
THE INCREDIBLE SHRINKING CONFRONTATION CLAUSE

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Sharp turns in the Supreme Court’s recent Confrontation Clause jurisprudence have left scholars reeling from conflicting emotions: exhilaration, despair, denial, and soon, perhaps, cynical acceptance. While most commentators celebrated the demise of the incoherent Ohio v. Roberts framework, their excitement largely faded as the Court’s decisions in Davis v. Washington and Bryant v. Michigan revealed nascent flaws in the evolving doctrine and sharply curtailed the newly revitalized confrontation right.

Recent scholarship strives to reanimate the jurisprudence by expanding the doctrinal definition of “testimonial” statements – the sole form of evidence

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that the Court now recognizes as implicating the Confrontation Clause. This Article targets a similar objective through a less-traveled path. It accepts the Court's focus on, and definition of, "testimonial" statements as a valid, even inevitable, jurisprudential development. This Article seeks instead to expand the reach of the confrontation right to "nontestimonial" hearsay, arguing that constitutional limits – albeit less strict ones – are also warranted for this type of evidence in light of the policies, text, and history of the Confrontation Clause. The Article then details how the Supreme Court can (consistent with the overarching historical, textual, and policy arguments noted above) integrate these limits on the admission of nontestimonial hearsay into its new jurisprudence.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

– United States Constitution, Sixth Amendment

"I know not 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."

– Chief Justice John Marshall¹

INTRODUCTION

Commentators cheered when the Supreme Court decided *Crawford v. Washington*² in 2004.³ The decision finally put "some teeth in the

¹ United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No.14,694).

² 541 U.S. 36 (2004).

³ See Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 192 (2005) (describing *Crawford* as "a successful blend of originalism and formalism" that announced a rule that "turns on simple, clear requirements of testimony, cross-examination, and unavailability, rather than ad hoc estimates of reliability"); Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1496 (2006) (describing *Crawford* as a "significant victor[y]" for the "criminal defense bar" that "restored clarity to confrontation law"); Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 273 (2005) (arguing that *Crawford* "represent[s] a great and beneficial development"); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 750, 767 (2005) (stating that *Crawford*'s "reasoning is difficult to refute, and its fealty to early constitutional history is admirable"; it is "a salutary development in confrontation law"); Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 512, 522 (2005) (explaining that *Crawford* has "given real teeth to the Confrontation Clause in several frequently encountered and important situations" and forecasting "a future in which substantially more confrontation may be provided"); Roger C. Park, *Purpose As a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297, 297 (2005) ("I applaud the change from *Ohio v. Roberts* to *Crawford v. Washington*"); Robert M.

Confrontation Clause,” repudiating the wishy-washy and widely-reviled *Ohio v. Roberts*⁴ framework that governed the Court’s jurisprudence over the preceding two decades.⁵ Adding to the excitement, the reinvigoration of the Sixth Amendment confrontation right was led by Justice Scalia playing counter-to-type and striking a resounding blow against prosecutorial power.⁶

Crawford was a victory not just for criminal defendants, but for the Constitution as well. The *Crawford* Court reversed a conviction because the prosecution had introduced unconfounded, “testimonial” hearsay – the type of evidence most analogous to the sworn statements of absent witnesses that the Sixth Amendment’s drafters abhorred.⁷ Such hearsay is inadmissible against a criminal defendant, *Crawford* announced, because the Sixth Amendment demands face-to-face confrontation, not the “malleable” tests of reliability set forth in *Roberts*.⁸

As ambitious as the case was, *Crawford* only mapped out the rough contours of the long-awaited Confrontation Clause revolution, leaving a number of important questions “for another day.”⁹ As the Supreme Court began to answer those questions in later cases, the new jurisprudence took a dramatic and surprising turn. Three years after *Crawford*, the Court strictly cabined the category of hearsay to which the reinvigorated confrontation right applied. Specifically, *Davis v. Washington*¹⁰ held that while “testimonial” hearsay was inadmissible absent confrontation, “nontestimonial” hearsay – a broad category of admissible hearsay – was “not subject to the Confrontation Clause” at all.¹¹ The next blow to the celebrated reinvigoration of the Confrontation Clause came in the 2011 case of *Michigan v. Bryant*.¹² In *Bryant*, a new majority of the Supreme Court seized the evolving jurisprudence from Justice Scalia’s guiding hand and, while claiming fidelity to *Crawford*, constricted the definition of “testimonial” statements to its minimalist core: statements

Pitler, *Symposium Introduction*, 71 *BROOK. L. REV.* 1, 12-13 (2005) (recounting post-*Crawford* exuberance among attorneys and scholars involved in the case, as well as in newspaper reports).

⁴ 448 U.S. 56 (1980).

⁵ See Miguel A. Mendez, *Crawford v. Washington: A Critique*, 57 *STAN. L. REV.* 569, 607 (2004).

⁶ Bibas, *supra* note 3, at 184 (noting the apparent irony that “Justice Scalia, long the darling of tough-on-crime conservatives” authored an opinion that “vindicated criminal defendants’ rights,” but adding that Justice Scalia had “occasionally shown a libertarian, pro-defendant streak in the past”).

⁷ See *infra* pp. 47-48.

⁸ *Crawford v. Washington*, 541 U.S. 36, 60, 69 (2004) (“[T]he only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

⁹ *Id.* at 68.

¹⁰ 547 U.S. 813 (2006).

¹¹ *Id.* at 821.

¹² 131 S. Ct. 1143 (2011).

“procured with a primary purpose of creating an out-of-court substitute for trial testimony.”¹³ In addition, the *Bryant* Court erected a framework for analyzing “primary purpose” that appears just as malleable as the *Roberts* test – a flexibility that, if *Roberts* is any guide, is more likely to favor the prosecution (by admitting hearsay) than the defense (by excluding it).¹⁴ Together, *Bryant* and *Davis* work a dramatic curtailment of the post-*Crawford* confrontation right. The current Supreme Court’s conclusion that the Confrontation Clause addresses *only* “testimonial” statements, in concert with its pointed narrowing of the definition of “testimonial,” results in the elimination (not strengthening) of the constitutional restrictions on the bulk of admissible hearsay.¹⁵ As *Bryant* itself declares, statements admitted under many commonly utilized hearsay exceptions – for example, excited utterances, present sense impressions, co-conspirator statements, statements for medical diagnosis or treatment – will rarely be testimonial and consequently are now completely unregulated by the Confrontation Clause.¹⁶

Scrambling to respond to the twists and turns of modern Confrontation Clause jurisprudence, the Court’s critics, now including Justice Scalia, target

¹³ *Id.* at 1155. Justice Scalia argued in dissent that a testimonial statement is one that is made “with the understanding that it may be used to invoke the coercive machinery of the State against the accused.” *Id.* at 1169 (Scalia, J., dissenting); *cf.* *Crawford*, 541 U.S. at 52 (suggesting as one possible definition of “testimonial”: “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial”). In *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012), Justice Alito proposed a further narrowing of the definition to statements “prepared for the primary purpose of accusing a targeted individual.” Only three other Justices, however, joined his opinion. *Id.* at 31 (plurality opinion).

¹⁴ See Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require That Roberts Had to Die*, 15 J.L. & POL’Y 685, 695-96 (2007) (remarking that *Roberts* “often resulted in scant protection as a practical matter” and “[o]nly occasionally . . . provide[d] protection even against facially problematic hearsay”); sources cited *infra* note 48; *cf.* *Commonwealth v. Allshouse*, 36 A.3d 163, 182 (Pa. 2012) (holding that a child’s statement to an investigating social worker that identified defendant as perpetrator of child abuse was not testimonial under *Bryant*); Lininger, *supra* note 3, at 767.

¹⁵ See Thomas Y. Davies, *Not “The Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y 349, 468 n.291 (2007); Tom Lininger, *Yes, Virginia, There Is A Confrontation Clause*, 71 BROOK. L. REV. 401, 405 (2005) (“[O]ne of *Crawford*’s greatest shortcomings is its failure to specify confrontation requirements for nontestimonial hearsay.”).

¹⁶ *Bryant*, 131 S. Ct. at 1157 n.9 (emphasizing that statements admissible pursuant to many common hearsay exceptions “are, by their nature, made for a purpose other than use in a prosecution”); *cf.* Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impressions*, 160 U. PA. L. REV. 331, 357, 360 (2012) (emphasizing the increasing role, in light of changing communication norms, for present sense impressions in litigation, and the absence of Confrontation Clause restrictions on their admission).

the contracting definition of “testimonial.” They urge the Court to capture more hearsay within the Confrontation Clause by adopting a broader definition of this critical term.¹⁷ This Article steers clear of that debate, accepting as generally sound the Court’s identification of a subset of out-of-court statements (roughly characterized as those made for purposes of litigation) that implicate the core of the Sixth Amendment right to confrontation. Instead, this Article proposes a different path toward a more muscular Confrontation Clause – a path that few scholars have suggested, much less fleshed out in any detail.¹⁸ Specifically, the Article argues that, contrary to the Court’s largely unsupported (yet unanimous) conclusion in *Davis*, the Confrontation Clause is not *solely* concerned with “testimonial” statements, but also restricts the admission of “nontestimonial” hearsay, albeit to a lesser degree.

While sharply criticizing the Court’s recent decisions, this Article recognizes that, by severely restricting the admissibility of testimonial hearsay, *Crawford* and its progeny indisputably improve Confrontation Clause jurisprudence. The admission of testimonial hearsay (narrowly defined) presents a unique affront to the Confrontation Clause. If it is to do nothing else, the Clause must prevent the prosecution, with its inherent advantage in structuring criminal trials, from procuring admissible out-of-court substitutes for live testimony and thereby extinguishing the defendant’s right to cross examination. When government agents generate out-of-court statements with an eye toward litigation, *Crawford* and its progeny rightly forbid the use of those statements absent confrontation. The Court is wrong, however, to suggest that preventing “abusive governmental practices” is the *only* function of the confrontation right.¹⁹ The right also embodies a general preference for

¹⁷ *Bryant*, 131 S. Ct. at 1171 (Scalia, J., dissenting); Michael D. Cicchini, *Dead Again: The Latest Demise of the Confrontation Clause*, 80 *FORDHAM L. REV.* 1301, 1321 (2011) (“[T]he proper inquiry to determine whether a statement is testimonial involves the statement’s *use at trial*.”); Michael D. Cicchini & Vincent Rust, *Confrontation After Crawford v. Washington: Defining “Testimonial,”* 10 *LEWIS & CLARK L. REV.* 531, 543 (2006) (“[T]he term testimonial should be defined as all accusatory hearsay, i.e., hearsay that tends to establish in any way an element of the crime or the identification of the defendant.”); Jeffrey L. Fisher, *What Happened – and What Is Happening – to the Confrontation Clause?*, 15 *J.L. & POL’Y* 587, 627 (2007) (arguing that “the best way to determine” whether a statement implicates the Confrontation Clause “is to ask whether the person was narrating completed events to a person of authority”); Friedman, *supra* note 3, at 242 (presenting “a broad conceptual approach to the meaning of ‘testimonial’”); Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 *J. CRIM. L. & CRIMINOLOGY* 147, 193 (2006) (proposing that the Court “adopt[] a functional approach to the term testimonial” that considers “whether the evidence functioned as testimony against the accused at the trial”).

¹⁸ See *infra* note 187 (describing two similar but nonetheless distinct proposals).

¹⁹ See *Bryant*, 131 S. Ct. at 1155 (emphasizing the danger of the “introduction of out-of-court statements . . . in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial”); Randolph N. Jonakait, *The Right to*

live testimony that compels prosecutors to produce available witnesses at trial instead of out-of-court assertions, whether those assertions are labeled “testimonial” or “nontestimonial.”²⁰ It is this general preference, once a central facet of the confrontation right,²¹ that is inexcusably absent from the Court’s new jurisprudence.

The path forward lies in preserving what the Court got right in *Crawford* (its intolerance for testimonial hearsay), while repairing its subsequent missteps (its indifference to nontestimonial hearsay). An important component of this approach is the recognition that interpreting the confrontation right to apply to nontestimonial as well as testimonial hearsay does not mean that both types of hearsay should be treated identically. As the admission of nontestimonial statements does not strike as closely to the historical and textual core of the confrontation right, it need not be restricted as severely (that is, excluded absent confrontation). Rather, prior to admitting such evidence, courts can enforce a constitutional preference for live testimony – as they have in other contexts – by requiring the prosecution to demonstrate the out-of-court declarant’s “unavailability.”²² If a declarant is unavailable, the prosecutor can introduce her nontestimonial hearsay; but if the declarant can testify, the prosecutor must offer that testimony, rather than rely solely on the declarant’s hearsay.

This Article’s proposed modification of modern Confrontation Clause jurisprudence remedies the unjustified absence of constitutional restrictions on unconfounded, nontestimonial hearsay. It also provides an opportunity to unify the nascent jurisprudence around a single uncontroversial principle: an overarching preference for live-witness testimony.²³ The principle requires that, in making a case against a defendant, the prosecution must, whenever possible, choose live-witness testimony over “weaker” out-of-court substitutes.²⁴ *Crawford*-era jurisprudence implicitly recognizes this principle, requiring witnesses to be brought to trial in lieu of the introduction of their

Confrontation: Not a Mere Restraint on Government, 76 MINN. L. REV. 615, 616 (1992) (arguing that while government abuse is part of the rationale for the Clause, it “operates not as a direct restraint on abusive governmental practices, but as a grant of positive rights to those charged with a crime”); *infra* Part III.

²⁰ See *infra* Parts II, III.

²¹ See *infra* Part III.

²² See *infra* Part III.

²³ See David Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1655 (2009) (criticizing the absence in *Crawford* of “any serious effort to identify the underlying point of confrontation” (quoting Roger C. Park, *Is Confrontation the Bottom Line?*, 19 REGENT U. L. REV. 459, 466 (2007))).

²⁴ *Davis v. Washington*, 547 U.S. 813, 828 (2006) (characterizing testimonial hearsay as a “weaker substitute for live testimony”); see also *Bryant*, 131 S. Ct. at 1171 (Scalia, J., dissenting) (same).

testimonial hearsay.²⁵ As this Article explains, the Court should extend its application of the principle more broadly to *nontestimonial* statements as well.

The Article proceeds in four parts. Part I emphasizes the aspects of Confrontation Clause jurisprudence that the Supreme Court got right in *Crawford*. This Part characterizes the groundbreaking decisions of the past few years, and particularly the novel testimonial-nontestimonial dichotomy, as a firm step forward in the Court's long struggle to interpret the enigmatic constitutional text. Part II hones in on what the Court got wrong in its new jurisprudence, critiquing the analytical moves made by the post-*Crawford* Court that lead not only to an appropriate focus on testimonial statements, but also to an erroneous conclusion that such statements constitute the sum total of out-of-court statements that implicate the Confrontation Clause. Part III posits an improved interpretation of the confrontation right in light of the text, history, and underlying policies of the Confrontation Clause. This interpretation, while parallel in many respects to existing jurisprudence, incorporates one critical difference – providing constitutional limits in the form of an unavailability requirement on the admission of nontestimonial hearsay. Part IV considers the policy implications of the proposal. By building on the Court's recent progress in interpreting the Confrontation Clause, and by eliminating the Court's unfortunate interpretive errors, the proposed reform provides the basis for achieving a long-elusive goal: a Confrontation Clause jurisprudence that is sensible, coherent, and strongly tethered to the text and history of the Sixth Amendment.

I. WHAT THE COURT GOT RIGHT: TESTIMONIAL HEARSAY AND THE CONFRONTATION CLAUSE

Analyzing *Crawford* in a broader context reveals with inescapable clarity that the decision represents a step forward in Confrontation Clause jurisprudence. As explained below, given the right perspective, *Crawford*, or a decision much like it, seems not only correct, but almost inevitable, both in terms of the Court's rejection of *Roberts* and its adoption of a testimonial-nontestimonial analytical dichotomy.

A. *The Enduring Challenge of Confrontation Clause Jurisprudence*

Any assessment of Confrontation Clause jurisprudence must begin with the “sparse” constitutional text.²⁶ The Sixth Amendment guarantee of an accused's right to “be confronted with the witnesses against him”²⁷ spawns an array of possible interpretations. At a minimum, the right guarantees a defendant's opportunity to cross-examine any witness called by the

²⁵ As explained below, the principle applies more strictly to testimonial statements, requiring exclusion of unavailable declarants' testimonial hearsay. *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *see also infra* Part III.B.

²⁶ *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2726 (2011) (Kennedy, J., dissenting).

²⁷ U.S. CONST. amend. VI.

prosecution at trial.²⁸ After a prosecution witness testifies, the defense must be permitted to test the witness's credibility before the jury through cross-examination, the "greatest legal engine ever invented for the discovery of truth."²⁹ The difficult interpretive question is how this right applies when the prosecution offers *out-of-court* statements of absent declarants – hearsay – as substantive evidence against the accused.³⁰

Over a century ago, Dean Wigmore took a famously narrow view, contending that the Confrontation Clause provides a right to cross-examine any live witness who testifies for the prosecution at trial, and nothing more.³¹ Limits on the introduction of the statements of out-of-court declarants, Wigmore argued, were the province of the hearsay rules, not the Constitution.³² At the other extreme, the Confrontation Clause could be interpreted to bar any unfronted statement whether made in or out of court. That interpretation would override "virtually every hearsay exception" the prosecution might invoke in a criminal trial.³³

The Supreme Court has consistently rejected the two extreme positions described above, claiming throughout its history to be charting "a middle course."³⁴ In one of its first encounters with the Confrontation Clause, in the

²⁸ See *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (characterizing the "right to *meet face to face* all those who appear and give evidence *at trial*" as "the irreducible literal meaning of the Clause" (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 123 (3d ed. 1940))); AKHIL AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 129 (1997); Sklansky, *supra* note 23, at 1645 ("The meaning of the term 'confronted' in the Sixth Amendment is . . . largely settled, and has been so for decades. Confrontation means an opportunity for cross-examination by defense counsel in front of the jury, ordinarily with the defendant and the witness both in the courtroom.").

²⁹ *Green*, 399 at 158 (quoting WIGMORE, *supra* note 28, § 1367).

³⁰ *Crawford*, 541 U.S. at 42-43; cf. John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1875 (2001) ("The problem of applying the Confrontation Clause to hearsay is among the most perplexing dilemmas of constitutional criminal procedure.").

³¹ JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 1755 (1st ed. 1904); see also *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring).

³² Wigmore argued: "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." WIGMORE, *supra* note 31, § 1397, at 1755.

³³ *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (stating that under this interpretation, "the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme").

³⁴ *Crawford*, 541 U.S. at 50-51; *Roberts*, 448 U.S. at 66 n.9.

1895 case of *Mattox v. United States*,³⁵ the Court recognized that the confrontation right bars the introduction of some, but not all, out-of-court statements introduced against a defendant at trial.³⁶ The Court has never explicitly wavered from this position, but its subsequent failure to chart a coherent middle path plagues the resulting jurisprudence.³⁷

To date, the Court has undertaken two major efforts to draw a dividing line between permissible and impermissible hearsay under the Confrontation Clause. In the 1980 case of *Roberts v. Ohio*, the Court synthesized a “general approach” from its precedents.³⁸ Although short on constitutional interpretation,³⁹ *Roberts* boils down to a fairly intuitive logical argument: (1) the Sixth Amendment mandates confrontation to ensure that testimony is reliable, and thus (2) if the reliability of hearsay can be established in some other way (for example, by a judicial determination of reliability), confrontation is not required.⁴⁰

In 2004, the *Crawford* Court famously overturned *Roberts*, rejecting the significance under the Sixth Amendment of a judicial endorsement of an out-of-court statement’s reliability.⁴¹ “The only indicium of reliability sufficient to satisfy constitutional demands,” *Crawford* announced, “is the one the Constitution actually prescribes: confrontation.”⁴² Under *Crawford* and its progeny, whether an out-of-court statement implicates the Confrontation Clause depends on how the statement came about – that is, the statement’s “primary purpose.”⁴³ If a statement is made or elicited primarily with an eye toward litigation, it is “testimonial” and generally inadmissible against the defendant, absent confrontation, in a criminal trial.⁴⁴ If the statement is made

³⁵ 156 U.S. 237 (1895).

³⁶ *Id.* at 242-43.

³⁷ Akhil Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 690 (1996) (“[M]odern Supreme Court caselaw on the clause is surprisingly muddled in logic and exposition.”).

³⁸ *Roberts*, 448 U.S. at 65.

³⁹ 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6367 (1972) (stating that *Roberts* “makes no attempt to anchor its theory in either the language of the Sixth Amendment or its history”).

⁴⁰ *Roberts*, 448 U.S. at 65 (describing the “underlying purpose” of the Confrontation Clause as being “to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence”); *see also* *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (critiquing the Court’s Confrontation Clause jurisprudence as “abstract[ing] from the right to its purposes, and then eliminat[ing] the right”); Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 525 (1992).

⁴¹ *Crawford v. Washington*, 541 U.S. 36, 69 (2004).

⁴² *Id.*

⁴³ *Id.* at 68.

⁴⁴ *Crawford* left the precise definition of testimonial undefined. *Id.* The most recent

or elicited with some other primary purpose, however, such as to evaluate and respond to an ongoing emergency, or as part of a casual conversation among friends, the statement is “nontestimonial” and its admission does not implicate the Confrontation Clause.⁴⁵

B. *The Testimonial-Nontestimonial Dichotomy*

The *Crawford* framework’s clear improvement over *Roberts* appears in its analytical separation of “core,” “testimonial” statements from all other hearsay.⁴⁶ While some commentators criticize *Crawford*’s “testimonial”-“nontestimonial” dichotomy,⁴⁷ such a distinction is essential to any coherent interpretation of the Confrontation Clause. As discussed below, the failure of *Roberts* to prohibit unconflicted, testimonial hearsay led most directly to the case’s repudiation, and properly so.

The *Roberts* framework provided no heightened barriers to the admission of “testimonial” statements. *Roberts* treated testimonial and nontestimonial statements identically and, in fact, provided so few limits on the admission of either form of hearsay that commentators ridiculed the case as largely ineffectual.⁴⁸ *Roberts* condoned the admission of any out-of-court statement (testimonial or otherwise) that fell within a “firmly rooted” hearsay exception, or appeared trustworthy.⁴⁹ Consequently, the *Roberts* framework adopted the

guidance is reflected above. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011).

⁴⁵ *Bryant*, 131 S. Ct. at 1155; *Whorton v. Bockting*, 549 U.S. 406, 419-20 (2007); Robert P. Mosteller, *Giles v. California: Avoiding Serious Damage to Crawford’s Limited Revolution*, 13 LEWIS & CLARK L. REV. 675, 679 (2009) (“Even though an incriminating, unconflicted statement is offered to convict the defendant, it is not covered at all by the Confrontation Clause unless the statement is deemed testimonial.”).

⁴⁶ *Crawford*, 541 U.S. at 51.

⁴⁷ *Id.* at 69 (Rehnquist, C.J., concurring in the judgment) (“The Court’s distinction between testimonial and nontestimonial statements . . . is no better rooted in history than our current doctrine.”); Craig M. Bradley, *Melendez-Diaz and the Right to Confrontation*, 85 CHI.-KENT L. REV. 315, 321 (2010) (asserting that “the main problem” with “*Crawford/Davis* . . . is that the testimonial/nontestimonial distinction has nothing to do with the defendant’s right to cross-examine witnesses against him”); Aviva Orenstein, *Sex, Threats and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 151 (2010) (describing the dichotomy as “[s]hort on nuance and hostile to issues of policy”).

⁴⁸ Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558 (1988) (contending that *Roberts* relegated the right to confrontation to the position of a “minor adjunct” to non-constitutional evidence law); Lininger, *supra* note 3, at 756 (commenting that under *Roberts*, “the Confrontation Clause rarely presented any impediment to the admission of hearsay against the accused”); Mosteller, *supra* note 14, at 695-96.

⁴⁹ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (holding that the prosecution can establish the requisite reliability either by showing “particularized guarantees” of a statement’s “trustworthiness,” or by showing that the statement falls “within a firmly rooted hearsay

spirit, if not the letter, of Dean Wigmore's minimalist position that non-constitutional hearsay rules, rather than the Sixth Amendment, delineated the limits on the prosecution's use of hearsay at trial.⁵⁰

Roberts's failure to target testimonial hearsay meant that its framework did nothing to prevent deliberate evasion of the defendant's core Sixth Amendment right to cross-examination. As long as a judge deemed the resulting statement reliable, the prosecutor could, under *Roberts*, obtain out-of-court statements, such as affidavits or videotaped examinations, and present them at trial in place of a live witness. Illustrating this shortcoming, Akhil Amar posited an extreme example: a cunning prosecutor who adjourns trial just before calling a witness, then obtains a videotaped statement from the witness and presents the tape, in lieu of the witness, at trial.⁵¹ Clearly such evidence should be precluded by a constitutional right to confront one's accusers, but *Roberts* did not dictate that result. In short, *Roberts* permitted an "inquisitorial" system – the bane of the right to confrontation.⁵²

While non-constitutional hearsay rules prevented a full-fledged civil law system from taking root under *Roberts*, isolated inquisitorial practices did emerge. One of the most noteworthy examples grew out of the wave of prosecutions necessitated by the "War on Drugs."⁵³ In a typical drug case, the prosecution must establish that the item in question is an illegal drug, as

exception").

⁵⁰ See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1021 (1998) (highlighting the near perfect alignment of pre-*Crawford* Confrontation Clause jurisprudence and the federal hearsay rules); Jonakait, *supra* note 48, at 571-72 (explaining that, prior to *Crawford*, for the accused to "know the boundaries of this part of his confrontation right, [he] should look not to constitutional interpretation, but to evidence law"); Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 201 (2004) (arguing that the *Roberts* test boiled down to "a restatement of Dean Wigmore's general theory of admissibility for hearsay rule exceptions, promulgated in his 1912 treatise on evidence"). As noted in Part III.A, *Roberts* itself prevented some prosecutorial abuses by requiring a showing of unavailability in the "usual case." *Roberts*, 448 U.S. at 65. The Court jettisoned this requirement shortly after *Roberts*, however. See *infra* Part III.A.

⁵¹ AMAR, *supra* note 28, at 129.

⁵² *Crawford*, 541 U.S. at 51. The Court uses the descriptive terms "civil law" and "inquisitorial" interchangeably to refer to a system that "condones examination in private by judicial officers," as opposed to the "common-law tradition . . . of live testimony in court subject to adversarial testing." *Id.* at 43. For a skeptical assessment of the Court's "anti-inquisitorialism" in *Crawford* and elsewhere, see Sklansky, *supra* note 23, at 1674 (arguing, inter alia, that the modern Court "exaggerates the importance of Continental criminal procedure to the Founding generation").

⁵³ See Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 754 (2002) (describing "America's second war on drugs – the ongoing ban on the sale, possession and use of illegal narcotics").

opposed to some innocuous substance such as baking soda or oregano.⁵⁴ Under *Roberts*'s permissive umbrella, statutes and judicial decisions allowed the prosecution to accomplish this with affidavits from non-testifying government chemists.⁵⁵ Sworn affidavits, prepared by disinterested professionals, were nothing if not reliable and, consequently, *Roberts* did not prevent their introduction against criminal defendants.⁵⁶

As the post-*Crawford* Supreme Court would hold in *Melendez-Diaz v. Massachusetts* and reiterate in *Bullcoming v. New Mexico*, the prosecution's presentation of sworn affidavits in lieu of live testimony violates any plausible interpretation of the defendant's right to "be confronted with the witnesses against him."⁵⁷ Indeed, over a century ago the Supreme Court explained that, "[t]he primary object of the constitutional provision . . . was to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness."⁵⁸

If the Supreme Court had decided *Melendez-Diaz* prior to *Crawford*, the recent transformation of Confrontation Clause jurisprudence may have looked less like a revolution and more like a counterinsurgency. The Court could have framed its rejection of *Roberts*-era case law as a simple recognition that

⁵⁴ Given that statutes must go to great lengths to criminalize certain substances and not others, the showing is not easy. *See, e.g.*, 21 U.S.C. § 812 (2006) (criminalizing cocaine by listing as a "Schedule II" drug, substances consisting of "coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives" (footnote omitted)).

⁵⁵ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 306 (2009); *id.* at 349-50 (Kennedy, J., dissenting) (citing *Sherman v. Scott*, 62 F.3d 136, 139-42 (5th Cir. 1995); *Minner v. Kerby*, 30 F.3d 1311, 1313-15 (10th Cir. 1994); *United States v. Baker*, 855 F.2d 1353, 1359-60 (8th Cir. 1988)). The certificates typically include the precise quantity as well. *See Melendez-Diaz*, 557 U.S. at 308; Brief for Petitioner at 6-7, *Melendez-Diaz*, 557 U.S. 305 (No. 07-591) (explaining that in that case "two state-employed analysts issued three sworn reports on letterhead from the Massachusetts Department of Public Health" that asserted, *inter alia*, "that the nineteen bags found in the police cruiser contained 22.16 grams of a substance containing cocaine").

⁵⁶ *See Crawford*, 541 U.S. at 63-64 (faulting *Roberts* for "admit[ting] core testimonial statements that the Confrontation Clause plainly meant to exclude"); *see also Melendez-Diaz*, 557 U.S. at 349-50 (Kennedy, J., dissenting) (explaining that "before *Crawford*" all the "Federal Courts of Appeals to consider the issue agreed" that the "Sixth Amendment does not require analysts to testify in court"); *Commonwealth v. Melendez-Diaz*, 950 N.E.2d 867, 871 (Mass. 2011) ("It is beyond question that prior to *Crawford*, drug certificates were broadly considered admissible against a criminal defendant in the absence of the testimony of the analyst.").

⁵⁷ *Melendez-Diaz*, 557 U.S. at 310 ("There is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements' thus described."); *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2716 (2011).

⁵⁸ *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *see also California v. Green*, 399 U.S. 149, 156 (1970).

its decisions had, perhaps unintentionally, introduced the long-spurned Wigmorean view of the Confrontation Clause⁵⁹ – permitting the prosecution to evade even the most basic confrontation guarantee. As *Crawford* states, and the facts of *Melendez-Diaz* demonstrate, “[l]eaving the regulation of out-of-court statements to the law of evidence” renders “the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”⁶⁰

In retrospect, then, the most surprising thing about the Court’s change of direction in *Crawford* is that it did not emerge sooner. As *Melendez-Diaz* demonstrates, a testimonial-nontestimonial dichotomy keyed to the purpose of the speaker or interrogator⁶¹ is a necessary, even inevitable, facet of Confrontation Clause jurisprudence. The Clause must, above all, prohibit the admission of out-of-court statements procured as substitutes for live-witness testimony. If it does not, the constitutional guarantee of confrontation becomes meaningless. An analytical framework that identifies and excludes “testimonial” hearsay permits this critical prioritization; its absence, as *Crawford* validly proclaimed, constituted *Roberts*’s “unpardonable vice.”⁶²

II. WHAT THE COURT GOT WRONG: NONTESTIMONIAL HEARSAY

The preceding Part illustrates the aspect of the *Crawford* revolution that must be preserved. *Crawford* and its progeny rightly target unconfrosted, “testimonial” statements as the primary evil prohibited by the Confrontation Clause. This Part begins the analysis of what the *Crawford*-era Court gets

⁵⁹ *Crawford*, 541 U.S. at 50-51 (“[W]e once again reject the view that the Confrontation Clause[’s] . . . application to out-of-court statements . . . depends upon ‘the law of Evidence for the time being.’” (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 104 (2d ed. 1923))); *Green*, 399 U.S. at 155 (rejecting the contention that “the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law”). Justice Breyer discussed the disconnect between *Green* and *Roberts* in a concurring opinion in *Lilly v. Virginia*: “The Court’s effort to tie the Clause so directly to the hearsay rule is of fairly recent vintage, compare [*Roberts v. Ohio*] with *California v. Green*.” *Lilly v. Virginia*, 527 U.S. 116, 140 (1999) (Breyer, J., concurring) (citations omitted).

⁶⁰ *Crawford*, 541 U.S. at 51; *Maryland v. Craig*, 497 U.S. 836, 865 (1990) (Scalia, J., dissenting) (explaining that the Court’s cases “found implicit in the Confrontation Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said”).

⁶¹ Prior to *Bryant*, the Court had not resolved whose (objectively analyzed) purpose controlled, the speaker’s or, where a statement was elicited during questioning, the questioner’s. See *Michigan v. Bryant*, 131 S. Ct. 1143, 1161 n.11 (2011) (noting the “confusion” on this point). The *Bryant* majority held that *all* perspectives were relevant to the inquiry. *Id.* at 1160-61. Justice Scalia disagreed, arguing that the speaker’s purpose controls. *Id.* at 1169 (Scalia, J., dissenting).

⁶² *Crawford*, 541 U.S. at 63.

wrong: its flawed rationale for that conclusion. As discussed below, the Court missteps when it claims – as it has since *Davis*, the decision that immediately followed *Crawford* – that, as a textual and historical matter, the Sixth Amendment term “witnesses” itself applies *only* to “testimonial” statements. This interpretive error is not a purely academic matter. If the Court’s intolerance for testimonial hearsay stemmed from the functional intuition discussed in Part I (a recognition that testimonial hearsay must, of course, be barred to preserve the defendant’s core Sixth Amendment right to cross-examination), nontestimonial hearsay could still receive Confrontation Clause scrutiny. The Court’s distinct textual claim that “witnesses” as used in the Sixth Amendment solely addresses “testimonial” hearsay forecloses this possibility.⁶³ The discussion below explores the origins of the Court’s textual and historical reasoning on this critical point and articulates its flaws.

A. *The Surprising Origins of the Testimonial-Nontestimonial Dichotomy*

The Supreme Court’s equation of the term “witnesses” in the Sixth Amendment with “testimonial” statements traces its roots to a curious source. The core of *Crawford*’s analysis sprouted not from the criminal defense bar or historical authorities, but from the United States’ amicus brief in the 1991 case *White v. Illinois*.⁶⁴ The amicus brief, arguing in support of the admission of a young child’s out-of-court allegations of sexual abuse, proposed a novel approach to interpreting the Confrontation Clause. This alternative approach ignored the reliability of the child’s statements or her availability (the key variables under the then-governing *Roberts* framework), and deemed the statements unobjectionable because the child was not a “witness” as that term

⁶³ If a person who makes a nontestimonial assertion is not a “witness” under the Confrontation Clause, then the Clause is indifferent to the admission of that person’s unopposed assertion against the defendant. See U.S. CONST. amend. VI (“[T]he accused shall enjoy the right . . . to be confronted with *the witnesses* against him” (emphasis added)).

⁶⁴ 502 U.S. 346 (1992); Brief for the United States as Amicus Curiae Supporting Respondent at 20, *White*, 502 U.S. 346 (No. 90-6113) [hereinafter *White* Amicus Brief]; see also Michael R. Dreeben, *Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 GEO. L.J. ANN. REV. CRIM. PROC. iii, v n.17 (2005). As Richard Friedman notes, *Crawford*’s origins can be traced even further back, to an earlier brief filed by the United States (and then-Deputy Solicitor General Samuel Alito) in *United States v. Inadi*. See Richard Friedman, *The Story of Crawford*, in EVIDENCE STORIES 335, at 343 (Richard Lempert ed., 2006). The United States’ argument in *Inadi*, however, merely sought a hands-off approach to hearsay admitted under traditional hearsay exceptions, while acknowledging that the Court should more vigorously scrutinize, under the Confrontation Clause, hearsay “analogous to ex parte affidavits and depositions.” Brief for the United States at 24-25, *United States v. Inadi*, 475 U.S. 387 (1986) (No. 84-1580). It was only in *White* that the United States presented a cognizable theory of the Clause that resembles (to a degree) what later emerged in *Crawford*.

was used in the Sixth Amendment.⁶⁵ Fleshing out the point, the United States' brief states: "For purposes of the Confrontation Clause, the term 'witnesses against' more fittingly describes those individuals who actually provide in-court testimony or the functional equivalent – i.e., affidavits, depositions, prior testimony or other statements (such as confessions) that are made with a view to legal proceedings."⁶⁶

As the child's hearsay in *White v. Illinois* arguably did not fit this description, the United States contended that admission of her statements – whether reliable or not – did not violate the Confrontation Clause.⁶⁷ Although its analysis is sparse, the United States tethered its textual interpretation to the definition of "witness" given in Noah Webster's 1828 dictionary, *An American Dictionary of the English Language*.⁶⁸ On this point, the United States parroted Justice Scalia's dissent a year earlier in *Maryland v. Craig*, in which Justice Scalia relied on the same definition to disparage the majority's conclusion that the presentation of trial testimony via closed-circuit television was constitutional.⁶⁹

During oral argument in *White*, Justice Scalia criticized *Roberts* and seized on the United States' alternative interpretation of the Confrontation Clause, proclaiming, "[m]aybe the solution lies in the word 'witnesses.' What constitutes a 'witness'? . . . [I]t may extend to nothing except witnesses in the formal sense, somebody who appears at trial or someone who makes a deposition or signs an affidavit in preparation for the trial."⁷⁰ The *White* majority roundly rejected the United States' alternative theory, but Justice

⁶⁵ *White* Amicus Brief, *supra* note 64, at 17.

⁶⁶ *Id.* at 18-19.

⁶⁷ *Id.* at 17.

⁶⁸ *Id.* at 18 (citing 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). The oral argument transcript reflects that the advocates for the United States and Illinois viewed the alternate position as a long shot. Justice Scalia voiced support for the alternate position earlier in oral argument, but counsel for the United States began with the contention that the case should be decided under existing law, and used most of his time arguing that point. Transcript of Oral Argument at 36, *White*, 502 U.S. 346 (No. 90-6113) ("It's our position that the case can be decided within the framework of *Inadi* . . ."). Only after Justice Scalia asked if the United States was "abandoning" the "position that this material is not really covered by the Confrontation Clause anyway" did the Deputy Solicitor General discuss the alternative theory – a theory that provided the Court an opportunity to reconsider the *Roberts* framework, "if it's inclined to do so." *Id.* Responding to Justice Scalia, counsel for Illinois offered only that the State had assumed the Court would follow *Roberts*, but if not, "the State of Illinois . . . would probably agree with you that there is a question" as to whether the declarant "was actually a witness for purposes of the Confrontation Clause." *Id.* at 22-23.

⁶⁹ *Maryland v. Craig*, 497 U.S. 836, 864-65 (1990) (Scalia, J., dissenting).

⁷⁰ Transcript of Oral Argument, *supra* note 68, at 15. Justice Scalia added: "That would make the Confrontation Clause make sense, and the States could continue to apply the hearsay rule." *Id.*

Thomas (joined by Justice Scalia) endorsed it in a concurring opinion as “in some ways more consistent with the text and history of the Clause than our current jurisprudence.”⁷¹ After *White*, the United States’ theory would be nurtured by influential commentators, such as Akhil Amar and Richard Friedman, and ultimately blossom into law thirteen years later in Justice Scalia’s majority opinion (joined by, inter alia, Justice Thomas) in *Crawford*.⁷² Interestingly, while both Amar and Friedman adopted the basic premise of the United States’ brief (a testimonial-nontestimonial dichotomy keyed to the statement’s purpose), neither scholar relied on Noah Webster’s dictionary definition of the term “witness” to do so.⁷³ In fact, while generally opining that history supported the dichotomy, these scholars primarily emphasized the practical imperative for any sensible confrontation right to prohibit statements consciously elicited as a substitute for live testimony.⁷⁴ As explained in Part I,

⁷¹ *White*, 502 U.S. at 353; *id.* at 360 (Thomas, J., concurring). Justice Thomas recognized that the “approach might be difficult to apply and might develop in a manner not entirely consistent with the crucial ‘witnesses against him’ phrase.” *Id.* at 364; *cf.* *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (pointing out that in *White*, the Court “considered . . . and rejected” a proposal to “apply the Confrontation Clause only to testimonial statements”).

⁷² *Crawford*, 541 U.S. at 51-52 (citing the *White* concurrence and mentioning that the concurrence was “joined by Scalia, J.”); Dreeben, *supra* note 64, at xv-xviii (describing the influence of Friedman and Amar); Friedman, *supra* note 50, at 1013 (“[M]y approach is similar to those advanced by Justice Clarence Thomas [in *White v. Illinois*,] by the United States as amicus curiae in [that case], and by Professor Akhil Amar” (footnotes omitted)).

⁷³ See AMAR, *supra* note 28, at 129-30 (arguing that the Confrontation Clause requires cross-examination of any live-witness testimony and also, to avoid undermining that precept, any out-of-court declarant whose statement was “prepared for court use”); Friedman, *supra* note 50, at 1025-26 (arguing, based on history and policy, that if out-of-court statements obtained to function as substitutes for testimony at trial are admissible, “the system has provided a mechanism by which witnesses, without actually appearing at trial, can create testimony for use there”; and stating that such statements “lie at the core of the concern underlying the Confrontation Clause”). For another pre-*Crawford* argument that reaches the same result without the historical or textual arguments, see Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness*, 56 TEX. L. REV. 151, 192 (1978) (stating, prior to *Crawford*, that “courts have apparently assumed that every hearsay statement introduced by the Government is a statement of a witness ‘against’ the defendant” because the courts adopt a “viewpoint of [the statement’s] use at trial” and suggesting that a “better approach” is to “judge the statement from the viewpoint of the circumstances under which it was made”).

⁷⁴ See *supra* note 72. The two scholars take slightly different approaches. Amar argues that the “ordinary, everyday meaning” of “witness” only encompasses persons who testify at trial, but he concedes that to avoid government manipulation, the term must also be read to encompass persons whose statements are recorded in “videotapes, transcripts, depositions, and affidavits” that were “prepared for court use.” Amar, *supra* note 37, at 692-94. Friedman seeks to expand Amar’s definition to include anyone who makes a statement

little historical or textual exegesis is required on this point; without such a rule, an industrious prosecutor could render the confrontation right a nullity.⁷⁵ As the next Section details, however, the Supreme Court in *Crawford* and *Davis* followed the United States' lead and purported to find the testimonial-nontestimonial distinction implicit in the term "witness" – a decision that leads inexorably to the elimination of constitutional restrictions on nontestimonial hearsay.

B. *The Constitutional Text: "Witnesses Against"*

Echoing Justice Thomas's concurrence (and the United States' amicus brief) in *White*, *Crawford* tethers its sweeping reinterpretation of the Confrontation Clause to the Framers' use of the term "witnesses" in the Sixth Amendment. Citing Webster's 1828 dictionary, the *Crawford* majority explained that, at the time of the Framing, the term "witnesses" would be understood to mean people "who bear testimony."⁷⁶ "Testimony," in turn, would be understood as a solemn declaration made with the "purpose" of establishing a fact.⁷⁷ Building from these two definitions, *Crawford* formulated a "core class of 'testimonial' statements" which it did not fully define, but hinted might be characterized as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."⁷⁸ These testimonial statements, the Court explained, are directly contemplated by the Confrontation Clause and thus (with the possible "sui generis" exception of dying declarations) cannot be admitted against a criminal defendant without confrontation, that is, cross-examination.⁷⁹

The statements at issue in *Crawford* were "testimonial," and thus the *Crawford* Court did not decide the level of constitutional scrutiny that would apply to the admission of nontestimonial statements.⁸⁰ The Supreme Court answered this critical question in its next Confrontation Clause case, *Davis v.*

"with the anticipation that, in all likelihood, the statement will be presented to the factfinder at trial." Friedman, *supra* note 50, at 1039. Friedman does not explicitly draw a connection between this interpretation of "witness" and constitutional text or history, although he does find general support in both sources for his approach. *Id.* at 1022-26.

⁷⁵ See *supra* Part I.B.

⁷⁶ *Crawford*, 541 U.S. at 51 (quoting WEBSTER, *supra* note 68); see also *Davis v. Washington*, 547 U.S. 813, 824 (2006) (quoting *Crawford*, 541 U.S. at 51).

⁷⁷ *Crawford*, 541 U.S. at 51.

⁷⁸ *Id.* at 52 (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 3, *Crawford*, 541 U.S. 36 (No. 02-9410)).

⁷⁹ *Id.* at 56 n.6, 61. The United States' brief in *White* likely did not intend that "testimonial" statements be so strictly limited, so *Crawford* deviates from the United States' position in that respect.

⁸⁰ *Id.* at 61.

Washington.⁸¹ The essentially unanimous Court in *Davis*⁸² reiterated its reliance on Webster's dictionary, but now explained that the term "witnesses" as used in the Sixth Amendment was not only primarily directed at "testimonial" statements, but would have been understood at the Framing to be limited to this type of evidence.⁸³ The Court (obtusely) proclaimed: "A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter."⁸⁴ Although some lower courts initially missed its import,⁸⁵ this statement announced that nontestimonial statements did not implicate the Confrontation Clause at all and, consequently, could be admitted against a criminal defendant without limitation. The Court eliminated any ambiguity arising from its subtle phrasing eight months later in *Whorton v. Bockting*, stating "[u]nder *Crawford*, . . . the Confrontation Clause has no application to [nontestimonial] statements."⁸⁶

The Supreme Court's conclusion that the Sixth Amendment term "witnesses" encompasses *only* "testimonial" statements gives rise to what may prove to be the most significant implication of the new Confrontation Clause jurisprudence – the elimination of constitutional restrictions on the admission of nontestimonial hearsay.⁸⁷ This development has become increasingly

⁸¹ *Davis*, 547 U.S. at 823.

⁸² Only Justice Thomas did not join the majority opinion in *Davis*, and his disagreement was that the Court's definition of "witnesses" was too broad, not too narrow. *Id.* at 835 (Thomas, J., concurring and dissenting). Thus, the Justices were unanimous in deciding that the Confrontation Clause does not limit nontestimonial hearsay.

⁸³ *Id.* at 824 (majority opinion).

⁸⁴ *Id.*; see also *id.* at 821 ("Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause. . . . It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."); Josephine Ross, *Crawford's Short-Lived Revolution: How Davis v. Washington Reins in Crawford's Reach*, 83 N.D. L. REV. 387, 411 (2007) (critiquing *Davis* for "almost casually" extinguishing the broader scope of the confrontation right suggested in *Crawford*). *Bryant* glosses over *Davis*'s role in this evolution, suggesting erroneously that *Crawford*, not *Davis*, "limited the Confrontation Clause's reach to testimonial statements." *Michigan v. Bryant*, 131 S. Ct. 1143, 1153 (2011). The Court makes this same error in *Bockting*. See Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis, and Bockting*, 19 REGENT U. L. REV. 367, 370 n.15 (2007). Friedman appears to agree with the Court's treatment of nontestimonial hearsay. See Friedman, *supra* note 50, at 1032 ("If the statement is not a testimonial one, then the declarant should not be deemed to have been acting as a witness in making it, and so the Clause should not apply – whether the declarant is available or not.").

⁸⁵ See Kirkpatrick, *supra* note 84, at 369 n.11 (citing cases).

⁸⁶ *Whorton v. Bockting*, 549 U.S. 406, 419-20 (2007).

⁸⁷ See Davies, *supra* note 15, at 468 n.291; Kirkpatrick, *supra* note 84, at 370; Lininger, *supra* note 15, at 405 ("[O]ne of *Crawford*'s greatest shortcomings is its failure to specify confrontation requirements for nontestimonial hearsay."); Lininger, *supra* note 3, at 767 (referencing a survey of post-*Crawford* court opinions that found that a substantial portion

important as the Court steadily narrows the definition of “testimonial” and, correspondingly, expands the category of nontestimonial hearsay.⁸⁸

As critics would quickly point out, the Court’s textual analysis is seriously flawed.⁸⁹ Even accepting the Court’s method of constitutional exegesis, the definition of “witness” upon which *Davis* grounded its analysis is only one of five provided in Noah Webster’s 1828 dictionary.⁹⁰ The Supreme Court in *Crawford* and then *Davis* inexplicably chose the fifth of Webster’s definitions, ignoring other potentially applicable definitions such as the third definition: “A person who knows or sees any thing; one personally present; as, he was witness; he was an eye-witness.”⁹¹ As Randolph Jonakait explains:

Those who bear testimony might be the people referred to as witnesses in the Confrontation Clause, but so too might be those who know something about a relevant event from their personal presence. If, as in [one of] Webster’s [explanatory] example[s], one who saw the ratification ceremonies was a witness, then one who saw a shooting is also a witness.⁹²

Although neither *Crawford* nor the subsequent case law provides an explanation for the Court’s rejection of Webster’s third definition, an explanation appears in Justice Scalia’s pre-*Crawford* dissent in *Maryland v. Craig*.⁹³ There, while critiquing a different facet of Confrontation Clause jurisprudence, Justice Scalia recognized that Webster’s third definition “would cover hearsay evidence,” but dismissed it as “excluded in the Sixth Amendment by the words following the noun: ‘witnesses against him.’”⁹⁴

of evidence called into question under *Crawford* was ultimately ruled admissible because it was nontestimonial).

⁸⁸ See *Bryant*, 131 S. Ct. at 1155 (suggesting that “testimonial” does not reach statements unless they were made or elicited “to create a record for trial” or for the purpose of “creating an out-of-court substitute for trial testimony”); cf. Jeffrey Bellin, *Applying Crawford’s Confrontation Right in a Digital Age*, 45 TEX. TECH L. REV. 33 (2012) (highlighting the possibility of a future where litigation depends to a great deal on nontestimonial, electronic evidence broadcast in text messages and on social media sites).

⁸⁹ See Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 157 (2006).

⁹⁰ WEBSTER, *supra* note 68.

⁹¹ Jonakait, *supra* note 89, at 159 (quoting WEBSTER, *supra* note 68); *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting).

⁹² Jonakait, *supra* note 89, at 159-61, 159 nn.26-27.

⁹³ *Craig*, 497 U.S. at 864 (Scalia, J., dissenting).

⁹⁴ *Id.* (quoting U.S. CONST. amend. VI). It is unclear why Justice Scalia did not rely on another Framing-era dictionary, which provides only one pertinent definition of “witness” and supports Justice Scalia’s position much more powerfully: “One who gives testimony.” 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1755); cf. Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 234 (1999) (discussing various Framing-era dictionaries). In fact, as discussed in the text, Webster’s dictionary provides

According to Justice Scalia (in *Craig*), the inclusion of the phrase “against him” demonstrated that the term “witnesses” in the Sixth Amendment “obviously refers to those who give testimony against the defendant at trial.”⁹⁵ Justice Scalia provided no further analysis to support his conclusion,⁹⁶ and has not reintroduced the argument in his more recent Confrontation Clause opinions.

Justice Scalia’s silence on this point in *Davis* and *Crawford* suggests that he has abandoned the argument that the textual phrase “against him” establishes the inapplicability of Webster’s third definition of “witness”; the argument likely impugns his current view (disputed by Justice Thomas) that even relatively informal hearsay statements – such as those at issue in *Bryant* – can qualify as “testimonial.”⁹⁷ It is nevertheless worth noting that Justice Scalia’s conclusion in *Craig* is far from “obvious[.]”⁹⁸ For one thing, many state constitutions at the time of the Framing guaranteed the right of the accused to confront “the witnesses” without the accompanying phrase “against him.”⁹⁹ Absent some evidence that the Framers sought to create a narrower federal confrontation right than existed in states like Virginia and Pennsylvania, these parallel constitutional provisions suggest that the phrase “against him” was

the most powerful evidence that the Johnson definition was *not* the only one in use at the time of the Framing. See *infra* note 105 and accompanying text.

⁹⁵ *Craig*, 497 U.S. at 864-65 (Scalia, J., dissenting); see also *White v. Illinois*, 502 U.S. 346, 360 (1992) (Thomas, J., concurring) (citing *Craig*, 497 U.S. at 864-65 (Scalia, J., dissenting)); *White* Amicus Brief, *supra* note 64, at 18 n.8 (citing *Craig*, 497 U.S. at 864-65 (Scalia, J. dissenting)).

⁹⁶ *Craig* considered limits on the defendant’s ability to physically confront a child witness who testified via closed-circuit television. *Craig*, 497 U.S. at 840-41. Since the child witness actually testified, there was no question that she was a “witness” under the Sixth Amendment. *Id.*

⁹⁷ See *supra* note 13 and accompanying text. The argument that Justice Scalia made in *Craig* and at oral argument in *White*, see Transcript of Oral Argument, *supra* note 68, at 13, resonates with Justice Thomas’s position that only formal affidavits and the like trigger the Confrontation Clause. See *Davis v. Washington*, 547 U.S. 813, 836 (2006) (Thomas, J., concurring and dissenting). Justice Scalia now disagrees with Justice Thomas on this point and consequently may have consciously abandoned the *Craig* argument to avoid conceding the point. Compare *id.* at 830 n.5 (majority opinion), with *id.* at 836 (Thomas, J., concurring and dissenting) (repeatedly citing the *White* concurrence, which Justice Scalia joined, for the proposition that only formal, out-of-court statements implicate the Confrontation Clause).

⁹⁸ *Craig*, 497 U.S. at 865.

⁹⁹ For pertinent state constitutional provisions, see WIGMORE, *supra* note 31, § 1397, at 155-58 n.1. The Virginia Constitution drafted largely by George Mason guarantees the defendant’s right “to be confronted with the accusers and witnesses”; the Pennsylvania Constitution provides a similar right “to be confronted with the witnesses.” See Graham Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 210-12 & n.18 (1984) (“The language of the confrontation clause apparently originated in a like provision contained in Article 8 of the Virginia Declaration of Rights . . .”); Daniel Pollitt, *The Right of Confrontation, Its History and Modern Dress*, 8 J. PUB. L. 381, 398 (1959).

inserted either for clarity or rhetorical effect, rather than, as Justice Scalia suggested in *Craig*, to narrow the right's scope.

With respect to clarity, the most logical explanation for the drafters' inclusion of the phrase "against him" in the Sixth Amendment is the separation of the broad category of "witnesses" – i.e., people who perceived relevant information, but play no role in a criminal proceeding – from the much smaller category of "witnesses against" who contribute to the prosecution's case. Only this latter category, consisting of persons whose testimony *or* out-of-court statements are introduced in the prosecution's case, triggers the confrontation right. On this reading, the phrase "against him" does not limit the Sixth Amendment command to statements of persons who formally "give testimony," but rather clarifies that the prosecution has no obligation to confront the defendant with every person possessing relevant information about a crime.¹⁰⁰

In terms of rhetoric, the phrase "witnesses *against him*" creates an elegant contrast in the Sixth Amendment to the immediately following right to "compulsory process for obtaining witnesses *in his favor*."¹⁰¹ One could imagine the snickering among the Constitution's masterful draftsmen if the proposed amendment omitted this contrast and blandly stated that the defendant had the right "to be confronted with *the witnesses*; to have compulsory process for obtaining *witnesses*, and to have the Assistance of Counsel for his defence."¹⁰²

As the preceding discussion suggests, neither Justice Scalia's unsupported assertions for the Court in *Crawford* and *Davis*, nor his earlier argument in his dissent in *Craig*, explain why, as a matter of textual interpretation, the term "witnesses" should be limited to persons who "bear testimony."¹⁰³ To the extent these efforts to narrowly define "witnesses" accomplish anything, it is to

¹⁰⁰ This interpretation answers Amar's contention that the term "witness" in the Confrontation Clause cannot mean "a person who sees an underlying out-of-court event." Amar, *supra* note 37, at 695 n.212. Amar argues that such an interpretation is facially absurd because it would capture persons who "never declare[] anything, in court or out" as well as persons who do make statements but whose statements "are never alluded to at trial." *Id.* ("[T]he government need not somehow bring [these witnesses] face to face with the defendant."). As explained previously, these persons may indeed be covered by the term "witnesses" but are then unequivocally excluded by the addition of the phrase "against him." See *supra* text accompanying note 94; cf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (emphasizing, in rejecting a claim that the government violated the Sixth Amendment right to compulsory process by deporting percipient witnesses, that "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining *witnesses in his favor*'" (quoting U.S. CONST. amend. VI)).

¹⁰¹ U.S. CONST. amend. VI (guaranteeing the defendant's right "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor").

¹⁰² *Id.* (emphasis added) (omitting the words "against him" and "in his favor").

¹⁰³ *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

needlessly obscure a straightforward term. Prior to Justice Scalia's cogitations in *Crawford*, there was never any suggestion that the phrase "witnesses against him" possessed a mysterious meaning only discernible to eighteenth-century English speakers. As Justice Scalia himself emphasized for a majority of the Court in a recent case, the "'Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"¹⁰⁴ And indeed, as Noah Webster's dictionary reveals, and Justice Scalia actually acknowledged in *Craig*, the "normal and ordinary" meaning of the Confrontation Clause text was the same "in 1791 as today."¹⁰⁵ The term "witness" is a flexible one that encompasses both Noah Webster's third and fifth definitions. A "witness" is, in common usage, *both* a person who testifies at trial *and* a person with personal knowledge of something relevant to a criminal case. Thus, there is no reason, based on the text, to eliminate either category from the Confrontation Clause's scope. The Sixth Amendment phrase "witnesses against" can most comfortably be read to encompass both the narrow meaning adopted by the modern Court *and*, whenever an out-of-court speaker's hearsay is used at trial, the broader meaning implicitly accepted in pre-*Crawford* jurisprudence.¹⁰⁶

That a person becomes a "witness against" the defendant whenever the prosecution relies on her out-of-court statements as substantive evidence is perhaps best illustrated by the absurdity of the Court's contrary contention as applied in cases such as *Davis* and *Bryant*. The prosecution's case in *Bryant* rested almost entirely on the out-of-court statement of the deceased victim, Anthony Covington, identifying Bryant as his killer.¹⁰⁷ The government's other evidence suggested only that the shooting occurred outside a house where Bryant lived, and that the victim purchased drugs from Bryant on prior occasions.¹⁰⁸ The jury's assessment of the credibility of Covington's unopposed statement determined Bryant's fate. In fact, during a pretrial hearing on the statement's admissibility, the prosecutor warned that if the trial

¹⁰⁴ *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

¹⁰⁵ *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting).

¹⁰⁶ A conclusion that the Sixth Amendment phrase "witnesses against" applies to all speakers whose hearsay statements are offered by the prosecution is by no means radical. In fact, the conclusion echoes pre-*Crawford* precedent – a body of case law that spans a century. See Friedman, *supra* note 50, at 1030 (explaining that under pre-*Crawford* doctrine, "the declarant of any out-of-court statement offered to prove the truth of what it asserts is treated as a 'witness' for purposes of confrontation"); cf. Bradley, *supra* note 47, at 316, 323 ("[I]t seems obvious . . . that *everyone* who testifies for the prosecution, whether offering live or hearsay testimony, is a 'witness' against the defendant under the terms of the Sixth Amendment").

¹⁰⁷ *People v. Bryant*, 768 N.W.2d 65, 67 (Mich. 2009).

¹⁰⁸ *Id.* at 66-67. Bryant's girlfriend testified that Bryant was not home at the time of the shooting. *Id.* Bryant's first trial ended in a hung jury. *Id.*

court excluded the statement, “we won’t have a trial.”¹⁰⁹ In his opening remarks, the prosecutor told the jury that Covington’s statement was “[t]he *most important piece of evidence* you’ll hear during this trial” and urged the jurors to view the statement as the victim “speaking to you from the grave and telling you what happened . . . and telling you who’s responsible.”¹¹⁰ Whatever one thinks of Bryant’s likely guilt (or the desirability of admitting Covington’s statement), it requires a true contortion of language to conclude that Covington was not one of the “witnesses against” Bryant. Indeed, it would be more accurate, in light of the trial record, to say that Covington was the *only* witness against him. As the prosecutor readily admitted, without Covington’s out-of-court statement, the case would have been dismissed.¹¹¹

Although there may be a temptation to attribute the Court’s strained textual analysis in *Bryant* to the lack of fidelity to *Crawford* bemoaned by Justice Scalia,¹¹² a similar contortion of the constitutional text appears in Justice Scalia’s majority opinion in *Davis*. Typical of domestic violence cases,¹¹³ the prosecution’s case in *Davis* consisted of live testimony from police officers who did not observe the alleged assault.¹¹⁴ Only the victim’s answers to questions during a frantic (reverse) 911 call connected Davis to the offense.¹¹⁵ In closing argument, defense counsel stressed this weakness, highlighting the absence of any eyewitness testimony to the assault.¹¹⁶ In response, the prosecutor relied on the victim’s out-of-court statements to fill the void:

“[T]here was a person present [during the crime] . . . and although she is not here today to talk to you[,] she left you something better. She left you her testimony on the day that this happened[;] . . . this shows that the

¹⁰⁹ *Id.* at 76.

¹¹⁰ *Id.* (quoting the prosecutor).

¹¹¹ *Id.*

¹¹² *Michigan v. Bryant*, 131 S. Ct. 1143, 1171 (2011) (Scalia, J., dissenting) (contending that under *Crawford*, “this is an absurdly easy case,” yet reaching the opposite conclusion of the majority).

¹¹³ Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims’ Out-of-Court Statements As Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3-4 (2002) (explaining that “[n]on-cooperation by recantation or failure to appear at trial is an epidemic in domestic violence cases” and reporting estimates by domestic violence practitioners of eighty to ninety percent noncooperation); Orenstein, *supra* note 47, at 144; Myrna Raeder, *Remember the Ladies and the Children Too: Crawford’s Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 328 (2005).

¹¹⁴ *Davis v. Washington*, 547 U.S. 813, 818 (2006).

¹¹⁵ *See State v. Davis*, 111 P.3d 844, 847 (Wash. 2005) (“The only evidence linking Davis to her injuries was the tape recording of the 911 call.”)

¹¹⁶ Brief for Petitioner at 8, *Davis*, 547 U.S. 813 (No. 05-5224); Ross, *supra* note 17, at 199.

defendant, Adrian Davis was at her home and assaulted her. It is right here in her voice.”¹¹⁷

Despite the prosecutor’s vivid rhetoric that the victim’s 911 call constituted her “testimony on the day that this happened,” the Supreme Court ruled that the victim was not a “witness against” Davis.¹¹⁸ Again, this conclusion ignores the “normal and ordinary” meaning of the pertinent terms. The victim was, after all, the only person who linked Davis to the crime; without the recording of her “testimony on the day that this happened,” the prosecution had no case.

C. *The Confrontation Right at the Time of the Framing*

The *Davis* opinion does not solely rely on Webster’s dictionary for its conclusion that out-of-court speakers whose nontestimonial statements are introduced at trial are not “witnesses” under the Sixth Amendment. *Davis* reinforces its textual argument with a historical one.¹¹⁹ In the sentence immediately following the groundbreaking (if obtuse) core-perimeter statement quoted above, the Court adds: “We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve [testimonial statements].”¹²⁰ The Court thus buttresses its textual argument with a historical claim: courts in the Framing era understood that only testimonial hearsay implicated the confrontation right.

Unfortunately for the *Davis* Court, the historical argument fares no better than the textual one. First, there is at least one early American case that the Court overlooks: the 1807 trial of Aaron Burr.¹²¹ Presiding over Burr’s trial, Chief Justice John Marshall deemed out-of-court statements of an alleged coconspirator inadmissible because the testimony was unopposed, even though those statements appear to fall neatly into the nontestimonial category.¹²² Second, there is an explanation, other than a shared understanding

¹¹⁷ Brief for Petitioner, *supra* note 116, at 8 (quoting the prosecutor); *see also* Ross, *supra* note 17, at 199.

¹¹⁸ *Davis*, 547 U.S. at 829.

¹¹⁹ *Id.* at 824.

¹²⁰ *Id.*

¹²¹ *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

¹²² *Id.* at 193; *see also* Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 228 (2005) (commenting that *Crawford* “completely ignored” this case); Roger W. Kirst, *Confrontation Rules After Davis v. Washington*, 15 J.L. & POL’Y 635, 680 (2007) (criticizing *Davis*’s statement because “it is not a true statement about history” and citing the case of Aaron Burr where “Chief Justice Marshall sitting as a Circuit Justice excluded evidence of private conversations that were offered as co-conspirator statements”). The majority and dissent in *Crawford* sparred over the significance of *Burr*, which makes its absence from the discussion in *Davis* particularly difficult to understand. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004); *id.* at 71 (Rehnquist, C.J., concurring in the judgment). Another case the Court might have considered on this point is *King v. Brasier* where a defendant was ruled improperly

of the confrontation right's inapplicability, that fully explains the dearth of Framing-era American cases excluding nontestimonial statements: a widely accepted contemporaneous understanding that nontestimonial hearsay could *not* be used in criminal cases.

Although disagreement on this point can be found,¹²³ recent historical scholarship makes a compelling case that at the time of the Framing, criminal courts consistently recognized only two hearsay exceptions: (1) an exception for sworn witness statements of unavailable witnesses taken pursuant to so-called Marian statutes (statements that were obviously "testimonial"); and (2) an exception for dying declarations (statements the post-*Crawford* opinions remove from the analytical framework as "sui generis").¹²⁴ Historical sources suggest that all other hearsay, including statements that the *Davis* majority would consider "nontestimonial" (for example, excited utterances), was generally regarded as inadmissible to prove a defendant's guilt.¹²⁵

convicted based on a child's statements to her mother. *King v. Brasier*, (1779) 168 Eng. Rep. 202 (K.B.) 202; 1 Leach 199, 200. The *Davis* Court suggests *Brasier* involved "testimonial" hearsay, *Davis*, 547 U.S. at 828, although the statements are certainly not "clearly" testimonial, particularly in light of the Court's recent interpretation of that term in *Bryant*. Admittedly, *Brasier* is an English case, but given the Supreme Court's reliance on English cases throughout its modern confrontation jurisprudence, it seems questionable for the Court to suddenly invoke the distinction here.

¹²³ For example, Michael Polelle argues that "res gestae statements were used as hearsay exceptions against criminal defendants before and at the time of the adoption of the Sixth Amendment." Michael Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285, 293 (2006). To support his contention, Polelle cites three cases: *Thompson v. Trevanion*, *King v. Gordon*, and *The Trial of John Horne Tooke*. *Id.* at 292-94, 293 n.43. *Trevanion* was a civil case, something Polelle recognizes. *Id.* at 292 n.39; *Thompson v. Trevanion*, (1693) 90 Eng. Rep. 179 (K.B.) 179; Skin 402; see also Davies, *supra* note 15, at 452 (arguing, as well, that "framing-era Americans . . . were unlikely to have thought [*Thompson*] was authority for a spontaneous declaration or res gestae hearsay exception"). *King v. Gordon* provides virtually no support as it appears to involve a very subtle manner of hearsay: repeated testimony, without apparent objection, that unknown members of an anti-Catholic mob sweeping through London cried out on various occasions, "'No Popery'" and wore "blue cockades." See *King v. Gordon*, (1781) 99 Eng. Rep. 372 (K.B.) 374; 21 How. St. Tr. 485. *Tooke* is similarly unenlightening in that the case report merely includes defense counsel's reference to a letter admitted, *without objection*, on the ground that it was "an answer to an act which is charged against the prisoner" and so was "part of the *res gesta*." *The Trial of John Horne Tooke*, (1794) 25 How. St. Tr. 1, 440.

¹²⁴ Davies, *supra* note 15, at 417-18; cf. *R. v Woodcock*, (1789) 168 Eng. Rep. 352 (K.B.) 353; 1 Leach 500, 503 (recognizing these "two . . . species" of admissible hearsay). For a summary of Marian statutes, see Davies, *supra* note 15, at 397-98 n.116, and Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 498 (2007).

¹²⁵ Davies, *supra* note 15, at 351, 452 (arguing that "framing-era evidence doctrine imposed a virtually total ban against using unsworn hearsay evidence to prove a criminal

Chief Justice Marshall's remarks in the Aaron Burr trial support the notion that the Framers would have considered uncontroverted, nontestimonial hearsay to be self-evidently inadmissible. Excluding nontestimonial statements offered against Burr, the Chief Justice invoked the "rule of evidence which rejects mere hearsay testimony."¹²⁶ Marshall thought the rule's wisdom obvious:

I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to criminate others than him who made it; *nor 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.*¹²⁷

Other historical sources are in accord. The 1769 edition of Gilbert's treatise (cited by Justice Rehnquist in his *Crawford* concurrence) states:

"Hearsay is no Evidence . . . though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; . . . if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . ."¹²⁸

Similar sentiments appear in William Hawkins's influential Framing-era treatise, which emphasized that the defendant "hath no Opportunity of a cross Examination" when hearsay is introduced.¹²⁹ Blackstone's 1771 *Commentaries on the Laws of England* states succinctly: "[N]o evidence of a discourse with another will be admitted, but the man himself must be produced."¹³⁰

defendant's guilt," and most modern hearsay exceptions "had not yet been invented when the Bill of Rights was framed"); John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 456-57 (1904) (stating that from the beginning of the eighteenth century, "the writers upon the law assume[d]" that the prohibition on the introduction of out-of-court statements was "a settled doctrine," based on the rationale that "statements used as testimony must be made where the maker can be subjected to cross-examination"). For a discussion of historical support for a business records exception, see *infra* Part III.C.

¹²⁶ *Burr*, 25 F. Cas. at 193.

¹²⁷ *Id.* (emphasis added).

¹²⁸ *Crawford v. Washington*, 541 U.S. 36, 70 n.2 (2004) (Rehnquist, C.J., concurring in the judgment) (quoting SIR GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 152 (3d ed., London, W. Owen 1769)).

¹²⁹ 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 429-31 (4th ed., London, E. Richardson & C. Lintot 1762) (stating, under the heading, "How far Hearsay is Evidence," that "what a Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side hath no Opportunity of a cross Examination; and therefore it seems a settled Rule, That it shall never be made use of but only by way of Inducement or Illustration of what is properly Evidence").

¹³⁰ 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 368 (4th ed.,

The relevant historical sources referenced, in part, above and exhaustively chronicled elsewhere by Thomas Davies¹³¹ support a key underlying point: the Supreme Court drew precisely the wrong conclusion from the historical record. The more convincing explanation for the relative absence of early American decisions excluding nontestimonial hearsay is that there existed, at the time of the Framing, a widespread and largely “settled Rule”¹³² that unsworn, out-of-court remarks (Justice Marshall’s “mere verbal declarations”) could not be used to convict a criminal defendant.¹³³ Such a rule would explain the absence of Framing-era cases *excluding or admitting* nontestimonial hearsay; if a rule is widely settled, it will rarely need to be invoked, particularly in the sparse published records of Framing-era litigation.

It is curious, after all, that the *Davis* Court framed its historical contention in terms of the absence of cases *excluding* nontestimonial hearsay.¹³⁴ Clearly the strongest type of historical evidence for its supposition that nontestimonial hearsay was admissible in the Framing-era would have been a citation to a single case *admitting* such evidence. Contrary to the Court’s supposition, the historical sources discussed above suggest that such a case would go against the prevailing understanding of the confrontation right and the *Davis* Court’s failure to identify even one such case is, consequently, quite telling.¹³⁵

The contention that hearsay was generally inadmissible in criminal trials of the Framing era should not be overstated. Judicial records of the time period are uneven and incomplete, and even the sources noted above recognize areas

Dublin, John Exshaw et al. 1771). Blackstone notes some narrow exceptions that do not appear to contradict the general point: “yet in some cases (as in proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts.” *Id.*

¹³¹ See generally Davies, *supra* note 15.

¹³² HAWKINS, *supra* note 129, at 431; Wigmore, *supra* note 125, at 456-57.

¹³³ MODEL CODE OF EVIDENCE 219-20 (1942) (explaining that “[b]y the end of the third decade of the eighteenth century,” hearsay “was generally rejected”); WIGMORE, *supra* note 31, § 1364, at 26 (explaining that as of the end of the seventeenth century “the applicability of the hearsay rule to sworn statements in general, as well as to unsworn statements, is not questioned” and “[f]rom the beginning of the 1700s the writers upon the law assume it as a settled doctrine” based upon the justification that: “statements used as testimony must be made where the maker can be subjected to cross-examination”); Davies, *supra* note 15, at 380-81.

¹³⁴ See *Davis v. Washington*, 547 U.S. 813, 835-36 (2006).

¹³⁵ See Davies, *supra* note 15, at 377, 452 (explaining that *Thompson v. Trevanion* did not appear to support a contrary position, and stating that “no brief or opinion in *Davis* or *Crawford* identified even a single published framing-era case report that actually admitted an unsworn out-of-court statement that might now be described as ‘nontestimonial hearsay’”); Jonakait, *supra* note 122, at 228-29; Kirst, *supra* note 122, at 680 (arguing that the lack of cases noted in *Davis* might reflect that “there was no occasion to use the doctrine, or [that] those who might have used the doctrine were not the ones who knew about it”).

of gray.¹³⁶ Indeed, Chief Justice Marshall suggests that jurists in the Framing era disagreed on the contours of the hearsay prohibition.¹³⁷ In the same opinion quoted above, he acknowledged that “some exceptions” to the general rule prohibiting hearsay “have been introduced, concerning the extent of which a difference of opinion prevails.”¹³⁸ Further, there is only so much that one can conclude about the nuances of hearsay doctrine from the abstract exhortations of treatise writers and a relative absence of pertinent caselaw. As Justice Rehnquist argued in his *Crawford* concurrence, one of the primary characteristics of Framing-era evidence rules is their opacity.¹³⁹ The rules were different in different courts, constantly evolving, and muddled by a pervasive insistence on the existence of a second-class category of (generally unsworn) quasi-evidence that could be admitted, but “use[d]” only as an “Inducement or Illustration of what is properly Evidence.”¹⁴⁰

The subtle inconsistencies and general messiness of the Framing-era historical record does not redeem the *Davis* Court, however. The Court (which is surprisingly unanimous on this point) does not contend that the historical record is uneven, difficult to interpret, or opaque.¹⁴¹ A candid conclusion along those lines would permit a much more nuanced approach to nontestimonial hearsay – an approach the *Davis* Court rejected out of hand.

¹³⁶ *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694); Davies, *supra* note 15, at 424, 444, 447; John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1172, 1190 (1996) (arguing that “the law of evidence,” including the hearsay rules, “hardened only in the last decades of the eighteenth century”); David Sklansky, *Hearsay’s Last Hurrah*, 2009 SUP. CT. REV. 1, 5 (emphasizing that hearsay doctrine in the eighteenth century was “less developed” than its modern-day counterpart). *Brasier* provides an example of a case where a trial court permitted hearsay in a criminal case (and was then reversed on appeal), possibly revealing weakness in the common law hearsay prohibition. *See supra* note 122.

¹³⁷ *Burr*, 25 F. Cas. at 193.

¹³⁸ *Id.* Justice Marshall cautioned “courts to be watchful of every inroad” into the “truly important” principle prohibiting unsworn evidence. *Id.*

¹³⁹ *Crawford v. Washington*, 541 U.S. 36, 72 (2004) (Rehnquist, C.J., concurring in the judgment); *see also* Fisher, *supra* note 17, at 594 (recognizing uncertainty in determining evidence rules at the time of the Framing in “light of the scant reporting style of early English cases and courts’ general hostility at the time to admitting any hearsay evidence whatsoever”); Langbein, *supra* note 136 at 1180-81; *cf. Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment) (“Under the common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based.”).

¹⁴⁰ HAWKINS, *supra* note 129, at 431; *see also Crawford*, 541 U.S. at 70-72 & n.1 (Rehnquist, C.J., concurring in the judgment); WIGMORE, *supra* note 31, § 1367 at 19-20 (discussing a line of doctrine that ran parallel to the “general rule of exclusion” that “a hearsay statement may be used as confirmatory or corroboratory of other testimony,” that died out by the end of the 1700s).

¹⁴¹ *See Davis v. Washington*, 547 U.S. 813, 821, 824 (2006); *see also supra* note 82.

Rather, the Court concluded that the historical record reflects a broad Framing-era consensus that nontestimonial hearsay was admissible.¹⁴² On this point, the Supreme Court is simply wrong. If, in fact, there was a consensus expressed at the time of the Framing, it was that unsworn hearsay, including nontestimonial hearsay, was generally *inadmissible* (not admissible) against criminal defendants.

D. *Summary*

Contrary to the Supreme Court's arguments in *Davis*, the Sixth Amendment text does not compel a conclusion that nontestimonial statements fall outside the scope of the Confrontation Clause. Under a straightforward textual reading, the phrase "witnesses against" encompasses all persons whose hearsay statements (testimonial or not) are relied on by the prosecution to prove a defendant's guilt. This conclusion holds whether the Sixth Amendment text is interpreted in light of common sense, historical sources, or, as the Court prefers, through the prism of Noah Webster's 1828 dictionary. While the Framers likely viewed the introduction of unopposed, *testimonial* statements as most alarming, the available evidence suggests they also feared the admission of unopposed, *nontestimonial* statements.¹⁴³ Consequently, the Confrontation Clause must be interpreted to apply not solely to "testimonial" hearsay, but to "nontestimonial" hearsay as well. The balance of this Article explores how best to incorporate constitutional limits on the admission of nontestimonial hearsay into the Court's jurisprudence.

III. REPAIRING THE DOCTRINE: LIMITING THE ADMISSION OF NONTESTIMONIAL HEARSAY

The preceding Parts map out two distinct aspects of *Crawford*-era Confrontation Clause doctrine: one aspect of the caselaw that significantly improves *Roberts*-era jurisprudence and another aspect that remains powerfully flawed. This Part sketches a reform proposal intended to preserve what is right in the new doctrine while repairing what is wrong. Importantly, while the proposal flows naturally from the historical and textual analysis discussed in Parts I and II, it is not justified on this ground alone. Indeed, as the foregoing analysis suggests, neither the history nor text of the Sixth Amendment dictates any single approach to regulating nontestimonial hearsay – a concession the Supreme Court (and even Justices Thomas and Scalia)

¹⁴² *Davis*, 547 U.S. at 824.

¹⁴³ *Cf.* Kirkpatrick, *supra* note 84, at 383 ("Thus while the historical record supports the conclusion that the Framers had a heightened concern about testimonial hearsay, it does not support a conclusion that the Framers neither had nor would have had concerns about other forms of hearsay."); Mosteller, *supra* note 14, at 721 ("[I]t is unclear how the Framers would have reacted to a modern world where, as Rehnquist noted, hearsay is much more admissible and ordinarily given weight that likely would have appeared foreign to the Framers.").

willingly made prior to *Crawford*.¹⁴⁴ Rather, the proposal (like the historical and textual analysis itself) stems from the two underlying principles that most clearly animate the confrontation right, only one of which is currently captured in the Supreme Court's jurisprudence.

The Court's primary revision of *Roberts*-era doctrine – its insistence that out-of-court statements made with an eye toward litigation cannot be admitted absent confrontation – represents an essential manifestation of one of the two key principles underlying the confrontation right. The government cannot consciously avoid cross-examination of its witnesses by procuring admissible, out-of-court substitutes for their testimony.¹⁴⁵ The key conceptual flaw in the Court's jurisprudence is its failure to recognize the second overarching confrontation principle: a preference for live-witness testimony, as opposed to hearsay, that applies regardless of the origins of any particular hearsay statement.¹⁴⁶ Critically, this flaw appears to arise not from any reasoned disagreement with the second principle itself, but as collateral damage from the Court's abrupt jurisprudential shift away from *Roberts*,¹⁴⁷ and the erroneous historical and textual analysis detailed in Part II.

As discussed below, the Supreme Court's seemingly unconsidered retreat from a broad preference for live testimony can be remedied fairly easily. The Court need only reintroduce, as a limit on nontestimonial hearsay, the feature of Confrontation Clause jurisprudence that once prominently enforced a preference for live testimony – an “unavailability” requirement. Doing so would address the Court's inexcusable neglect of nontestimonial hearsay and, at the same time, strengthen the underlying rationale for – and coherence of – modern Confrontation Clause jurisprudence.

A. *An Unavailability Requirement's Remarkable Pedigree*

The notion that the Sixth Amendment embodies the Framers' broad preference for live testimony is fairly uncontroversial. The idea can be found

¹⁴⁴ See *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988). *Coy* relies on Justice Harlan's concurrence in *California v. Green*, in which he states: “[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause.” *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring). Justice Thomas, joined by Justice Scalia, echoed Justice Harlan's sentiment in his concurrence in *White*. See *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring) (“There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean.”); cf. Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 568 (1978) (“[P]erhaps the most that should ever be expected from constitutional history is some guidance in narrowing the range of potential meanings.”).

¹⁴⁵ See *supra* Part I.B.

¹⁴⁶ See *infra* Part III.A.

¹⁴⁷ *Roberts* was a case that underscored the constitutional “preference” for live testimony. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) (“[T]he Clause reflects a preference for face-to-face confrontation at trial.”).

in the arguments of Confrontation Clause scholars,¹⁴⁸ in the common law authorities that informed the Framers' conceptions of the confrontation right,¹⁴⁹ and throughout pre-*Crawford* jurisprudence.¹⁵⁰ Traditionally, the preference manifests as an unavailability requirement: if the prosecution seeks to introduce a hearsay statement, the prosecutor must, at a minimum, demonstrate that the declarant is not available to testify in person.

An unavailability requirement, as described above, is quite familiar to Confrontation Clause jurisprudence.¹⁵¹ For example, the Supreme Court reversed a conviction in the 1968 case of *Barber v. Page* because the prosecution failed to make "a good-faith effort" to obtain the live testimony of a witness whose preliminary hearing testimony was read to the jury.¹⁵² Emphasizing the importance of a showing of unavailability, even when the admission of an out-of-court statement seems otherwise sensible, the Court criticized the prosecution's failure "to seek [the witness's] presence" and stirringly declared that "[t]he right of confrontation may not be dispensed with so lightly."¹⁵³ *Barber* cites an earlier case where the Court went so far as to

¹⁴⁸ Friedman, *supra* note 3, at 243 ("[T]he whole point of the confrontation right is to bring testimony to trial."); Jonakait, *supra* note 48, at 580 (describing "the confrontation clause's . . . goal . . . of preserving personal examination in front of the jury so that the jurors can judge the believability of the witness"); Lilly, *supra* note 99, at 215.

¹⁴⁹ See, e.g., *West v. Louisiana*, 194 U.S. 258, 262 (1904) (stressing that the common law permitted certain hearsay depositions to be read, but only after it was shown "that the witness was at the time of the trial dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant"); Lilly, *supra* note 99, at 212 (pointing out that "[a]lmost all of the eighteenth century American and English cases collected by Wigmore imposed on the government a stringent obligation to produce the declarant"); Wigmore, *supra* note 125, at 456-57.

¹⁵⁰ *Maryland v. Craig*, 497 U.S. 836, 849 (1990) ("[O]ur precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,' a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'" (citations omitted) (quoting *Roberts*, 448 U.S. at 63; *Mattox v. United States*, 156 U.S. 237, 243 (1895))); *Barber v. Page*, 390 U.S. 719, 725 (1968); *United States v. Dowdell*, 221 U.S. 325, 330 (1911) (recognizing as the "general rule of law embodied in the Constitution" an intent "to secure the right of the accused to meet the witnesses face to face"). The European Court of Human Rights has set forth as one of two minimum "requirements" for admission of hearsay against a criminal defendant that "there must be a good reason for the non-attendance of a witness." *Al-Khawaja & Tahery v. United Kingdom*, 54 Eur. Ct. H.R. 807, 809 (2012).

¹⁵¹ See *United States v. Inadi*, 475 U.S. 387, 393 (1986) (characterizing *Roberts* as part of "a long line of Confrontation Clause cases involving prior testimony" that held "that before such statements can be admitted the government must demonstrate that the declarant is unavailable").

¹⁵² *Barber*, 390 U.S. at 724-25.

¹⁵³ *Id.* at 725.

reject the requisite showing of unavailability because the witness only became unavailable through “the negligence of the prosecution.”¹⁵⁴

Because the pre-*Crawford* Supreme Court cases applying an unavailability requirement consistently concerned one particular type of hearsay – testimony in a prior proceeding – it is not clear how broadly the Court viewed this requirement. Searching for a theme in the Supreme Court precedents, however, Justice Harlan concluded in 1970 that “the availability of the witness” was the “uppermost consideration” in Confrontation Clause jurisprudence.¹⁵⁵ Synthesizing prior caselaw, the Court’s opinion ten years later in *Roberts* followed suit, highlighting unavailability as a *threshold* Confrontation Clause requirement.¹⁵⁶ *Roberts* explained that the Confrontation Clause’s “preference for face-to-face accusation, . . . establishes a rule of necessity,” which requires that in the “usual case,” the “prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.”¹⁵⁷ For a brief time under *Roberts*, at least in the “usual case,” only after the prosecution met its burden of demonstrating unavailability could a judicial determination of reliability stand in for the constitutional requirement of confrontation.¹⁵⁸

The broad unavailability principle announced in *Roberts* faded quickly. Six years after *Roberts*, the Supreme Court in *United States v. Inadi* endorsed the introduction of a coconspirator’s hearsay statement despite the apparent

¹⁵⁴ *Motes v. United States*, 178 U.S. 458, 474 (1900).

¹⁵⁵ *California v. Green*, 399 U.S. 149, 183 (1970) (Harlan, J., concurring); *cf.* Imwinkelried, *supra* note 40, at 532-36 (discussing the “checkered history” of an unavailability requirement in the Supreme Court’s late twentieth-century decisions); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665, 670 (1986) (recognizing that “[t]he requirement of showing unavailability or producing the hearsay declarant for cross-examination at trial has been a recurring theme in two lines of Supreme Court decisions extending back to the nineteenth century,” but stipulating that the cases primarily deal with prior testimony and so “do not provide authority for the sweeping unavailability requirement set forth in *Roberts*”).

¹⁵⁶ *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (explaining that a “general approach to the problem is discernible” from the Court’s prior opinions and attempting to outline that approach).

¹⁵⁷ *Id.*; *see also* *Maryland v. Craig*, 497 U.S. 836, 865 (1990) (Scalia, J., dissenting) (“Our Confrontation Clause conditions for the admission of hearsay have long included a ‘general requirement of unavailability’ of the declarant.”).

¹⁵⁸ *See Roberts*, 448 U.S. at 65 (“The second [reliability] aspect operates once a witness is shown to be unavailable.”); *Stevens v. Bordenkircher*, 746 F.2d 342, 348 (6th Cir. 1984) (“A hearsay statement is admissible for purposes of the Confrontation Clause only if the declarant is unavailable and the hearsay statement appears reliable.” (citing *Roberts*, 448 U.S. 56)). In addition to its explicit reference to the requirement of unavailability as the first of two tests for admissibility under the Confrontation Clause, a section of the *Roberts* opinion is devoted to explaining the nuances of establishing unavailability. *Roberts*, 448 U.S. at 74-75.

availability of the coconspirator to testify.¹⁵⁹ The majority scoffed at “the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.”¹⁶⁰ Shortly after *Inadi*, the Court delivered the coup de grace. In *White v. Illinois*, the Court stated that although *Roberts* “used language that might suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence, such an expansive reading of the Clause is negated by our subsequent decision in *Inadi*.”¹⁶¹

To justify its elimination of a central prong of *Roberts*’s Confrontation Clause analysis, the *White* Court pointed not to constitutional text or history, but to practicality. The majority pontificated that “there is little benefit, if any, to be accomplished by imposing an ‘unavailability rule.’”¹⁶² Such a rule, the Court explained, was not “likely to produce much testimony that adds meaningfully to the trial’s truth-determining process” because the prosecution would presumably produce any persons whose testimony would help its case, and the defendant could subpoena declarants helpful to the defense.¹⁶³ The Court added that the unavailability rule was “likely to impose substantial additional burdens on the fact-finding process” by forcing the prosecution to

¹⁵⁹ *United States v. Inadi*, 475 U.S. 387, 395 (1986). While the majority suggested that it was faithful to *Roberts*, the dissent harshly criticized the retreat as “a giant leap” from precedent. *Id.* at 401 (Marshall, J., dissenting); *see also* *Dutton v. Evans*, 400 U.S. 74, 102 (1970) (Marshall, J., dissenting) (emphasizing that the declarant “was plainly available to the State” and may have “willingly testified”).

¹⁶⁰ *Inadi*, 475 U.S. at 394.

¹⁶¹ *White v. Illinois*, 502 U.S. 346, 353 (1992). *Roberts* itself arguably set the stage for this disavowal in a footnote. *Roberts*, 448 U.S. at 65 n.7 (stating that “[a] demonstration of unavailability, however, is not always required” and citing *Dutton v. Evans* as an example of such a circumstance where “the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness”).

¹⁶² *White*, 502 U.S. at 354.

¹⁶³ *Id.* at 354-55. As others, including the post-*Crawford* Court, have noted, it is insufficient as an interpretive matter to say that the defendant’s right to compel the appearance of witnesses “in his favor” remedies any deprivation of his right to confront prosecution witnesses. The compulsory process right is distinct from the confrontation right, and cannot be sensibly viewed as a substitute for that right, unless one views the Confrontation Clause as mere surplusage. Friedman, *supra* note 50, at 1037. Further, the Confrontation Clause states the defendant “shall enjoy” the right to “be confronted,” a phrasing that can only mean that the defendant need do nothing to satisfy this right. *Id.* at 1036; *cf.* *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) (“[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”). As a practical matter, the vast chasm of resources (and oftentimes energy) between prosecution and defense makes the defense’s ability to subpoena witnesses an even less palatable means of enforcing the confrontation right. *See* Jonakait, *supra* note 48, at 616 (criticizing the Court’s practical arguments against permitting confrontation).

“locate and keep continuously available each declarant, even when neither the prosecution nor the defense has any interest in calling the witness to the stand.”¹⁶⁴ Accordingly, *White* confined *Roberts*’s unavailability requirement to the specific circumstances of that case – where the prosecution sought to introduce an absent witness’s testimony from a prior judicial proceeding.¹⁶⁵

White’s focus on practicality obscured the fact that a requirement that the prosecution demonstrate the declarant’s unavailability prior to introducing hearsay was not some idiosyncratic invention of the *Roberts* majority. Instead, the historical seeds of this requirement can be found as far back as the trial of Sir Walter Raleigh – a not insignificant point, given the Supreme Court’s recent assertion that the “basic purpose of the Confrontation Clause was to ‘target[t]’ the sort of ‘abuses’ exemplified at the notorious treason trial of Sir Walter Raleigh.”¹⁶⁶

The evidence introduced at Raleigh’s trial consisted primarily of a written confession of Raleigh’s associate, Lord Cobham, who was imprisoned nearby.¹⁶⁷ Raleigh, suspecting Cobham would, if confronted, recant his accusations, futilely implored the tribunal to bring Cobham before it:

[M]y Lords, I claim to have my accuser brought here face to face to speak If you proceed to condemn me by bare inferences, without an oath, without a subscription, without witnesses, upon a paper accusation, you try me by the Spanish inquisition. *If my accuser were dead or abroad, it were something; but he liveth, and is in this very house.*¹⁶⁸

¹⁶⁴ *White*, 502 U.S. at 355. As noted below, this criticism can be partially defused through a notice and demand requirement that would require the defense to indicate its desire to require live testimony from certain witnesses prior to trial. See *infra* notes 241-242 and accompanying text.

¹⁶⁵ *White*, 502 U.S. at 354 (“*Roberts* stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding.”). Some commentators suggest that *Roberts*’s unavailability requirement survived in a slightly broader form. See, e.g., Mosteller, *supra* note 14, at 694 & n.28 (arguing that the unavailability requirement after *White* “applied only to a limited class of hearsay statements and most clearly only to prior testimony”).

¹⁶⁶ *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011); *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (stating that “the founding-era rhetoric decried” the “practices that the Crown deployed in notorious treason cases like Raleigh’s” and “[t]he Sixth Amendment must be interpreted with this focus in mind”); see also *id.* at 44 (relating that one of Raleigh’s judges later lamented that “the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh” (internal quotation marks omitted)); Kirkpatrick, *supra* note 84, at 378 (“The notorious trial of Sir Walter Raleigh in 1603 is an important part of the background of the Confrontation Clause, and was cited repeatedly by Justice Scalia in *Crawford* as well as in *Davis*.”).

¹⁶⁷ Cobham implicated Raleigh both in letters and ex parte pretrial examinations. See Mosteller, *supra* note 14, at 691 n.15.

¹⁶⁸ 1 DAVID JARDINE, CRIMINAL TRIALS 418-19 (London, Charles Knight, Pall Mall East

As the emphasized sentence suggests, Raleigh viewed witness availability as a critical component of the confrontation right. In another report of the trial, Raleigh demurs to the judges' resistance to his request for confrontation, stating: "Indeed where the Accuser is not to be had conveniently, I agree with you; but here my Accuser may; he is alive, and in the house."¹⁶⁹

Fighting for his life, Raleigh did not assail the prosecution simply because it relied on Cobham's out-of-court statements. Raleigh emphasized the prosecutor's failure to bring before the court a witness who was "in this very house."¹⁷⁰ Raleigh even concedes that a trial by affidavit might be palatable were his accuser "not to be had conveniently" because "dead or abroad." To Raleigh, and presumably his intended audience, Cobham's ready availability to testify was a critical component of the Crown's injustice.¹⁷¹

While Raleigh's judges ridiculed his plea for the live testimony of an available witness,¹⁷² his argument, not their rejection of it, stood the test of time. William Hawkins's 1721 treatise *Pleas of the Crown* explains:

There are many Instances in the Reigns of Queen *Elizabeth* and King *James I*, wherein the Depositions of absent Witnesses were allowed as Evidence in Treason and Felony, even where it did not appear but that the Witnesses might have been produced *viva voce*. And it was adjudged in the Earl of *Strafford's* Trial, that where Witnesses could not be produced *viva voce*, by Reason of Sickness, &c. their Depositions might be read for or against the Prisoner on a Trial of High Treason, but not where they might have been produced in Person.¹⁷³

Thus, the injustice of allowing the prosecution to rely on unconflicted hearsay as a *matter of choice* was recognized well before the Framing, and outlawed in the Earl of Strafford's trial in 1680. This was seventy years too late for Raleigh, but well in advance of the drafting of the Sixth Amendment. In fact, the dispositive nature of unavailability at the Framing is well established in the

1832) (emphasis added).

¹⁶⁹ *The Trial Of Sir Walter Raleigh (1603)*, in 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 19 (London, R. Bagshaw et al. 1809) [hereinafter COBBETT'S].

¹⁷⁰ JARDINE, *supra* note 168, at 419.

¹⁷¹ Cf. Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule": A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 558 n.4 (2007) ("[T]he admission of out-of-court statements by a person who was available to be called as a witness was one of the notorious defects in Sir Walter Raleigh's 1603 trial.").

¹⁷² For example, Justice Warburton responded: "I marvel, Sir Walter, that you being of such experience and wit, should stand on this point; for many horse-stealers should escape if they may not be condemned without witnesses." JARDINE, *supra* note 168, at 421.

¹⁷³ HAWKINS, *supra* note 129, at 430; see also WIGMORE, *supra* note 31, § 1367 at 20-24 (describing the evolution of the rule that "the deponent ought to be produced if he can be"); Davies, *supra* note 15, at 469 n.111 (quoting this passage and concluding that "Hawkins indicated that the reading of depositions of available witnesses in treason trials was banned starting with Strafford's trial in 1680").

historical record. In an article criticizing *Crawford* and its progeny, Thomas Davies concludes that, at the time of the Framing, “out-of-court statements of *available* witnesses were *never* admissible as evidence of a defendant’s guilt.”¹⁷⁴ Decades earlier, Graham Lilly reached a similar conclusion, explaining that “a prevailing principle threads throughout” the eighteenth century Anglo-American caselaw: “if the declarant was living and could be produced, he must appear at trial.”¹⁷⁵ Consequently, Lilly concluded, as this Article maintains, that the Framers intended the Confrontation Clause to “function[] as a rule of preference requiring the presence of the declarant, if available.”¹⁷⁶

Despite the prominent role of history in the Supreme Court’s new Confrontation Clause jurisprudence and the privileged place that jurisprudence assigns to the trial of Sir Walter Raleigh, the Court’s treatment of witness unavailability has not changed since *White*. Under *Crawford* and its progeny, unavailability is relegated to the same trivial role as in *White*, functioning as a limit on the admission of prior, cross-examined testimony (for example, a deceased witness’s cross-examined testimony in a previous trial) and nothing more.¹⁷⁷ For all practical purposes, the broad Sixth Amendment “preference for face-to-face accusation” identified in *Roberts* retains no place in current doctrine. It is likely no coincidence that when *Crawford* recounts Raleigh’s protestations of the Crown’s injustice, it omits Raleigh’s references to Cobham’s availability.¹⁷⁸ Raleigh pointedly emphasized that his absent accuser was not “dead or abroad” but “liveth, and is in this very house.”¹⁷⁹ The *Crawford* Court deemed this complaint too insignificant to mention.

B. *Unavailability As a Prerequisite to Admitting Nontestimonial Statements*

The historical pedigree and Supreme Court precedent enforcing an unavailability requirement should make such a requirement relatively attractive to the current Court as a mechanism for restricting nontestimonial hearsay. More importantly, an unavailability requirement would reintroduce one of the confrontation right’s essential purposes to modern doctrine – enforcing a preference for live testimony over hearsay, regardless of the particular species of hearsay at issue.

This proposal does not require another seismic shift in Confrontation Clause jurisprudence. The courts can neatly overlay a Sixth Amendment preference for live-witness testimony onto modern jurisprudence, by supplementing the existing bar to unconflicted “testimonial” statements with a requirement that a

¹⁷⁴ Davies, *supra* note 15, at 395-96, 395 n.111.

¹⁷⁵ Lilly, *supra* note 99, at 212-15.

¹⁷⁶ *Id.* at 215.

¹⁷⁷ *Cf.* FED. R. EVID. 804(b)(1) (specifying identical requirements for admission of “former testimony”).

¹⁷⁸ See *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

¹⁷⁹ JARDINE, *supra* note 168, at 418-19.

prosecutor offering an unfronted “non-testimonial” statement demonstrate the witness’s unavailability. For the historical and practical reasons identified in the preceding Parts, the introduction of testimonial statements would continue to trigger the strictest constitutional protections.¹⁸⁰ These statements, as *Crawford* holds, should not be admitted at trial absent an opportunity to cross-examine the declarant.¹⁸¹ Confrontation Clause doctrine need not restrict nontestimonial statements as severely. While nontestimonial hearsay can constitute powerful evidence, there is, by definition, no danger that the prosecution will consciously elicit such statements to deprive the defendant of cross-examination.¹⁸² Once government malfeasance drops out of the equation, only one of the confrontation right’s core policies remains – the preference for live testimony. This preference can be enforced through an unavailability requirement.

Permitting nontestimonial statements when there is no alternative (that is, when the declarant is unavailable) does not violate the Sixth Amendment right to confrontation. The statements, by definition, arose independently of the litigation. The defendant’s ability to confront the witness is lost by happenstance. It is the witness’s unavailability, not government scheming, that is to blame.¹⁸³ At this point, the Sixth Amendment *preference* for live-witness

¹⁸⁰ Cf. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 561 (1992) (“Hearsay statements procured by agents of the prosecution or police should . . . stand on a different footing than hearsay created without governmental intrusion.”); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485, 493 (1987) (arguing that unavailability alone is not a sufficient Confrontation Clause test because “the critical time is not only the time the evidence is offered by the prosecution, but also the time the hearsay is created by the government for the prosecution”). Historical support for the proposition that unavailability is not alone sufficient to dispense with confrontation of *testimonial* statements can be found in *King v. Dingler*, (1791) 168 Eng. Rep. 383; 2 Leach 561. In that case, a husband stabbed his wife numerous times resulting in her death. A magistrate took a statement under oath from the victim, but the court excluded the statement, rejecting the Crown’s argument that the statement “was the best evidence that the nature of the case would afford.” *Id.* at 383.

¹⁸¹ *Crawford*, 541 U.S. at 36.

¹⁸² *Michigan v. Bryant*, 131 S. Ct. 1143, 1154-57 (2011) (explaining that when statements are elicited by government agents for purposes of establishing facts for purposes of investigation and, ultimately, litigation, they are “testimonial”); *Crawford*, 541 U.S. at 56 n.7 (noting that the “[i]nvolvement of government officers in the production of testimony” presents a “unique potential for prosecutorial abuse”). Of course, police or prosecutors could falsify the origins of a statement to satisfy the requirements of the doctrine, but this danger cannot be avoided through doctrine. If the authorities are willing to fabricate evidence, they will avoid any doctrinal hurdles.

¹⁸³ Cf. Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 503 (1998) (criticizing hearsay prohibition generally in a similar context, and asking why, if “[t]he proponent did not create the evidence, but took it as found,” a “fair fight” would “demand exclusion for lack of cross-

testimony must bow to “the necessities of the case.”¹⁸⁴ The prosecution played no conscious role in eliciting the statements and is, consequently, not responsible for their presentation at trial in less than ideal form. The defendant who objects to the introduction of unopposed, nontestimonial evidence when the declarant is unavailable demands the impossible. Just as the defendant’s Sixth Amendment right to compulsory process to obtain “witnesses in his favor” does not require the government to produce unavailable witnesses (so long as it played no role in causing their unavailability),¹⁸⁵ the right to confront the “witnesses against him” does not necessitate exclusion of out-of-court statements of witnesses who cannot be brought to court (so long as the statements were not elicited for purposes of litigation).¹⁸⁶

The two-tiered framework set forth above would allow the Court to offer significant, although not absolute, Confrontation Clause protection to defendants who, as in *Davis* and *Bryant*, face nontestimonial accusations by absent witnesses. Specifically, this protection would consist of a requirement that the prosecution demonstrate the unavailability of the out-of-court speaker whose statement will be introduced.¹⁸⁷ The precise measure of

examination when, through no fault of either party, it is not possible to produce better evidence in the form of the declarant”). To the extent the government is responsible for a witness’s unavailability, the government would forfeit the ability to rely on unavailability. *See Motes v. United States*, 178 U.S. 458, 474 (1900) (holding that the government cannot invoke a witness’s unavailability if the witness’s “absence was due to the negligence of the prosecution”).

¹⁸⁴ *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (“[O]ur precedents establish that ‘the Confrontation Clause reflects a preference for face-to-face confrontation at trial,’ a preference that ‘must occasionally give way to considerations of public policy and the necessities of the case.’” (citations omitted) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)); *Mattox*, 156 U.S. at 243-44; *Westen*, *supra* note 144, at 600 (“The state fully exhausts its obligations under the confrontation clause once it produces its evidence in best available form.”)).

¹⁸⁵ *United States v. Ballesteros-Acuna*, 527 F.2d 928, 930 (9th Cir. 1975) (“[T]he Government is ‘under no obligation to look for’ a defendant’s ‘witnesses, in the absence of a showing that such witnesses were made unavailable through the suggestion, procurement, or negligence’ of the Government.” (quoting *Ferrari v. United States*, 244 F.2d 132, 141 (9th Cir. 1957))); *see also United States v. Lee*, 906 F.2d 117, 119 (4th Cir. 1990) (same); *cf. Washington v. Texas*, 388 U.S. 14, 23 (1967) (holding that defendant was “denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying”).

¹⁸⁶ *See Westen*, *supra* note 144, at 596 (arguing that the confrontation right should be interpreted to treat unavailable witnesses in the same manner as the compulsory process right).

¹⁸⁷ Shortly after *Crawford*, Robert Mosteller advocated reviving *Roberts* to provide “weaker” constitutional protections for “problematic,” but nontestimonial hearsay – specifically, any out-of-court statement that “may be regarded as suspect either because it is facially unreliable or because it is only barely outside the definition of testimonial

“unavailability” can be determined by reference to existing case law – the concept is defined at length in *Roberts* itself¹⁸⁸ – as unavailability already plays a role in determining the admissibility of prior, cross-examined testimony under *Crawford*.¹⁸⁹

statements.” Mosteller, *supra* note 14, at 722. Mosteller’s advocacy for “a guarantee that helps force confrontation or excludes particularly problematic hearsay statements from a person whom the defendant cannot confront” sounds a common theme with this Article. *Id.* at 712. The instant proposal does not incorporate *Roberts*’s test for reliability, but does “force confrontation” in some circumstances where it would be otherwise abandoned. *Id.*

Tom Lininger seems to have endorsed a similar approach in a brief symposium essay that cited Oregon case law with approval. *See* Lininger, *supra* note 15, at 406 (citing Oregon courts’ requirement of unavailability as an “attractive alternative” to the Supreme Court’s abandonment of Confrontation Clause protection for nontestimonial hearsay – a requirement that limits “the gamesmanship of the pre-*Crawford* era, when prosecutors called police to recount victims’ hearsay statements even when the victims were available to testify”). Lininger has advocated elsewhere for legislatures to amend the hearsay rules to require unavailability as a prerequisite to the admission of nontestimonial hearsay. *See* Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 307 (2006). In contrast to the arguments presented here, Lininger appears to concede that “originalist constitutional interpretation” supports the conclusion reached in *Davis*, but he objects on policy grounds. *Id.* at 288 (asserting that the Court’s conclusion in *Davis* “may accurately reflect the Framers’ understanding of then-existing law, but originalist constitutional interpretation does not necessarily make good policy”).

Oregon adheres to a state-constitution-based unavailability requirement for hearsay admitted against a criminal defendant that appears to result from a refusal to follow *White*’s divergence from *Roberts*. *See* *State v. Moore*, 49 P.3d 785, 792 (Or. 2002); *State v. Campbell*, 705 P.2d 694, 706 (Or. 1985). Hawaii follows a state-constitution-based requirement that nontestimonial hearsay satisfy *Roberts*. *See* *State v. Fields*, 168 P.3d 955, 968 (Haw. 2007). Other jurisdictions continue to apply *Roberts* to nontestimonial hearsay, but whether they are simply carelessly following pre-*Crawford* case law or implementing a state-constitution-based requirement is often unclear. *See* *Sharifi v. State*, 993 So. 2d 907, 930 (Ala. Crim. App. 2008) (suggesting that *Roberts*-era analysis continues to apply to nontestimonial hearsay); *People v. Hagos*, 250 P.3d 596, 624 (Colo. App. 2009); *State v. Brocca*, 979 So. 2d 430, 434 (Fla. Dist. Ct. App. 2008); *State v. Dewitz*, 212 P.3d 1040, 1050 (Mont. 2009); *State v. Ramirez*, 936 A.2d 1254, 1266 (R.I. 2007); *State v. Kaufman*, 711 S.E.2d 607, 621 & n.31 (W. Va. 2011); *see also* *Stinski v. State*, 691 S.E.2d 854, 868 & n.2 (Ga. 2010) (applying *Roberts* analysis to nontestimonial hearsay, but acknowledging that the basis for doing so has been “undermined”).

¹⁸⁸ *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (“[A] witness is not “unavailable” for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.” (alteration in original) (quoting *Barber v. Page*, 390 U.S. 719, 724-25 (1968))); *see also* *Hardy v. Cross*, 132 S. Ct. 490, 493-95 (2011) (reviewing case law defining “unavailability” for purposes of the Confrontation Clause).

¹⁸⁹ *Crawford v. Washington*, 541 U.S. 36, 57 (2004). “Unavailability” is also a component of some standard hearsay exceptions. *See* FED. R. EVID. 804.

If the prosecution is unable to demonstrate unavailability, it must either call the witness at trial, or forgo the opportunity to introduce the witness's nontestimonial hearsay. This requirement would revive the Sixth Amendment preference for live-witness testimony, echoing the short-lived command of *Roberts* that in the "usual case," the "prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."¹⁹⁰

Little need be said about the benefits of live-witness testimony in an adversary system. Apart from a rare deviation in *White*,¹⁹¹ the judicial reports fawn over cross-examination of live witnesses as an essential element of a fair trial. The Supreme Court summarizes these sentiments in *California v. Green*, stating that such testimony

(1) insures that the witness will give his statements under oath – thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.¹⁹²

Confrontation furthers other important goals as well, including fostering both the reality and perception of procedural fairness.¹⁹³ This is because, as Tom Lininger explains, confrontation is not only "a means to an end, but an end in itself," and therefore of value "even when [its] utility" in a particular instance "may appear negligible."¹⁹⁴

C. *A Historical Exception for Business Records and Analogous Hearsay*

While the unavailability requirement proposed in this Article remedies the key analytical flaw in modern Confrontation Clause jurisprudence, it also raises a new (albeit minor) problem that must be addressed. Confrontation Clause jurisprudence has long recognized the admissibility of certain, largely non-controversial, hearsay even when the declarant is technically available. For example, both *Roberts* and *Crawford* gave wide latitude to the admission of business records and analogous hearsay. Under *Roberts* (after *White*), business records, public records, and the like were generally admissible regardless of the availability of the out-of-court declarant because they fell

¹⁹⁰ *Roberts*, 448 U.S. at 65.

¹⁹¹ See *White v. Illinois*, 502 U.S. 346, 355 (1992).

¹⁹² *California v. Green*, 399 U.S. 149, 158 (1970) (footnote omitted) (quoting WIGMORE, *supra* note 28, § 1367).

¹⁹³ *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.").

¹⁹⁴ Lininger, *supra* note 15, at 408.

within a firmly rooted hearsay exception.¹⁹⁵ Under *Crawford*, such evidence is similarly admissible regardless of witness availability because it is not testimonial.¹⁹⁶

By reintroducing constitutional limits on the admissibility of *all* hearsay and tying these limits to witness availability, the framework proposed in this Article creates a need for a mechanism to admit uncontroversial business records and analogous hearsay.¹⁹⁷ The prosecution should not be blocked, for example, from proving the amount of money in an embezzler's bank account by a constitutional mandate that the prosecution produce every (available) bank employee who entered a credit or debit to the account.¹⁹⁸

There are a variety of ways to approach the admissibility of routine business and public records under an availability-focused Confrontation Clause.¹⁹⁹ Perhaps the cleanest approach is to rely on the same analysis that *Crawford*

¹⁹⁵ *Roberts*, 448 U.S. at 66 n.8.

¹⁹⁶ *Crawford v. Washington*, 541 U.S. 36, 56 (2004) (recognizing historical evidence of admission of business records, but asserting that such records “by their nature were not testimonial”); *cf.* *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n.9 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

¹⁹⁷ *See Kirkpatrick*, *supra* note 155, at 667 n.12 (“[A] showing of unavailability of the declarant is not possible with respect to many types of business and official records, yet production of the declarant would negate the utility of the exception.”). This difficulty was apparently partially to blame for Justice Harlan’s abandonment of an availability-focused theory of the Confrontation Clause. *See Dutton v. Evans*, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring). Justice O’Connor raised the concern at oral argument in *White* as a strike against any doctrinal unavailability requirement. Transcript of Oral Argument at 12, *supra* note 68 (“I suppose if you were correct, then it wouldn’t even be possible to offer business records in any criminal case.”).

¹⁹⁸ *Cf. Hoffman v. Palmer*, 129 F.2d 976, 988 n.25b (1942) (quoting a memo written by the Attorney General that claims courts’ failure to liberalize the business records exception caused “[t]he Government in a number of instances [to be] handicapped in the prosecution of criminal cases” and providing, as an example, a case where “the Government was prevented from [introducing] entries in books of a bank . . . unless the specific bookkeeper who made an entry could identify it” – something that “was impossible in view of the fact that the bank employed 18 bookkeepers, and since the entries were made by bookkeeping machines, no one bookkeeper could recall which entries were made by him”); FED. R. EVID. 803(6) advisory committee’s note (articulating desirability of permitting introduction of business records without “the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information”).

¹⁹⁹ Scholarly proposals of alternative approaches to the Confrontation Clause often advocate special treatment for business records and analogous hearsay. *See Jonakait*, *supra* note 48, at 605 (suggesting a special exception for business records that would operate on a case-by-case basis depending on whether “the cross-examination of the business declarant might affect [the jury’s] evaluation of the hearsay”); *Westen*, *supra* note 144, at 617-18 (excepting from proposed availability-centered Confrontation Clause framework declarants that “the defendant could not reasonably be expected to wish to examine”).

applies to dying declarations. In *Crawford*, the Court recognized that many dying declarations would qualify as “testimonial” statements.²⁰⁰ Yet, the Court highlighted the existence of common law “authority” for admitting such statements and the absence of any indication that the Framers thought the Sixth Amendment eliminated the venerable dying declaration hearsay exception.²⁰¹ Consequently, the Court all but endorsed a sui generis exception to the confrontation right for dying declarations on “historical grounds.”²⁰²

The historical record also supports an exception to the Sixth Amendment preference for live-witness testimony in the case of certain business and public records. In fact, the Court has already laid some of the necessary groundwork. Although it never explains their significance to the *Crawford* framework, the majority in *Melendez-Diaz* recognized three “early common-law cases” that permitted the admission of “records prepared for the administration of an entity’s affairs” in criminal trials despite the absence of confrontation.²⁰³ The

²⁰⁰ *Crawford*, 541 U.S. at 56 n.6.

²⁰¹ *Id.*

²⁰² *Id.*; see also *Michigan v. Bryant*, 131 S. Ct. 1143, 1177 (2011) (Ginsburg, J., dissenting); *Giles v. California*, 554 U.S. 353, 358, 361-62 (2008). Although the Court has yet to rule on this question, it appears willing to endorse a historical exception for unconfrosted, dying declarations. See Aviva Orenstein, *Her Last Words: Dying Declarations and Modern Confrontation Jurisprudence*, 2010 U. ILL. L. REV. 1411, 1414, 1441 (predicting that “the Court will hold that dying declarations are admissible as an exception to the Confrontation Clause even when testimonial”). In early Confrontation Clause cases, the Court confidently proclaimed the admissibility of dying declarations in dicta. See *Kirby v. United States*, 174 U.S. 47, 61 (1899) (“This exception was well established before the adoption of the Constitution, and was not intended to be abrogated.”); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895). The Court has also not addressed the contours of this dying declaration exception. The Court might interpret the exception to allow the prosecution to introduce testimonial hearsay in lieu of an available live witness in one unlikely scenario – if the statement qualifies as a dying declaration, but the declarant did not die. The arguments advanced in this Article would support a requirement that the prosecution call the witness in such a case. Cf. *Giles*, 554 U.S. at 358 (describing the common law exception as encompassing “declarations made by a speaker who was both on the brink of death and aware that he was dying”); FED. R. EVID. 804(b)(2) (conditioning admission of a dying declaration on unavailability).

²⁰³ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 n.7 (2009) (noting cases that permitted the introduction of “records prepared for the administration of an entity’s affairs,” such as a “ship’s muster-book,” a church “vestry book,” and a “prison logbook”); *Crawford*, 541 U.S. at 56 (acknowledging “business records” as a hearsay exception that was “well established by 1791” and explaining that the exception dealt with statements that “by their nature were not testimonial”). Some scholars question the Supreme Court’s assumption (shared apparently by all the Justices) that English cases shed light on the American understanding of the right to confrontation. See, e.g., Jonakait, *supra* note 19, at 620-21. This challenge certainly has some merit as the Framers presumably sought rights beyond those provided by the King of England. English sources, however, are still relevant to the inquiry, if for no other reason than to suggest a baseline: it is likely safe to assume that the

Court distinguished the records admitted in those cases from a chemist's affidavit swearing to a substance's narcotic properties on the obvious ground that the latter was prepared for litigation and thus did not satisfy either the historical or modern conception of a business or public record.²⁰⁴ The majority and dissenting opinions in *Melendez-Diaz* also recognized that American courts in the Framing era permitted "a clerk's certificate authenticating an official record – or a copy thereof – for use as evidence" in criminal cases.²⁰⁵ According to the majority, "[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not . . . create a record for the sole purpose of providing evidence against a defendant."²⁰⁶ The *Melendez-Diaz* Court's recognition of common law cases admitting unopposed business and public records – so long as the records were not created for purposes of litigation – implies an openness to a historical exception for analogous evidence in the modern era.

Melendez-Diaz provides almost no description of the cited business records cases, but a brief review confirms their potential applicability. In *King v. Rhodes*, a prisoner charged with forging John Thompson's will objected to admission of a ship's muster book with the entry: "John Thompson, an able seaman, died 22 August 1739, at Turtle Bay."²⁰⁷ The prosecutor responded that "it was the constant course and uninterrupted practice of the Court to admit the entry in the muster-book, after it had been authenticated by the Clerk who signed it, as full evidence of the fact."²⁰⁸ The English Court seemingly agreed, overruling the objection and, in so doing, citing another case (*Fitzgerald and Lee*) in which "a muster-book was admitted as evidence of the same kind of fact."²⁰⁹

In *King v. Aickles*, a trial court admitted a "daily book . . . containing entries of the names of all the debtors and criminals who are brought into [Newgate] prison, and the times when they are discharged" to prove that a convict, Aickles, prematurely returned from exile.²¹⁰ The daily book was presented to

protections the Framers envisioned were at least equivalent to those already provided in English courts. *Cf. Mattox*, 156 U.S. at 243 ("We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject . . .").

²⁰⁴ *Melendez-Diaz*, 557 U.S. at 321 (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)).

²⁰⁵ *See id.* at 322; *id.* at 347 (Kennedy, J., dissenting) ("During the Framers' era copyists' affidavits were accepted without hesitation by American courts.").

²⁰⁶ *Id.* at 322-23 (majority opinion); *see also Dowdell v. United States*, 221 U.S. 325, 330-31 (1911).

²⁰⁷ *King v. Rhodes*, (1742) 168 Eng. Rep. 115 (K.B.) 115; 1 Leach 24, 25.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 115-16 (citing *King v. Fitzgerald and Lee*, (1741) 168 Eng. Rep. 113 (K.B.) 113; 1 Leach 20, 20-21).

²¹⁰ *King v. Aickles*, (1785) 168 Eng. Rep. 297 (K.B.) 298; 1 Leach 390, 391. Aickles's sentence for grand larceny was commuted on condition that he transport himself overseas,

the court by Mr. Newman, “clerk of the papers of the prison,” and it was recognized that the “entries were not made from Mr. Newman’s own knowledge of the facts,” but from the hearsay statements of “turnkeys.”²¹¹ The court overruled the prisoner’s objection to these “entries made entirely from hearsay and information.”²¹²

In *King v. Martin*,²¹³ a criminal libel case, the trial court permitted the prosecution to introduce a vestry book that recorded the affairs of a parish, commenting that “[t]he books of the Bank of England, and of other public companies are evidence to a great variety of purposes.”²¹⁴ The report contains the following footnote: “So corporation books, concerning the public government of a city or town, when they have been publicly kept, and the entries have been made by a proper officer, are received as evidence of the facts contained in them.”²¹⁵

within fourteen days of discharge from prison, for a period of seven years. *Id.* at 297. The evidence reflected Aickles’ capture in England a mere two months after his discharge, presumably violating the condition of commutation (assuming, of course, that the record accurately evidenced his date of discharge). *Id.* at 298.

²¹¹ *Id.* The judges distinguished the prison log book from “the books or memorandums of a tradesman,” by emphasizing the clerk’s status as a “public officer recording a public transaction” with “no private interest whatsoever in this book.” *Id.*; see also Brief for Respondent at 36-37, *Melendez-Diaz*, 557 U.S. 305 (No. 07-591) (citing cases).

²¹² *Aickles*, 168 Eng. Rep. at 298; see also *White v. United States*, 164 U.S. 100, 104 (1896) (citing, inter alia, *Aickles* in rejecting an objection to the admission of jail records). *White* adds: “In speaking of entries in books which are evidence in and of themselves, Greenleaf mentions many kinds of such entries, and among them he includes prison registers, and cites the cases of *Rex v. Aickles* and *Salte v. Thomas* as authority.” *White*, 164 U.S. at 104 (citations omitted) (citing SIMON GREENLEAF, A TREATISE OF THE LAW OF EVIDENCE § 484, at 533 (Boston, Little, Brown & Co. 1842)).

²¹³ (1809) 170 Eng. Rep. 1094 (K.B.); 2 Camp. 99.

²¹⁴ *Id.* at 1095.

²¹⁵ *Id.* (citing *Rex v. Mothersall*, (1718) 93 Eng. Rep. (K.B.) 405, 405; 1 Strange 93, 93; *Thetford’s Case*, (1719) 93 Eng. Rep. (K.B.) 405, 405; 1 Strange 93, 93). Michael Polelle identifies three treatise writers who noted the existence of a business records exception for hearsay at common law. Polelle, *supra* note 123, at 292 & n.35; see also VAUGHN C. BALL ET AL., MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 305, at 717-19 (2d ed. 1972) (discussing evolution of common law business records exception in the years preceding the Framing); BLACKSTONE, *supra* note 130, at 368 (describing an analogue to the modern business records exception, that allowed an entry in a shopbook or book of account to be admitted if the “servant (who was accustomed to make those entries) be dead” as this is “the best evidence that can then be produced”). Disagreeing with Justice Scalia, and an amicus brief, Davies argues that “there was no broad framing-era hearsay exception for ‘business records,’” but only a narrow exception for the admission of the “‘shop-book’ of a merchant . . . as evidence to prove delivery of goods in civil lawsuits.” Davies, *supra* note 15, at 362 n.33, 366 n.43 (citing BLACKSTONE, *supra* note 130, at 368-69). Davies discusses this issue in two footnotes and does not address the cases discussed above. See *id.* In any event, even Davies’ arguments may allow for isolated examples of the admission of business records in

Paralleling *Crawford's* sui generis exception for dying declarations, the common law authority discussed above supports a historical exception to the confrontation right for business records and analogous hearsay – something that, even if not fully developed at the time of the Framing, few commentators or judges will likely resist.²¹⁶ Admission of routine business and public records without confrontation is generally uncontroversial, and rarely implicates the textual, historical, or policy concerns of the confrontation right. The precise nature of the business and public records exception for modern times would need to be developed through the caselaw, and may turn out to be narrower than prosecutors might like.²¹⁷ Nevertheless, as with dying declarations, some form of the public or business records exception to hearsay doctrine existed at the time of the Framing. Absent evidence that the Sixth Amendment's drafters sought its extermination, this same exception could be relied upon to admit business and public records (regardless of declarant availability) over Confrontation Clause objection in the modern era.

criminal cases – which is probably the most that can be expected of a time when, given the nature of criminal law enforcement, few prosecutions would be expected to rely on business records. Cf. Langbein, *supra* note 136, at 1178 (stating that at the time of the Framing, “written evidence was always relatively unimportant in criminal prosecutions for felony”).

²¹⁶ *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (stating that the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding”). Oregon requires available hearsay declarants to testify if their hearsay (nontestimonial or otherwise) is to be admitted. See *supra* note 187. Applying an analysis similar to that suggested here, the Oregon courts make an exception to this seemingly blanket requirement for public and business records, explaining that “the unavailability requirement that otherwise may apply . . . does not apply in this case, because the framers of the Oregon Constitution would have understood public and official records to have constituted an exception to the confrontation rights guarantee.” *State v. William*, 110 P.3d 1114, 1116-17 (Or. Ct. App. 2005); see also *State v. Partee*, 573 P.2d 751, 753-54 (Or. Ct. App. 1978) (rejecting state and federal Confrontation Clause challenges to admission of business records even though the “defendant did not have the opportunity to cross-examine the person who originally prepared the records”).

²¹⁷ See FED. R. EVID. 803(5) advisory committee's note (evidencing a desire to broaden the common law notion of “business records” admissible over a hearsay objection); see also *Salte v. Thomas*, (1802) 127 Eng. Rep. 104 (H.L.) 105; 3 Bos. & Pul. 188, 190 (distinguishing *Aickles* because “there was no document of the fact which was proved [in that case] but the book itself, and no other evidence could have been resorted to except the parole testimony of the turnkey who might happen to be in the prison at the time of the prisoner's discharge”). Records prepared “for use in litigation” would be inadmissible. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 n.7 (2009); see also *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943); *Aickles*, 168 Eng. Rep. at 298 (emphasizing that “Newman has no private interest whatsoever in this book, to induce him to make factitious entries in it”); cf. Kirkpatrick, *supra* note 84, at 369 n.12 (highlighting types of business records that, contrary to the conclusory assertion of the *Crawford* majority, seem to require Confrontation Clause scrutiny).

IV. POLICY IMPLICATIONS OF AN UNAVAILABILITY REQUIREMENT

Supplementing existing Confrontation Clause jurisprudence with an unavailability requirement erects real obstacles to prosecutors' use of nontestimonial hearsay to prove defendants' guilt.²¹⁸ Numerous hearsay exceptions currently allow prosecutors to introduce out-of-court statements regardless of the declarant's availability. For example, the twenty-three hearsay exceptions in Rule 803 of the Federal Rules of Evidence permit the introduction of hearsay "regardless of whether the declarant is available as a witness."²¹⁹ State hearsay rules generally follow suit.²²⁰ If prosecutors are required, as a constitutional matter, to demonstrate unavailability prior to invoking these exceptions, their ability to introduce hearsay will be significantly curtailed.²²¹ In cases where prosecutors could previously fill evidentiary voids with nontestimonial hearsay, the prosecution would either have to introduce the declarant's live testimony or demonstrate unavailability.

The effects of the proposed unavailability requirement on prosecutors (and witnesses) raise important policy concerns. Commentators already criticize *Crawford* for exacerbating the difficulties of prosecuting domestic violence and child abuse offenses where victims are unable or unwilling to cooperate with prosecutors.²²² The government's merits brief in *Inadi* similarly criticized

²¹⁸ Kirkpatrick, *supra* note 155, at 667 (stating that an unavailability requirement "would severely restrict the use by prosecutors of numerous hearsay exceptions that have traditionally been available").

²¹⁹ FED. R. EVID. 803. Rule 803 includes exceptions for excited utterances, present sense impressions, and statements for purposes of medical treatment. *Id.* Statements of a coconspirator, agent, or employee can also be admitted without a showing of unavailability. *See* FED. R. EVID. 801.

²²⁰ *See, e.g.*, HAW. R. EVID. 803; MICH. R. EVID. 803; N.J. R. EVID. 803; N.C. R. EVID. 803; OHIO R. EVID. 803; PA. R. EVID. 803; TEX. R. EVID. 803; W. VA. R. EVID. 803; *cf.* Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L.J. 1525, 1533 (1996) ("[T]he Federal Rules of Evidence have served as a model for many state evidence codes . . .").

²²¹ Many states also provide specific hearsay exceptions designed to admit out-of-court statements by child victims, but these provisions, like the proposal in this Article, usually require either the child to testify or a finding of "unavailability." *See* Commonwealth v. Allshouse, 36 A.3d 163, 163-64 (Pa. 2011) (describing the Pennsylvania statute); Kirkpatrick, *supra* note 84, at 372, 378 n.55. Some states extend "unavailability" in this context to circumstances where the child, while technically available, would likely be emotionally traumatized in the process. *See* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691-92, 700 & n.32; *cf.* Nelson v. Farrey, 874 F.2d 1222, 1228 (7th Cir. 1989) (ruling that "unavailability" for Confrontation Clause purposes included circumstances where an "attempt to extract evidence from [the victim] in a courtroom setting was likely to be not only futile but also psychologically harmful to her").

²²² *See* Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 535 (2010) (arguing that, in light

Roberts for articulating an unavailability requirement that would unnecessarily hamstring complex conspiracy prosecutions; the Court in *Inadi* adopted these concerns wholesale.²²³ The proposal articulated here may be opposed on similar grounds. As this Part explains, however, the implications of an unavailability prerequisite to the admission of nontestimonial hearsay are not as stark as might first be suspected and, in any event, do not form a compelling basis for rejecting the proposed expansion of the modern confrontation right.

It is worth noting at the outset that not all observers will view the proposed unavailability requirement negatively. From a defense perspective, the development is clearly beneficial.²²⁴ Viewed in the best light, this is because there are cases where innocent (or partially innocent)²²⁵ defendants' inability to cross-examine their accusers deprives the jury of information that would lead to an acquittal (or less severe sentence). Even in the domestic violence context where fear of, or affinity for, a cohabitant is a common reason for victim noncooperation, one cannot entirely discount the possibility that the initial out-of-court reports of abuse contain flaws and omissions. Such reports (particularly as recounted by others) may be overstated or omit details that could exculpate the defendant or diminish the defendant's culpability. Outside of the domestic violence context, this possibility informs the argument, generally accepted in the United States, that live testimony is a crucial component of the search for truth and procedural fairness.²²⁶ The possibility cannot be completely discounted in domestic violence, child abuse, or complex conspiracy prosecutions.

of obstacles raised, particularly in prosecution of domestic violence cases, "*Crawford* has set back the quest for rational adjudication"); Lininger, *supra* note 3, at 768; Orenstein, *supra* note 47, at 145. Some of the fears of a drastic effect on domestic violence prosecutions that emerged have been tempered by the Court's narrowing view of which statements are testimonial and its expansive view of forfeiture by wrongdoing. See Lininger, *supra* note 3, at 818-19 (writing prior to *Davis* that one way "to salvage domestic violence prosecutions after *Crawford*" is "to engage in the intellectually dishonest exercise of labeling most statements by victims to police as 'nontestimonial,'" but arguing that "[s]uch an approach might seem expedient, but it would not be true to the Supreme Court's interpretation of the Confrontation Clause").

²²³ *United States v. Inadi*, 475 U.S. 387, 398-99 (1986); see also *White v. Illinois*, 502 U.S. 346, 354-55 (1992); Brief for the United States at 37, *Inadi*, 475 U.S. 387 (No. 84-1580) (critiquing the "practical wisdom" of an unavailability rule, particularly in "large-scale drug conspiracy or organized crime cases").

²²⁴ Kirkpatrick, *supra* note 84, at 376 ("[A] general consensus exists that it is important to have the child [victim in a sexual abuse case] testify when possible, given the nature of the crime and the severity of the penalties.").

²²⁵ A "partially" innocent defendant is guilty of some but not all of the offenses charged, or is guilty of a lesser offense than the charged offense.

²²⁶ *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) ("The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it."); Lininger, *supra* note 3, at 772.

Many observers will, understandably, adopt a different perspective and view the addition of an unavailability prerequisite to the admission of nontestimonial hearsay as a practical disaster. To these observers, the requirement will exacerbate the under-prosecution of domestic violence and child abuse cases, needlessly burden prosecutions in other contexts, and, perhaps worst of all, increase the incentive for defendants to cause victims to fail to appear at trial.²²⁷ While these concerns are important, they can be overstated. There will be few instances where the prosecution *must* abandon a case due to an unavailability requirement. When the victim or witness is truly unavailable (for example, a fearful witness flees the jurisdiction, refuses to comply with subpoenas, or cannot be located),²²⁸ nothing changes: the prosecution, after making a showing of unavailability, can present any out-of-court statements that would be admissible under current doctrine. In addition, since a witness's refusal or inability to testify will constitute unavailability, the proposed reform entails no change in existing incentives for witness intimidation.²²⁹

For the diligent prosecutor, obstacles to admission of hearsay statements only arise under this proposal when the witness is available. In this scenario, the prosecutor can overcome the obstacles by securing the witness's attendance at trial. If the prosecution produces the witness, the witness's out-of-court statements (and in-court testimony) become unobjectionable under the Confrontation Clause because the defendant can confront the witness.²³⁰

Nevertheless, an unavailability requirement will undoubtedly lead to fewer prosecutions for a number of reasons. Most directly, there may be cases where the prosecution declines to go forward to relieve an otherwise available victim or witness of the burden of testifying.²³¹ If the prosecutor could have obtained a conviction with nontestimonial hearsay, dismissal will be the fault of the new unavailability requirement. Relatedly, there will be cases where victims and witnesses will suffer harm and inconvenience from the "ordeal of cross-

²²⁷ Lininger, *supra* note 3, at 771.

²²⁸ See *Hardy v. Cross*, 132 S. Ct. 490, 494 (2011) (reviewing a case in which state courts deemed the victim of a sexual assault "unavailable" after she fled the jurisdiction to avoid testifying and could not be located, and upholding the state court ruling as reasonable interpretation of constitutional law).

²²⁹ See *United States v. Earles*, 113 F.3d 796, 801 (8th Cir. 1997) (holding that the witness's refusal to testify against his father constituted "unavailability" for purposes of the Confrontation Clause); *Jennings v. Maynard*, 946 F.2d 1502, 1505 (10th Cir. 1991) (holding that the witness's refusal to testify out of fear, after receiving threats, constituted "unavailability" for purposes of the Confrontation Clause).

²³⁰ *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

²³¹ Trial testimony is only one aspect of this burden. Even if a victim avoids testifying at trial, the victim may still be required to testify in a pretrial examination, to a grand jury, or in semi-formal conferences with police and prosecutors.

examination” if they must testify when previously the prosecution could rely on nontestimonial hearsay alone.²³² If an out-of-court statement is critical to a case, a prosecutor may go so far as to obtain a material witness warrant to detain the witness until trial – something that already occurs when an important case depends on an uncooperative victim’s testimony or testimonial hearsay, but could occur more frequently with the proposed unavailability requirement.²³³

Critics of this proposal will correctly note as well that, as with any additional doctrinal hurdle, an unavailability requirement will result in a greater number of prosecutions falling through the cracks. Due to the unprecedented scope of modern law enforcement, many prosecutors juggle hundreds of cases at a time.²³⁴ A prosecutor may forget to subpoena a witness, fail to realize the obligation to do so, or simply overlook certain pretrial tasks due to caseload pressures. This is most likely to occur in misdemeanor cases, which make up a large portion of domestic violence prosecutions.²³⁵ In such circumstances, a case that could have gone forward based on nontestimonial hearsay may be dismissed due to the prosecutor’s failure to demonstrate the declarant’s unavailability. Still, dismissal is neither certain nor dispositive. The prosecutor could avoid dismissal by seeking a continuance to remedy an inadvertent failure to subpoena a witness or, if unsuccessful, reinstate the prosecution assuming that a dismissal is “without prejudice” (a safe assumption if the prosecutor’s failure resulted from negligence as opposed to bad faith).²³⁶ If prosecutors refrain from taking these steps due to caseload pressure or indifference, it is again tempting to blame the unavailability requirement. In this context, however, the blame is not well placed. The government must choose how to spend its resources. If the choice is to bring so many prosecutions (including many prosecutions for non-violent, victimless crimes)²³⁷ that even serious, violent offenders go unpunished due to negligence

²³² *Mattox v. United States*, 156 U.S. 237, 244 (1895).

²³³ See Lininger, *supra* note 3, at 787; Orenstein, *supra* note 47, at 146; Raeder, *supra* note 113, at 328. The calculus of whether to prosecute a case against the wishes of a reluctant victim is complex. See Lininger, *supra* note 3, at 782; Orenstein *supra* note 47, at 145, 147 (describing literature suggesting that “*Crawford* empowers battered women” but disagreeing because “the so-called ‘autonomy’ of the accuser is illusory in many domestic violence cases”).

²³⁴ See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 270 (2011).

²³⁵ Lininger, *supra* note 3, at 822 (chronicling survey responses of state prosecutors in which eighty-two percent reported that a majority of domestic violence cases in their jurisdictions were misdemeanors).

²³⁶ See *United States v. Stoker*, 522 F.2d 576, 580 (10th Cir. 1975) (“A dismissal resting on a non-constitutional ground such as ‘want of prosecution’ or ‘calendar control’ is normally without prejudice to a subsequent prosecution.”).

²³⁷ See Luna, *supra* note 53, at 777 (chronicling “the overwhelming volume of narcotics

and lack of diligence, the fault lies most squarely with the allocation of resources, and not with doctrinal rules such as an unavailability requirement (or, for that matter, the right to a jury trial or the presumption of innocence).²³⁸

In addition, the number of cases where prosecutions stall due to the proposed unavailability requirement can be minimized through judicially or statutorily authorized pretrial procedures.²³⁹ In many domestic violence cases, for example, it will be clear to the defense that the victim's presence at trial will hurt, not help their cause. In such circumstances, the defense may be willing to waive any availability-based objection to the admission of a victim's hearsay statements to decrease the chances that the prosecution will call the victim to testify.²⁴⁰ The pretrial procedure for obtaining the requisite waiver could be modeled on the "notice and demand" statutes approved in dicta in *Melendez-Diaz*.²⁴¹ If jurisdictions can create notice-and-demand systems to relieve government chemists of the burden of testifying when neither party desires their presence at trial, they can (and should) implement analogous procedures for civilian witnesses, such as child abuse victims and victims of domestic violence.²⁴²

The real-world implications of Confrontation Clause doctrine are important to consider. As *White*'s curtailment of the brief post-*Roberts* experiment with a broad unavailability requirement suggests, the chief arguments against the proposal outlined here may, in fact, be policy based.²⁴³ At the same time, a

cases in the legal system").

²³⁸ Cf. Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, a Response to Adam Gershowitz and Laura Killinger*, 106 Nw. U. L. REV. 143, 155 (2011) (arguing that when prosecutorial resources are overtaxed, prosecuting agencies can charge fewer cases, focusing existing resources on "the cases that matter . . . most"). The government may also direct its resources toward identifying and prosecuting the perpetrators of domestic violence incidents who are most likely to escalate their violent behavior, and assisting the victims of those perpetrators to safely exit dangerous situations. A typical misdemeanor prosecution does little to accomplish either of these goals.

²³⁹ Lininger, *supra* note 3, at 753 (proposing "legislative reforms" to ease domestic violence prosecutions after *Crawford*).

²⁴⁰ Remorseful defendants may waive the requirement that a victim testify to minimize further harm to the victim and, perhaps, curry favor with the judge.

²⁴¹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009) (stating that "[t]here is no conceivable reason why" the defendant "cannot . . . be compelled to exercise his Confrontation Clause rights before trial"); see, e.g., TEX. CODE CRIM. PROC. ANN. art. 38.41 (West 2003) (requiring the prosecutor to provide notice of desire to introduce chemist affidavit, and then requiring the defendant to demand live testimony at least ten days before trial); cf. Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883, 892-904 (1991).

²⁴² Unlike a government chemist, however, a crime victim may want to testify in court to ensure that his or her voice is heard.

²⁴³ See *supra* Part III.A.

debate on policy grounds is likely impossible to resolve to the satisfaction of either side.²⁴⁴ To a significant extent, this is the same centuries-old debate that preceded the adoption of the Sixth Amendment. Raleigh's judges, like modern critics, warned of the dire consequences for the King's justice if Raleigh's requested confrontation right were recognized: common criminals would go free due to practical impediments to prosecution,²⁴⁵ and serious offenses would "flourish."²⁴⁶ His judges also questioned the practical utility of confrontation where, as with Cobham's self-inculcating confession (according to Chief Justice Popham, the "strongest" of "all other proofs"), hearsay was self-evidently reliable.²⁴⁷ Reflecting a modern argument in the domestic violence context, the judges discounted the significance of any change of heart Cobham might voice in live testimony; after all, any deviation from Cobham's pretrial confession would only confirm that Raleigh improperly influenced Cobham (who, according to the prosecution, "was afraid of Raleigh") prior to trial.²⁴⁸

Raleigh's British judges were villains no doubt, but their arguments were not frivolous. As in Raleigh's time, reasonable people can disagree about the tradeoffs required by a robust right to confrontation. The key point, however, is that the Framers sided with Raleigh. Recognizing the obstacles it might create for the administration of justice, they granted the accused the right to "be confronted with the witnesses against him." The fact that the dangers foreseen by Raleigh's judges – the losing party in this debate – now resonate in

²⁴⁴ Cf. Orenstein, *supra* note 202, at 1455 & n.280; Raeder, *supra* note 113, at 313-14 (recognizing the difficulty of "ensur[ing] that the voices of women and children are heard, without eviscerating the ability of the defendant to confront live complainants, and not just second hand witnesses").

²⁴⁵ COBBETT'S, *supra* note 169, at 18 (Justice Wharburton: "[S]o many horse-stealers may escape, if they may not be condemned without Witnesses."). Interestingly, Justice Wharburton's concern came to fruition in an early American case. See *State v. Webb*, 2 N.C. (Mart.) 103, 103 (1794) (rejecting effort to introduce deposition of purchaser of stolen horse in trial of Pleasant Webb "for horse-stealing").

²⁴⁶ *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (stating that "the prosecution responded" to Raleigh's requests "with many of the arguments a court applying *Roberts* might invoke today"); COBBETT'S, *supra* note 169, at 18 ("This thing cannot be granted for then a number of Treasons should flourish . . ."); JARDINE, *supra* note 168, at 427 (recounting that Raleigh's judges thought confrontation was a means "to cover many with treasons").

²⁴⁷ JARDINE, *supra* note 168, at 420.

²⁴⁸ COBBETT'S, *supra* note 169, at 19 ("There hath been intelligence between you; and what under-hand practices there may be, I know not."); *id.* at 22 ("I observe there was Intelligence between you and Cobham in the Tower . . ."); *id.* at 10 (relaying that Cobham "was afraid of Raleigh"). Covering all bases, the judges also speculated that if called to testify, Cobham would falsely exonerate Raleigh out of friendship or, more generically, fall prey to his rhetorical tricks. *Id.* at 24 ("Since he must needs have justice, the acquitting of his old friend may move him to speak otherwise than the truth."); *id.* at 18 ("[T]o save you, his old friend, it may be that he will deny all that which he hath said."); *id.* at 18 ("[T]he Accuser may be drawn by practice.").

our own administration of justice suggests not that Confrontation Clause jurisprudence is off track, but that it is finally finding its proper role.

CONCLUSION

Chief Justice John Marshall thought that the inadmissibility of informal, out-of-court statements offered in the 1807 prosecution of Aaron Burr was a fairly easy call. The Chief Justice wondered 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.”²⁴⁹ Two centuries later, the *Davis* Court also viewed the constitutional treatment of mere verbal declarations (i.e., “nontestimonial” statements) as fairly obvious.²⁵⁰ But the Court came to the opposite conclusion. Someone is wrong here and, given Chief Justice Marshall’s proximity to the Framing era, it is hard to side against him. The proximity intuition is not all we have, however. As this Article details, there is abundant evidence to conclude that the *Davis* Court, not Chief Justice Marshall, misread the authority on this critical point. The Court’s error can be shown as a matter of textual and historical analysis. In addition, when applied to real-world fact patterns, as in *Davis* and *Bryant*, the Court’s conclusion that the out-of-court speakers of “nontestimonial” statements are not “witnesses against” the defendant vanishes in a puff of common sense.

The Court’s error in placing nontestimonial hearsay outside the bounds of the Confrontation Clause, while serious, does not damn the entire jurisprudence. The Supreme Court is right to finally focus its Confrontation Clause analysis on core, “testimonial” hearsay. Framing-era authorities recoiled at the prospect of the admission of such evidence, and for good reason. The Court must preserve this intuition while revisiting its conclusion that hearsay falling outside this core class of statements triggers no Confrontation Clause protections whatsoever.

²⁴⁹ *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694).

²⁵⁰ *Davis v. Washington*, 547 U.S. 813, 825 (2006).