaning in one setting invites arguments that it ought to be done in others. And if following original meaning is generally a bad idea, it might seem like a good idea to discourage its use anywhere, in an abundance of caution. On the other hand, that would involve forgoing present benefits for fear of future costs, inviting questions about the certainty and weight of those costs and benefits.

Two future costs are particularly salient. The first concerns the negative impact that future originalist decisions actually produce. We could imagine, for instance, that perpetuating Sixth Amendment originalism might lead a future Court to revisit the history of the Sixth Amendment right to counsel and determine that *Gideon v. Wainwright*⁴²⁶ should be overruled—neither in 1791 nor in 1868 would criminal defendants be understood to have a right to *state-provided counsel*. This, in turn, could lead to more factually innocent people being coerced into pleas or convicted at trial.

The second future cost worth considering is political. Suppose original meaning just does not explain why Supreme Court justices do

424. Lawrence B. Solum, *Originalist Methodology*, 84 UNIV. CHI. L. REV. 269, 293 (2017).

425. For examples of anti-carceral use of constitutional history by scholars who do not claim to be originalist, see, for example, Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 50–51 (2019); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1112 (2020); Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 145–48 (2022).

426. 372 U.S. 335 (1963).

what they do. The Court gets the hardest constitutional cases, and the hardest cases concern constitutional language that history rarely resolves. The quality of the historical evidence upon which the Justices rely is contingent upon the quality of the briefing on any given issue, and the quality of their analysis is contingent upon (among other things) available time, interest in the issue, and the weight of non-originalist precedents. For all of these reasons, a Justice who claims that their decision is completely dictated by original meaning may well be sincere but may also be sincerely wrong. The result: (1) A lack of transparency in decisions that are fundamentally political; (2) a consequent discouragement of democratic discourse concerning how those political decisions ought to be made.

These concerns are in some tension with one another. If original meaning has *no* impact on judicial decision making, a future Court will not overrule *Gideon* because of anything that is done with original meaning. The only way in which these concerns could both materialize is if the choice to focus on original meaning has *some* causal power—but not as much as the Justices say that it has. This does not mean that these concerns should be dismissed, of course—the choice to follow originalism could produce both costs described above; only one; or only the other.

Still more importantly, these costs are *very* difficult to measure. How would we determine that implementing the original content of confrontation actually led Justices to overrule *Gideon*, assuming that they did so? If they said that it did, would we be justified in believing them, assuming we hold some of the premises that underwrite the second set of costs? How much democratic discourse is affected by how the Supreme Court reaches the results it reaches, rather than by those results? For that matter, how many people actually read Supreme Court opinions at all?

The measurement problems here seem sufficiently grave to place the burden on those who would argue that following the original meaning of confrontation would be a net-negative decision, without regard to what that original meaning is. Until that burden is carried, we should focus instead on whether my account of the original meaning and functions of confrontation seems morally compelling.

2. Windfalls for the Guilty

Those who believe that originalism is or ought to be our law may need no further argument for following it. Further, although the *Crawford* cases—particularly those in which Justice Scalia wrote for a

majority—do discuss the costs of confrontation for prosecutors, police, survivors, and victims of violence, they play no acknowledged role in the Court’s constitutional analysis. They are mentioned by the Court only to highlight their legal irrelevance or to indicate reasons why they are not high.

But *Crawford* has been subjected to longstanding criticism because of its neglect of the costs of confrontation. Confrontation has costs for survivors and victims of crime; and it may indirectly have costs for defendants. Broad confrontation rights that are extended to pretrial and posttrial proceedings threaten to raise them.

a. Confrontation’s Costs

The longest-standing criticism of *Crawford* has focused on its costs for survivors of intimate partner abuse.⁴²⁷ Domestic violence and rape survivors are often unavailable to testify because they have been abused and fear further abuse. They may be pressured by their abuser; they might fear the humiliation of describing their abuse in a public setting; they might fear that, if believed, they will suffer economic consequences or permanently rupture a relationship with someone for whom they still have affection.⁴²⁸

Indeed, scholars who provided the constitutional theory behind *Crawford* appear to have focused their attention on strengthening confrontation precisely because of the loosening of hearsay rules around intimate partner abuse. There is no better example than “Dial-In Testimony,” in which Richard Friedman and Bridget McCormack documented and criticized what was becoming a “common practice for some prosecutors” of “offering the recording of a 911 call—that is, a telephone conversation between the alleged victim of the crime or another witness to it and an agent of an emergency assistance service.”⁴²⁹ The authors situated this practice in a broader context of “[a]ggressive police policies in domestic violence cases,” which had resulted in “police officers . . . see[ing] it as their role to supply evidence in ‘victimless’ prosecutions.”⁴³⁰

427. See, e.g., Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005); Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 330-31 (2005); Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 22-25 (2006).

428. See Tuerkheimer, *supra* note 427, at 15-17.

429. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 UNIV. PA. L. REV. 1171, 1171 (2002).

430. *Id.* at 1185, 1187.

These policies did not come out of nowhere. Aya Gruber has shown them to be the fruits of an anti-domestic-violence movement led by second-wave feminists.⁴³¹ In the early stage of second-wave feminism, feminists created shelters for abused women and focused on raising public consciousness of a patriarchal culture that led men to beat their partners in order to control them, police to avoid intervention in domestic disputes, and prosecutors to decline to file criminal charges for nonfatal spousal assaults.⁴³² But by the 1980s, feminists and tough-on-crime conservatives had joined forces to call for policies mandating arrest in domestic-violence cases, making it easier to secure protective orders and criminally punishing their violation, prohibiting prosecutors from dropping domestic-violence cases.⁴³³

The costs of *Crawford* are not limited to survivors of intimate partner abuse. Witnesses in cases involving organized crime often face threats of violence for “snitching,” resulting in either refusal to testify or perjury.⁴³⁴ Cases of all kinds often fail for lack of an available witness.⁴³⁵

Even if one regards all of the above costs as worth incurring—on which more shortly—there is reason to be wary. William Stuntz has argued that the Supreme Court has long overinvested in criminal-procedural rights that promise but do not afford much in the way of meaningful protection to criminal defendants against arrest, prosecution, and imprisonment.⁴³⁶ The drivers of a nationally unprecedented and internationally unusual rise in the U.S. prison population, on Stuntz’s account, include largely unregulated prosecutorial control over plea bargaining and broad criminal laws that carry heavy mandatory penalties.⁴³⁷ Stuntz contends that providing defendants with, what from the prosecutors’ perspectives, are “expensive” trial rights, and, from legislators’ perspective, allow too many guilty people to go free has encouraged (1) prosecutors to seek more plea deals and (2) legislators to enact criminal laws under which less needs to be proven to secure convictions.⁴³⁸ And he singles out

431. See AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION* 44 (2020).

432. *Id.* at 42-44.

433. See generally *id.* at 67-92 (discussing the progress in the feminist movement throughout the 70’s and 80’s).

434. See Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L., 521, 537-38 (2010).

435. *Id.* at 532-33.

436. See STUNTZ, *supra* note 384, at 216-17, 234-35.

437. See *id.* at 235-63.

438. See *id.* at 260-63.

Crawford as an example of the perversity of our constitutional criminal procedure.⁴³⁹

As with the objections to originalism, there are tensions between these critiques of broadening and strengthening confrontation. It cannot be the case both that broader, stronger confrontation rights will hinder the punishment of people who have committed crimes because cases will fail without witnesses *and* that broader, stronger confrontation rights will facilitate criminal punishment because legislators and prosecutors will quickly adjust. It might, however, be the case that broader, stronger confrontation makes it more difficult to convict *only some* people—those who choose to go to trial and are sophisticated enough to raise criminal-procedural objections.⁴⁴⁰ If the latter tend to have more resources, that might shift egalitarian costs to one side of the scale; or, we might think that it is better for some (more) people to have a trial and strong confrontation than for everyone to lack the latter.

b. Anti-Carceral Confrontation

Responding to these objections requires zooming out a bit to appreciate the scope and gravity of what commentators on American criminal law across the ideological spectrum have come to regard as a crisis.⁴⁴¹ The precise nature of that crisis, as well as the causal forces responsible for it, are disputed. But we can describe a cluster that roughly constitutes it, even if we cannot agree on its essence:

Overcriminalization. There are too many criminal laws, reaching far beyond uncontroversially heinous conduct like murder, rape, and robbery. Many criminal laws cover activities that should not be criminalized at all; many are unnecessary because they duplicate existing laws.⁴⁴²

Discretion. Police have too much discretion over who to surveil, arrest, and protect. Prosecutors have too much discretion over who to bring charges against and what to charge for what underlying conduct, as well as over whether to pressure them into a coerced plea.⁴⁴³

439. See *id.* at 226-27.

440. See *id.* at 224.

441. See Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1956-57 (2019).

442. See, e.g., Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. UNIV. L. REV. 703, 713-17 (2005); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3-4 (2008).

443. See, e.g., William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 790-91 (2006); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 4-7 (2007).

Discrimination. Police and prosecutors exercise their considerable discretion in ways that track and reinforce race, class, gender, and other identity-based forms of marginalization.⁴⁴⁴

Severity. The “price” of crime is too high. People are incarcerated for periods and under conditions that are not justifiable on any plausible theory of why punishment might be morally legitimate, and the collateral consequences of conviction include disenfranchisement, deportation, criminal registration, and community notification that subordinate them in civic life.⁴⁴⁵

It has been argued that this cluster of problems has been with us since the Founding.⁴⁴⁶ But we must recognize differences in degree, if not in kind. For instance, the overrepresentation of Black people in U.S. prisons is not a recent development.⁴⁴⁷ But the degree of overrepresentation is, as well as the magnitude of the general increase in the prison population—from about 100 people in prison per 100,000 in 1970 to a high of about 750 per 100,000 in 2008.⁴⁴⁸ Beyond the confines of prison walls, the number of people on probation, under community supervision, or released from prison under parole supervision has increased by several orders of magnitude.⁴⁴⁹ The systemic nature and sheer scale of this social control has led many of its critics to refer to a “carceral state” and to treat it as a core feature of modern American governance.⁴⁵⁰ Critics of the criminal legal system range from reformers who seek to recover or create a system of criminal punishment that is

444. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 114-23 (2010); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 185-86 (2010).

445. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 UNIV. PA. L. REV. 1789, 1806-12 (2012); Shon Hopwood, *Improving Federal Sentencing*, 87 UMKC L. REV. 79, 80-84 (2018); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 242-45 (2015); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 190-95 (2017).

446. See Ristroph, *supra* note 441, at 1970; Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1435 (2016); MARKUS D. DUBBER, *THE DUAL PENAL STATE: THE CRISIS OF CRIMINAL LAW IN COMPARATIVE-HISTORICAL PERSPECTIVE* 177-183 (2018).

447. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 2 (2006).

448. Ristroph, *supra* note 441, at 1991.

449. *Id.*

450. See Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167, 177 (2018) (using “carceral state” to refer to “the sprawling, dynamic network of policies, institutions, personnel, and apparatuses through which federal, state, local, and tribal governments exercise power to police, prosecute, and punish”); see also Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1693 (2006) (using the term and describing the carceral state’s expansion).

more procedurally just,⁴⁵¹ evidence-based⁴⁵² or democratic,⁴⁵³ to carceral abolitionists⁴⁵⁴ who look to build a world without police, prisons, or the social conditions that make life without the latter seem unthinkable.

Suppose you agree that related, often overlapping problems make the U.S. criminal legal system larger, harsher, more discriminatory, and more arbitrary than it ought to be. If so, the case for stronger confrontation rights is robust.

Let's start with Stuntz's claim about procedural rights being self-defeating because of the capacity of prosecutors and legislatures to adjust. The empirical basis for this claim is dubious, and the proposed confrontation reforms are responsive to Stuntz's concerns.

Intuitively, it makes sense: Raise the costs of anything, you'll either get less of that thing or innovation that lowers it. So, if the costs of trial go up because of procedural rights, prosecutors and legislators facing a demand for electorally salient demand for toughness-on-crime have a strong incentive to innovate. Stuntz's claim is that the Warren Court's investment in constitutional rules that exclude evidence gathered in violation of the Fourth and Fifth Amendments led to more prosecutorial pressure to plea bargain and the legislative enactment of substantive offenses that were easier to prove at trial.⁴⁵⁵

As Stephen Schulhofer has detailed, however, this does not seem to have happened. Rather, "[l]egislatures enacted harsher sentencing policies at a time when decisions like *Mapp*, *Miranda*, and other procedural landmarks had been largely or entirely de-fanged."⁴⁵⁶ Guilty pleas did not surge dramatically, either; rather, they have increased

451. See, e.g., Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. UNIV. L. REV. 1525, 1530-32 (2017); Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J.F. 525, 526-28 (2014); Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 348-49 (2011).

452. See, e.g., RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 146-49 (2019); John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 UNIV. CHI. L. REV. 711, 810 (2020).

453. See, e.g., Barry Friedman & Maria Pomomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1875, 1881 (2015); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. UNIV. L. REV. 1367, 1405 (2017); STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 147-48 (2012).

454. See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1838-39 (2020); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617-19 (2019); MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 19-20 (2021).

455. See STUNTZ, *supra* note 384, at 262-65.

456. Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1077 (2013).

steadily at least since the Civil War.⁴⁵⁷ Perhaps *perceptions* of rampant crime facilitated by the Supreme Court eventually led to delayed backlash, but there are too many confounding variables to be confident about this.

In any event, the proposed confrontation reforms would be very difficult for police and prosecutors to work around. A longstanding criticism of *Miranda* is that it underappreciated the ability of police to manipulate interrogation environments to elicit waivers of self-incrimination rights.⁴⁵⁸ At present, *Crawford* suffers from a similar manipulation problem, owing to its focus on whether a statement is intended to aid prosecution and the reality that the only person present when it was given may be a police officer.⁴⁵⁹ If the testimonial character of a statement is made contingent, not upon anyone's intentions but upon whether or not it tends to establish an offender's identity or an element of the offense, there is no mileage in manipulation and nothing to be gained through perjured testimony regarding the conditions in which the statement was made. And the proposed confrontation reforms ensure that out-of-court statements that establish offense elements or identity are subject to cross-examination even if there is no trial.

To be sure, legislatures *might* respond to high-profile cases abandoned for lack of witnesses by reforming criminal laws to include fewer and less demanding elements and harsher sentences. But the costs of legislative action are considerable, and it would take quite the laser-like focus on constitutional criminal procedure amidst competing demands for legislative attention to make such a response plausible. In the meantime, strong confrontation would give defendants considerable leverage at the pretrial stage, increase their chances at trial, give them the dignity of face-to-face appearances before their accusers, and enable them to engage jurors and the broader community in their support.

On the other side are the costs of what will concededly be more decisions not to charge, more dropped charges, lower bargained-for penalties, and more acquittals. Whatever the impact of *Crawford* on domestic-violence and organized-crime-related prosecutions would be magnified by the proposed reforms. More people who have in fact

457. *Id.* at 1063-65.

458. See, e.g., Donald A. Dripps, *Foreward: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 709-10 (1987); Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 744 (1992); Albert A. Alschuler, *Miranda's Fourfold Failure*, 97 B.U. L. REV. 849, 858-59 (2017).

459. See Ross, *supra* note 290, at 175; Michael D. Cicchini, *Judicial (In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis*, 75 TENN. L. REV. 753, 754 (2007).

committed crimes will not be punished; some of those crimes will lie near the core of what most people think ought to be punished.

It is true—but not entirely satisfying—to point out that other components of the adversarial process, from the right to counsel to the presumption of innocence, allow people who have in fact committed crimes to go free. Perhaps it is “better that ten guilty persons escape, than that one innocent suffer” because “when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me, whether I behave well or ill; for virtue itself, is no security.”⁴⁶⁰ But the less fit the procedural tool for sifting guilty from innocent, the less attractive “Blackstone’s ratio” seems as a justification. Couldn’t the survivor or victim of crime—their families, their friends, their communities—similarly despair of security, to say nothing of justice for injuries inflicted?

The case of intimate-partner abuse is particularly troubling. Confrontation grew up around socially and legally reinforced patriarchal domination. Whatever balance Anglo-American criminal law struck between the protection of person and property from injury, on the one hand, and dignity, fairness, liberty, and democratic contestation through the adversarial process, on the other, did not incorporate violence within the marital relationship—from battery to rape. Feminist critics of *Crawford* have emphasized this context; pointed out that Justice Scalia ignored it entirely; and charged that *Crawford*’s primary-purpose inquiry, which distinguishes sharply between “crying for help” and “providing information” to law enforcement suffers from failure to appreciate the dynamics of abuse.⁴⁶¹ In sum, the critique holds that *Crawford* perpetuates the gender-based subordination around which confrontation was initially constructed—in part by threatening twentieth-century reforms in hearsay law that were specifically designed to prevent gender-based subordination.

The proposed changes to confrontation doctrine would indeed threaten some of these reforms. On the other hand, those reforms have been a focal point of criticism by criminal justice reformers who urge that laws targeting domestic and sexual violence should not escape the scrutiny that has been directed at the criminal legal system more

460. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1779); *Adams’ Argument for the Defense: 3-4 December 1770*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016> [<https://perma.cc/JZ54-7XKE>].

461. See, e.g., Raeder, *supra* note 427, at 320; Tuerkheimer, *supra* note 427, at 7, 23-28; Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 22 (2011).

generally.⁴⁶² Studies have found that mandatory-arrest policies might actually increase domestic violence by provoking further abuse.⁴⁶³ Protection orders and their enforcement necessarily entangle victims and offenders in the criminal legal system, and disproportionately affect the poor and members of racial minorities.⁴⁶⁴ Victims themselves may be arrested for child abuse and neglect; police may resent and retaliate against victims who return to their batterers.⁴⁶⁵

Not even the most radical of carceral abolitionists would deny that our society ought to protect people against gendered violence through some means. It does not follow, however, that the criminal legal system in its present state is ideally responsive to that need for protection, or takes adequate account of other morally salient considerations. Anticarceral feminists have argued that is not and perhaps cannot; many have worked to create community-based organizations that do not rely upon the criminal system to intervene in intimate partner and sexual violence.⁴⁶⁶ Noncarceral approaches to resolving interpersonal violence include the use of restorative- and transformative-justice processes. Both of these processes see victims of violence identifying and making visible the harm inflicted upon them; offenders acknowledging the harms; and victims, offenders, and their supporters working together to develop plans to make reparations and change the offender's behavior going forward.⁴⁶⁷

We should not assume that every change in criminal-law doctrine that threatens well-intended reforms that are responsive to real harms will make the world worse rather than better. If our criminal legal system is in a state of crisis because of some combination of overcriminalization, discretion, discrimination, and severity, it is unlikely that its treatment of gendered violence is ideal. Quite the

462. See, e.g., LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 7-8 (2018); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* 1, 4, 22 (2012); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 585-86 (2009); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 802-05 (2001).

463. See Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, 250 NAT'L INST. JUST. J. 20, 21-22 (2003).

464. See GRUBER, *supra* note 431, at 7.

465. See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1046 (2000).

466. See Emily Thuma, *Lessons in Self-Defense: Gender Violence, Racial Criminalization, and Anticarceral Feminism*, WOMEN'S STUD. Q., Fall/Winter 2015, at 52, 59.

467. See Michelle Brown, *Transformative Justice and New Abolition in the United States*, in JUSTICE ALTERNATIVES 73, 77-84 (Pat Carlen & Leandro Ayres Franca eds., 2020); McLeod, *supra* note 454, at 1630-32.

opposite; here as elsewhere, we probably have too much criminalization and punishment and too much prosecutorial power.

Feminist critics of *Crawford* are correct that there is no reason to assume that eighteenth- or nineteenth-century confrontation rights are appropriately tailored to protecting people against gender-based violence. The same, however, can be said for the adversarial process more generally. Every piece of it was designed without sufficient moral concern for gender-based violence—from the right to counsel to the presumption of innocence. The proposed confrontation reforms are not put forward in ignorance of, or insensitivity to, the realities of gendered or any other kind of violence. Rather, they are put forward in the belief the criminal system we have has not been adequately responsive to gendered or any other kind of violence and has inflicted other harms in responding to it. And they do not—as *Crawford* does—require the application of implausible binary distinctions between crying-for-help and providing information, or any other probing of survivor motivations.⁴⁶⁸

What benefits can be expected? Those that confrontation has always promised. Reconstructing confrontation will promote respect for a defendant's dignity at all stages of criminal prosecution. At every juncture, it will mitigate an overwhelming power imbalance, even if it is a stretch to call it “fair.” It positions defendants to bargain for lesser penalties, increases their chances of acquittal, and aids them in seeking mitigation at sentencing. It enables them to engage the entire community in resisting not only their prosecution but the system that is prosecuting them, injecting a measure of democratic responsiveness to all members of the polity—not just those whose views are shared by legislative majorities.⁴⁶⁹ By these means it will shift power to those who are at greatest risk of domination by the carceral state.

VII. CONCLUSION

Perhaps no statement about cross-examination—indeed, about confrontation in general—is better known than John Henry Wigmore's praise of it: “[B]eyond any doubt the *greatest legal engine* ever invented

468. See Tuerkheimer, *supra* note 427, at 26-28.

469. See Simonson, *supra* note 360, at 850 (describing power-shifting reforms that are designed to place decisions in the hands of people “who not only tend not to have much political power, but who are also consistently excluded from most forms of public participation in the criminal legal system”).

for the discovery of *truth*.”⁴⁷⁰ Even as it overruled *Roberts*, *Crawford* framed confrontation primarily as a truth-discovery mechanism.

But neither at the Founding nor at the ratification of the Fourteenth Amendment was confrontation thus understood. Rather, confrontation was concerned with promoting the dignity of defendants; enabling even the almost certainly guilty a fair shot at liberty; and enabling democratic participation in and contestation of criminal punishment. The primary purpose of the cross-examination of John Caphart was not to reveal the truth about whether Robert Morris had aided Shadrach Minkins’s escape from slavery; it was to put slavery itself on trial. Not only Morris’s acquittal but also the transcript’s later use in abolitionist literature was a testament to its success.

These goals remain vitally important today. The scope and scale of the criminal punishment system is a subject of cross-ideological concern. The proliferation of forms of evidence that do not easily fit the Court’s current criteria for testimonial hearsay risks exacerbating an already overwhelming imbalance of power.⁴⁷¹ Fourteenth Amendment confrontation will not smash the carceral state. But it will empower those who are caught up in it and create opportunities for resistance that can be seized by those most directly impacted by it. It can operate alongside and reinforce ongoing grassroots efforts to demand jury trials, facilitate communal participation in criminal defense, make juries more representative, and open courts.

Far from watering down confrontation, recovering its antebellum history would strengthen it. The question is whether the Court will shrink from the consequences. The anti-carceral consequences of Fourteenth Amendment confrontation will operate as a test of judicial originalism’s commitment to the discovery of truth.

470. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 27 (1923) (emphasis added).

471. See Bellin, *supra* note 288, at 42, 46-47.