

TRUTH, LIES, AND THE CONFRONTATION CLAUSE

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This Essay examines and critiques the recent revival of the Sixth Amendment's Confrontation Clause as a means of improving the quality of criminal trials. The Clause is best interpreted as a tool that aims to reduce the likelihood of wrongful convictions by limiting the ability of prosecutors and witnesses to concoct believable but false stories without fear of their deception being uncovered through cross-examination. Unfortunately, modern doctrine has come unmoored from this foundation. Requiring confrontation of available prosecution fact witnesses serves a useful (if narrow) evidentiary function in that it provides a check against an unethical prosecutor who might otherwise prepare and present perjured, misleading, or incomplete substitutes for live testimony. It does not automatically follow that the Clause should also require suppression as a remedy whenever witnesses who make testimonial statements become unavailable as trial witnesses. Rather, the courts should only suppress unconfrosted hearsay by an unavailable witness when the unavailability was caused by a deliberate choice on the part of that witness or the prosecutor. By contrast, when the unavailability occurs unintentionally, or as the result of a deliberate choice made by the defendant, suppression only serves to undermine the goals that the Clause is designed to promote.

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INTRODUCTION

If an outside observer were to draw conclusions based on recent decisions by our Supreme Court, they could easily come to the conclusion that unconfrosted hearsay evidence is among the gravest challenges currently facing our court systems. Since the Supreme Court’s landmark decision in *Crawford v. Washington*,¹ it has heard case after case concerning the exact contours and nature of a criminal defendant’s Sixth Amendment right to “be confronted with the witnesses against him.”² This pattern is particularly striking by its contrast to other issues of evidence law, whether under the Federal Rules

1. 541 U.S. 36 (2004).

2. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

or other constitutional provisions. In the midst of this flurry of Confrontation Clause decisions, it has been decades since the Supreme Court considered most of the issues I teach, even where there have been longstanding circuit splits.³

The above comment might seem curmudgeonly—surely all law teachers wish the court gave more attention to problems in their field—but the pattern reveals a deeper problem. Despite what a hypothetical observer might have thought, it is quite easy to conjure up problems with our criminal trials that are far more deserving of the Court’s attention. If we were to take research into the causes of wrongful convictions as our guide, for instance, we would surely be giving greater priority to the problems of unreliable eyewitness testimony, the admission of false confession evidence, in-court perjury by jailhouse informants, or the admission of unreliable forms of forensic identification testimony.⁴ Yet despite the avalanche of academic commentary pointing out the serious concerns raised by all these issues, the Court has spent precious little time on any of them in the last twenty years,⁵ perhaps in part due to its continuing struggle to elucidate the boundaries of the Confrontation Clause.

Of course, to say that this situation is unfortunate is not to say that those who have brought it about are acting irrationally. Once the Supreme Court reinterpreted the Clause to require the exclusion of many previously admissible hearsay statements, defense advocates rightly scrambled to invoke this powerful new tool in the hopes of securing acquittals for their

3. For instance, the lower courts have split over the nature and extent of the reporter’s privilege, but the Supreme Court has declined to weigh in on the subject since its cryptic 1972 decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). See generally 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:46 (4th ed. 2017) (describing the varied articulations of the doctrine that have developed across the circuits over the forty-five years since the Supreme Court last considered the issue).

4. See generally BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8–11 (2011) (surveying the most common identifiable causes of wrongful convictions in a sample of 250 DNA exoneration cases).

5. The only recent decision to consider eyewitness identification issues, for instance, was *Perry v. New Hampshire*. In that case, the Supreme Court sided with the circuits that have given a narrow construction to Due Process limits on unreliable eyewitness identifications, ruling that trial courts need not exclude unreliable identifications except when they are the result of actively suggestive lineup procedures employed by the police. 565 U.S. 228, 231–33 (2012).

clients.⁶ And as the lower courts struggled to interpret the Supreme Court's cryptic commands, appellate judges properly made it a priority to provide clearer guidance as to the nature of this new requirement.⁷ But to say that these actors behaved reasonably is not to say that the resulting equilibrium is satisfactory. Thus, in this Essay I suggest an approach, grounded in both the history of the Clause and in sensible present-day policy considerations, that would greatly simplify the Confrontation analysis in most cases and return the Clause to its proper role in our system of justice.

Towards this end, the analysis below will proceed as follows. In Part I, I will begin by relating how the Framers, being sensibly concerned with designing trial systems that protected the innocent while allowing conviction of the guilty, were justly concerned by a set of abusive practices that were well-known in royal and colonial courts. Especially given other rules of proof and procedure that were then in play, vindictive prosecutors or spiteful witnesses could easily tell lies out of court that defendants could not meaningfully challenge. From that perspective, the Confrontation Clause is best understood as a tool designed to deter perjury and curb deliberate prosecutorial abuses.

By contrast, it does not make as much sense to view the Clause as a freestanding means of increasing the accuracy of trials in cases when a witness becomes unavailable to testify through no fault of the prosecutor, as I will illustrate in Part II. Regardless of what the Framers may have believed, cross-examination is not necessarily a cure-all for bringing to light either deliberate perjury or eyewitness mistakes. Furthermore, both common sense and psychological experiments suggest that juries will not senselessly believe every out-of-court statement,

6. See *Crawford*, 541 U.S. at 60–69 (rejecting the doctrine of *Ohio v. Roberts*, 448 U.S. 56 (1980), and holding that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation”).

7. See, e.g., *Triplett v. Hudson*, No. 3:09-CV-01281, 2011 WL 976575, at *6 (N.D. Ohio Mar. 17, 2011) (noting that the courts faced “great confusion” regarding the application of the *Crawford* decision to forensic expert reports); *People v. Moscat*, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004) (noting that *Crawford* decision “fail[ed] to give urgently needed guidance” to lower courts regarding its applicability to statements made during 911 calls). See generally MUELLER & KIRKPATRICK, *supra* note 3, § 8:27 (noting “at least six areas of difficulty” that have occupied lower courts, including “exceptions for child victim hearsay, excited utterances, medical statements, public records, and against-interest statements”).

but rather will likely give less credit to second-hand accounts, especially when given under suspicious circumstances. At the same time, enforcing the Clause through the exclusion of unopposed testimony by unavailable witnesses works its own harm on the ability of a jury to ferret out the truth by hiding from them some statements that were both material to the dispute and truthful when made. So in short, a broad application of the Clause may easily end up undermining, rather than improving, the accuracy of our trials.

Happily, there is a sensible doctrinal solution that nicely balances these concerns, which I will set forth in Part III. It is quite common in constitutional law to acknowledge that defining the scope of a constitutional right may still leave uncertain some other questions about the scope of the associated constitutional remedy. In particular, when judges decide to enforce a constitutional right (such as the right against unreasonable searches) through the suppression of evidence, they have properly acknowledged that this particular remedy only makes sense when it is likely to deter violations of the underlying right. Both history and present policy considerations suggest that a similar understanding of confrontation rights and remedies would be equally sensible. In such a regime, a defendant would have the *right* to be confronted with adverse testimony whenever the witness is available to be produced. By contrast, the courts would have discretion to articulate a protective exclusionary *remedy* in order to prevent prosecutors or witnesses from engaging in other conduct that might undermine that right.

A sensible relationship between rights and remedies might work as follows. In cases where the witness was available and subject to production by the prosecutor, the appropriate remedy would be to offer the prosecutor a choice between presenting the witness or foregoing the content of her prior statements as evidence. Likewise in cases where prosecutors procure a witness's unavailability to testify, or where the witnesses themselves take steps to hide their prior statements from public confrontation, the suppression remedy may play a valuable role, in that it will rob such tactics of any practical benefit and make it harder to falsely accuse others of crimes without facing perjury charges. By contrast, in cases where a witness becomes unavailable, but not through their own fault or through the fault of the prosecutor, the suppression remedy has more costs than benefits. Unlike in cases involving

misconduct designed to avoid confrontation, we have no special reason to think that the jury will give radically greater credence to the out-of-court statement than they would to a similar statement if made in court and confronted. Unfortunately, suppression in such cases works a converse harm by robbing the jury of potentially valuable information. Moreover, suppression in such cases cannot provide any party with a motive to make themselves or another witness available for live testimony, because when prospective unavailability is not a deliberate tactical choice, it is unlikely to be affected by the possibility that evidence will be lost as a result.

I. THE CONFRONTATION CLAUSE'S ORIGINS & PRESENT INTERPRETATION

To an extent that may surprise readers unfamiliar with the relevant historical sources, the origins of the Confrontation Clause and the exact ways in which it was meant to operate are surprisingly hard to elucidate.⁸ Still, a brief survey of the rapidly changing law of evidence applicable to out-of-court statements at the time the Clause was enacted may give us a reasonably clear picture of the specific harms that the Clause was meant to prevent. In addition, we shall see that many modern controversies regarding the Clause's application can receive little guidance from this early history, because the specific doctrines of hearsay admissibility were still in an early stage of their development. After surveying these historical matters, this Part will conclude with a brief summary of current Confrontation Clause doctrine.

A. *The Origins of the Clause*

Compared with some other protections included within the Bill of Rights, the confrontation right was a relatively recent addition to English and colonial practice. Indeed, for most of the jury trial's history up until that point, the notion of a defendant's right to confront live witnesses in open court (and to exclude other forms of evidence from admission) would have

8. See *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) ("History seems to give us very little insight into the intended scope of the . . . Confrontation Clause.").

gone strongly against the grain of English criminal procedure.⁹ For centuries, criminal defendants played a surprisingly passive role in their own trials. They were barred from giving testimony under oath (although they would often make unsworn interjections into the proceedings).¹⁰ Nor were they allowed to obtain the help of attorneys,¹¹ who would have had little to do in any case as the defendant had no right to call witnesses in his own defense¹² or to question witnesses directly.¹³ Rather, from the dawn of the live jury trial up until a series of incremental reforms enacted during the 150-year period preceding the American Revolution, a criminal defendant's role was strictly limited. Defendants mostly listened while the prosecution's witnesses testified under oath, contributing to the process only through unsworn interjections that might prompt a judge to ask additional questions of a

9. See, e.g., *Trial of Sir Walter Raleigh for High Treason (1603)*, in 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 15–16 (Thomas B. Howell ed., 1816) (explaining, in response to defendant's request to have his accusers brought to court for a face-to-face confrontation, that the law permitted proof of his guilt through a written statement by an accuser, and that the prosecutor was not obliged to bring the witness to court for cross-examination); Harry L. Stephen, *The Trial of Sir Walter Raleigh: A Lecture Delivered in Connection with the Raleigh Tercentenary Commemoration*, in 2 TRANSACTIONS OF THE HIST. SOC'Y 172 (1919) (noting that it was common in that era for trials involving treason or other serious felonies to proceed primarily on the basis of written accusatory evidence). Even in the 1700s, when it was becoming clearer that the prosecutor should generally bring his witnesses to court to be cross-examined by the accused, the exclusion of accusatory hearsay testimony by absent witnesses was not always guaranteed. See, e.g., John H. Langbein, *The Criminal Trial Before Lawyers*, 45 U. CHI. L. REV. 263, 301–02 (1978) (describing criminal cases from the early part of the 1700s in which hearsay evidence was admitted against the accused without regard to the unavailability of cross-examination); James Oldham, *Truth-Telling in the Eighteenth Century English Courtroom*, 12 L. & HIST. REV. 95, 103–04 (1994) (noting, based on his survey of Lord Mansfield's trial notes, that hearsay was “often admitted” in his criminal cases during the late 1700s).

10. See SIR GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 122 (1756) (stating the general rule that “no Man can be a Witness for himself”); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 124 (1983) (noting that although defendants were barred from giving testimony under oath, they often were allowed to speak unsworn).

11. Langbein, *supra* note 9, at 282–83 (noting that defendants were not permitted representation until the early 1700s).

12. See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 352–54 (1769) (noting the recent abolition of this practice by statutory reforms in cases of treason and felony).

13. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L. J. 1011, 1024 n.74 (1998) (relating early cases in which defendants were not permitted to question witnesses directly and the incremental rejection of that rule over the course of the seventeenth century).

witness or influence the jury's interpretation of ambiguities in the evidence.

This might strike modern readers as a system deliberately designed to punish the guilty and innocent alike, but it was not so. Rather, the trial in this era was founded on fundamentally different notions of how innocence should best be protected. The bedrocks of this system were the oath and the assumption that a fear of both divine punishment and prosecution for perjury would deter most prosecution witnesses from lying.¹⁴ To protect both the integrity of trials and the souls of would-be perjurers, judges barred all testimony from any witness who might be interested in the outcome of a proceeding.¹⁵ This was the source of the bar on the defendant's testimony, and it likewise extended to other witnesses, such as both plaintiffs and defendants in civil cases, or others whose financial or proprietary interests might be affected by an outcome. And to give further security to the trustworthiness of testimony under oath (and further defense of souls that might be put in peril by perjury), judges also barred any testimony by persons thought to be resistant to the oath's deterrent powers, including felons, forgers, excommunicated persons, and infidels.¹⁶

Why, you might wonder, would judges and lawmakers persist in trusting the oath so heavily even as they knew that perjury would certainly occur from time to time? One likely explanation is that this stemmed from a general worry that judges and jurors were poorly equipped to decide questions of credibility. A broader survey of evidence law from the period shows that judges devised many rules to prevent conflicts of credibility from arising in the first place.¹⁷ In civil cases, judges developed rules designed to replace (potentially perjured) oral proof with formalized writings, such as the parol evidence rule,

14. See GILBERT, *supra* note 10, at 4 (opining that there is so much "Faith and Credit to be given to the Honesty and Integrity of credible and disinterested Witnesses, attesting any Fact under the Solemnities and Obligation of Religion, and the Dangers and Penalties of Perjury" that we "cannot have any more Reason to be doubted than if we ourselves had heard and seen it").

15. *Id.* at 122-28 (describing the many bases for declaring a witness to be "interested").

16. *Id.* at 121-23 (describing the types of persons "excluded from Testimony for want of Integrity").

17. See George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 580 (1997) (noting that the legal system of the period "sought to avoid . . . credibility conflicts altogether").

the statute of frauds, and the best evidence rule.¹⁸ They likewise sought to avoid the need for explicit credibility determinations regarding oral proof. For instance, when one witness testified to seeing an event, but another testified that they were present at the scene but did not see it occur, jurors were typically instructed that the event *must* have occurred but that the second witness simply failed to see it. As one court put it, “One affirmative oath is better than Forty Negative Oaths.”¹⁹ And when credibility conflicts were unavoidable, judges also developed purely formal means for their resolution, rather than allowing the jury to engage in a discretionary weighing of trustworthiness. Thus, when some witnesses swore that they saw something happen, while others swore that they saw something else happen, a judge might instruct the jury that it should find in favor of whichever party had called a greater number of witnesses on the point.²⁰

Against this background, it should come as no surprise that the primary question judges would ask about an out-of-court statement was whether it had been made under oath. In Geoffrey Gilbert’s 1754 treatise, *The Law of Evidence*, there are extensive passages dedicated to the complex documentary proof rules or the rules barring interested witnesses, felons, and atheists from giving testimony.²¹ By contrast, the book gives only scattered and cursory treatment to the admissibility of out-of-court statements. At one point, he suggests that “mere Hearsay is no Evidence” to the extent that it is not made under oath.²² But he elsewhere gives the lie to this seemingly strong principle, suggesting that hearsay may be admissible under a variety of circumstances, such as whenever it can corroborate the testimony of a live witness,²³ or when it was taken during a pretrial examination or preserved as part of a recorded

18. See generally John H. Langbein, *The Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1169, 1173–74 (1996) (noting the centrality of rules requiring the production of written evidence in the law of the period).

19. Fisher, *supra* note 17, at 626 (relating the trial of Slingsby Bethel in 1681 as the “earliest example” on record in which judges applied this rule, but concluding that it likely predated that case); GILBERT, *supra* note 10, at 110–11 (restating and defending this rule).

20. Fisher, *supra* note 17, at 652–54 (collecting authorities in support of this “numerological rule”).

21. See generally GILBERT, *supra* note 10.

22. *Id.* at 152.

23. *Id.* at 153.

deposition in an earlier case between the same parties.²⁴

And indeed, hearsay was frequently admitted during criminal trials in this period, with concerns over this practice rising only slowly and inconsistently over the course of the seventeenth and eighteenth centuries. At the famous trial of Sir Walter Raleigh for treason in 1603, no witness appeared in person. Instead, the prosecutor proved his case using prior statements made by witnesses during examinations by the Privy Council.²⁵ Walter objected eloquently, but the members of the court held that this was consistent with extant law.²⁶ In more ordinary felony cases, justices of the peace were required to examine suspects and witnesses under oath, based on a pair of statutes passed during the reign of Queen Mary (often referred to as the “Marian statutes”).²⁷ If a witness subsequently became unavailable to testify at trial, a clerk might then read their examination answers in lieu of live testimony, even if the defendant had not been present at the time of the examination.²⁸

Judges began to develop the principle that confronted testimony was preferable to unopposed hearsay based on two sets of judicial crises, one in England and the other in the Colonies. The crisis in England had to do with an ongoing and highly visible scandal of perjury in the courts. The most notorious incident was the “Popish Plot” scandal in the latter half of the seventeenth century, in which Titus Oates testified under oath that he had been approached in London by a group of Jesuits in a scheme to assassinate King Charles II.²⁹ Despite the fact that a large number of other Jesuits took the stand at these trials to testify that Oates was in France, not London, at the time when these events allegedly transpired, the law of the time did not permit defense witnesses to give sworn testimony, and judges regularly instructed jurors that they could not give unsworn testimony greater weight than statements made

24. *Id.* at 44–46, 62–64.

25. 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS, *supra* note 9, at 15–19.

26. *Id.* at 16–17.

27. *See* Crawford v. Washington, 541 U.S. 36, 43–44 (2004).

28. *See* Langbein, *supra* note 10, at 82 (noting that these examinations were routinely read into evidence by the clerk into the latter half of the seventeenth century); GILBERT, *supra* note 10, at 100 (noting that this practice was still permissible in felony cases based on the statutory authority, but had been abolished in misdemeanor cases by *King v. Paine*, 87 Eng. Rep. 584 (1696)).

29. *See* Fisher, *supra* note 17, at 619–20.

under oath.³⁰ As a result, fourteen of the alleged conspirators were convicted and hanged before sentiment began to turn against Oates, leading to his own conviction for perjury and the abolition of the rule against sworn defense witness testimony in treason cases in the Treason Act of 1696.³¹

But the problem would grow worse, not better, over the next century, due to the passage of a variety of statutes offering rewards to private citizens who detained and prosecuted a variety of capital felonies, beginning with highway robbery. In repeated incidents, such as the notorious Macdaniel scandal in 1755, private citizens acting as prosecutors would accuse and detain innocent men for committing felonies, offer perjured testimony against them, obtain their execution, and then collect a cash reward.³²

It was thus becoming all too apparent that neither the oath, nor the system of interested witness exclusions, nor the existing protections offered to criminal defendants were adequate to ensure the protection of factually innocent people. As a result, a combination of statutory reforms and judicial leniency slowly extended to defendants the right to be represented by attorneys at trial, and these lawyers began to persuade judges to cast a stricter eye towards the proof that private prosecutors typically had offered.³³

Colonial attorneys, many of whom were trained in England before emigrating during this period, would have had a keen memory of the dangers of uncontrolled perjury. But their situation was somewhat different, given that the Colonies had followed the Continental practice of appointing public prosecutors rather than leaving it to private citizens to initiate cases.³⁴ Their own crisis, therefore, did not come in the form of private perjuries motivated by greed or vengeance. Rather, they discovered the grave harms that could arise when biased or corrupted *officials* were willing to abuse their power in order to punish as many people as possible.

30. *Id.*

31. *Id.* at 615, 620–22.

32. Langbein, *supra* note 10, at 106–14.

33. See Langbein, *supra* note 9, at 309–13 (describing the extension of the right to defense counsel in criminal cases, starting with the Treason Act of 1696 but not fully completed in English practice until 1836).

34. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 99 (1995) (noting that “[b]y the time of the Revolution, public prosecution in America was standard”).

The gravest incident of this kind occurred during the controversy surrounding revenue collection under the Stamp Act and subsequent measures in the 1760s.³⁵ Colonists disliked paying the new taxes, and they especially disliked the means by which violations of the act were to be resolved.³⁶ Hoping to induce ample enforcement of the Act, Parliament turned to a familiar but problematic tool, offering informers “a moiety of forfeitures” while allowing them to keep their identities secret from those accused of violations, creating a serious risk of perjured accusations.³⁷ Seeking to avoid nullification by colonial juries, Parliament ordained that violators should be tried, not in the ordinary colonial courts, but instead at the Admiralty courts, which up until that point had been used only for offenses occurring on the high seas.³⁸ These trials followed a civil law mode of practice. Trial was by judge rather than by jury, there was heavy use of ex parte depositions, and a party had no right to be present during the oral examination of adverse witnesses.³⁹ Unable to give testimony under oath, unable to cross-examine adverse witnesses or sometimes even know their identities, and facing a decision-maker whose loyalties lay quite clearly with the Crown, the defendants no doubt found that the outcomes were typically a foregone conclusion.

It should come as no surprise, therefore, that when the newly freed colonists subsequently drafted bills of rights for their own state and then federal constitutions, the right to confront adverse witnesses, although of relatively recent vintage, was regularly included.⁴⁰ And this history makes it quite plain that the drafters would have found it obvious that the Clause should bar prosecutors from deliberately substituting hearsay proof for the live and confronted

35. See Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 396–98 (1959) (describing the Stamp Act’s unusual procedural provisions and the colonists’ response).

36. See, e.g., John Adams, *Instructions on the Town of Braintree on the Stamp Act*, 1 PAPERS 141–42 (Oct. 10, 1765) (labelling the “alarming Extension of the Power of Courts of Admiralty” as the “most grievous Innovation of all”).

37. See Pollitt, *supra* note 35, at 396.

38. *Id.* at 396–97.

39. *Id.* at 397. Pollitt notes that “[t]here is only one recorded case in the Rhode Island Vice-Admiralty Court where the advocates carried on a sort of cross-examination.” *Id.*

40. See *Crawford v. Washington*, 541 U.S. 36, 48 (2004) (collecting authorities).

testimony of an available witness. What is less clear is how they would have viewed the broader range of situations to which the Clause might possibly apply.

The then-existing caselaw⁴¹ was far from consistent on what should be done in cases where the party who had made an out-of-court statement was now unavailable to offer in-court testimony. For example, in the relatively early case of *King v. Paine*, the King's Bench had declared that a prosecutor could not introduce an ex parte deposition taken by a mayor acting as a justice of the peace in a misdemeanor case, even though the witness who had given the deposition was dead at the time of trial.⁴² But under the Marian statutes the justices of the peace were required to prepare written examinations of witnesses in felony cases, and such documents continued to be introduced in felony cases for some time when the witnesses were unavailable.⁴³ Use of this practice appears to have been declining towards the close of the eighteenth century, but at the same time courts were allowing "dying declarations" by deceased crime victims to be used as substantive evidence of guilt, even when the defendant had not been present at the time the statement was made,⁴⁴ and also allowed hearsay statements when the defendant had engaged in wrongdoing that made the witness unavailable to testify.⁴⁵ Multiple cases approved admission of res gestae hearsay statements,⁴⁶ or the hearsay statements of children who would not be permitted to

41. I am here referring to reported common law cases from England, which were regularly discussed and followed by colonial and post-Revolutionary courts. See *Crawford*, 541 U.S. at 49 (discussing the reliance on English common law authorities in early U.S. caselaw).

42. *King v. Paine*, 87 Eng. Rep. 584 (1696).

43. See, e.g., *King v. Westbeer*, 168 Eng. Rep. 108, 109 (1739) (admitting an accomplice's deposition implicating a defendant, which had been made under oath before a justice of the peace, on the basis that the accomplice had died before trial and was therefore unavailable to testify).

44. See, e.g., *King v. Woodcock*, 168 Eng. Rep. 352, 353 (1789); *King v. Reason*, 16 How. St. Tr. 1, 24–38 (K. B. 1722).

45. See, e.g., *Lord Morley's Case*, 6 How. St. Tr. 769, 771 (H. L. 1666).

46. See Michael J. Polelle, *The Death of Dying Declarations in a Post-Crawford World*, 71 MO. L. REV. 285 (2006) (collecting and summarizing several early res gestae cases). Courts sometimes admitted such statements against a criminal defendant, even when there was no confrontation opportunity and when the statements were made to the authorities. See, e.g., *Regina v. Vincent et al.*, 9 C & P 275 (1840) (admitting hearsay statements by persons who had complained to the police that they were alarmed by meetings that the defendants had held, in a case charging the defendants with organizing an unlawful assembly).

give sworn testimony in court.⁴⁷ And many trial judges during the 1700s would take a remarkably casual approach towards hearsay evidence, admitting it freely in many cases even after advocates had objected, and then relying on cautionary instructions to prevent a jury from giving it undue credit.⁴⁸

What are we to make of this confusion, when considering how to interpret the cryptic command requiring that defendants “be confronted with the witnesses against [them]?”⁴⁹ One reading, adopted by the Supreme Court in its recent line of cases, is to try and synthesize these cases and treat them analogously to a modern code of evidence.⁵⁰ On this reading, any hearsay exceptions not already recognized are impliedly excluded, leaving the principle of confrontation as subject only to those exceptions enumerated before 1791. But on the other hand, another sensible reading acknowledges that these were principles being developed, one case at a time, by common law judges in a relatively new field. It may be anachronistic to conclude that such judges intended their statements to apply in a rigid and rule-like way to new cases presenting new kinds of problems. Moreover, it requires an even greater leap to assume that those who drafted or ratified the Bill of Rights had any shared understanding regarding the extent to which the Clause had, by its own force, superseded any further developments in hearsay law within its sphere. All we can say with confidence is that they would have all agreed readily that it outlawed the abusive practice they had endured under the Stamp Act, in which those charging violations could freely substitute written depositions or *ex parte* oral examinations by the judge in place of live testimony subject to cross-examination.

B. Contemporary Confrontation Clause Doctrine

In contrast to the confusion surveyed above, modern

47. See Langbein, *supra* note 9, at 294 n.37 (noting Hale’s recognition that hearsay accusations by child victims were frequently received as evidence against defendants).

48. *Id.* at 301–02 (relating relevant examples from the Old Bailey Session Papers).

49. U.S. CONST. amend. VI.

50. See, e.g., Crawford v. Washington, 541 U.S. 36, 54 (2004) (stating that the amendment is most naturally read as incorporating the entire “right of confrontation at common law, admitting only those exceptions established at the time of the founding”).

Confrontation Clause doctrine is relatively clear and comprehensive. Although a detailed survey would exceed what I can provide in a brief essay, I will sketch an outline here for unfamiliar readers.

First, under *Crawford v. Washington*, the modern Confrontation Clause is implicated only when a prosecutor offers *testimonial* evidence against a criminal defendant.⁵¹ In this context, a statement is clearly testimonial if it is either *actual* prior testimony (such as that given before a grand jury or in a prior case)⁵² or a formalized substitute for such testimony (such as an affidavit or a deposition taken under oath).⁵³ Furthermore, whether sworn or unsworn, criminal confessions and other answers given in response to police interrogation during an investigation are likewise testimonial.⁵⁴ By contrast, it is clear that hearsay statements made with no connection to any current or anticipated criminal prosecution, such as ordinary business records, are not testimonial.⁵⁵ Between these relatively clear examples lies a gray area, in which the court has frequently attempted to delineate a line based on the purpose for which statements are made and the extent to which law enforcement agents were involved in their making.⁵⁶

Second, in modern doctrine, the Confrontation Clause is *violated* only when a prosecutor offers a testimonial statement under circumstances that deny a criminal defendant a legitimate opportunity to cross-examine the person who made the statement.⁵⁷ Thus, unlike the hearsay rule in evidence law, the Confrontation Clause has no application to prior statements made by witnesses who take the stand and are available for cross-examination.⁵⁸ Similarly, some statements made during depositions or in prior cases may be admissible against a defendant, provided that the defendant had a sufficient motive and opportunity to cross-examine the

51. *Id.* at 68.

52. *Id.*

53. *See id.* at 51–52; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

54. *Crawford*, 541 U.S. at 68; *Davis v. Washington*, 547 U.S. 813, 829–30 (2006).

55. *See Crawford*, 541 U.S. at 56.

56. *See, e.g., Ohio v. Clark*, 135 S.Ct. 2173, 2179–82 (2014).

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

58. *Id.* at 61 n.9; *California v. Green*, 399 U.S. 149, 162 (1970).

declarant at that time.⁵⁹

Third, the Court has thus far recognized only two genuine exceptions to the principles above. First, based on its early recognition in English case law before the Clause was adopted, the Supreme Court has suggested (but never yet held) that statements falling within the dying declaration exception could be used even if they are testimonial and not subject to cross-examination.⁶⁰ Similarly, in *Giles v. California*, the Court made it clear that the exception for forfeiture by wrongdoing would similarly be “grandfathered in” on the basis of its recognition in pre-adoption cases.⁶¹

Finally, when the confrontation right has been violated by a prosecutor’s proffer of unfronted testimonial hearsay that is not subject to either of those two exceptions, the Court has consistently held that exclusion of that evidence is the proper remedy.⁶² It has not, thus far, explored the possibility that an exclusionary remedy might not be appropriate in all cases, despite the frequent recognition of that principle in other areas of constitutional criminal procedure.⁶³ Furthermore, the Court has struggled to articulate consistent doctrine in some areas, such as the way the Clause should be applied to forensic expert reports.⁶⁴ And a significant number of justices have suggested

59. *Crawford*, 541 U.S. at 57; *Mattox v. United States*, 156 U.S. 237, 244 (1895).

60. See, e.g., *Giles v. California*, 554 U.S. 353, 358–59 (2008); *Crawford*, 541 U.S. at 56 n.6.

61. *Giles*, 554 U.S. at 373; *Reynolds v. United States*, 98 U.S. 145, 159 (1879).

62. E.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009); *Davis v. Washington*, 547 U.S. 813, 829–30 (2006); *Crawford*, 541 U.S. at 68–69.

63. See, e.g., *Perry v. New Hampshire*, 565 U.S. 228, 232–33 (2012) (applying that principle in the context of Due Process Clause limits on the admissibility of unreliable identifications of a criminal suspect by an eyewitness); *United States v. Leon*, 468 U.S. 897, 907 (1983) (applying that principle to limit the circumstances under which courts should suppress evidence based on prior violations of the Fourth Amendment’s search and seizure protections).

64. See, e.g., *Williams v. Illinois*, 567 U.S. 50, 55–60 (2012) (holding that a lab analyst’s prior statements could be admitted because they were not accusatory and were not offered for their truth); *id.* at 93–99 (Breyer, J., concurring) (setting forth a very different rationale for the same result, premised on the notion that safeguards within an accredited laboratory provide an alternate means of assuring that unfronted statements are reliable); *id.* at 110–13 (Thomas, J., concurring) (providing yet another way to reach the same result, based on the fact that the statements at issue were unsworn and informal); *id.* at 118–21 (Kagan, J., dissenting) (writing on behalf of four justices to reject the majority’s result, and noting drily that “in all except its disposition,” the “plurality opinion” “is a dissent,” given that “[f]ive Justices specifically reject every aspect of its reasoning and every paragraph of its explication”).

that it may be a mistake to limit the Clause's exceptions to those recognized in pre-1791 common law.⁶⁵

II. THE POWER (AND LIMITS) OF THE CLAUSE AS A MEANS OF DETECTING LIES AND OTHER TESTIMONIAL DEFICIENCIES

At the time the Confrontation Clause was adopted, there had been a steady surge of support for the principle that unconfrosted testimony was unreliable and likely to give rise to false convictions. When we reassess the utility of the principle from a modern standpoint, however, the picture is far less clear. Both the changing nature of the trial process and emerging social science evidence have undercut some (but not all) of the justifications prevalent at the time of the Clause's adoption. This Part will consider the efficacy of confrontation as a cure for perjury and other testimonial deficiencies, and explain why the costs of an exclusionary remedy often outweigh its benefits.

A variety of concerns were raised by courts and treatise writers about unconfrosted hearsay testimony when the courts were first developing rules restricting its admissibility. First, there was Gilbert's worry, discussed above, that hearsay testimony was frequently given in unsworn form.⁶⁶ Second, some writers expressed a concern that would-be perjurers would find it easier to tell a lie in private than in the full glare of open court, with the accused defendant looking on.⁶⁷ Third, several writers believed that juries would be more likely to be deceived by out-of-court statements than in-court testimony. There were several reasons why juries might be misled: they would not be able to view the declarant's demeanor while

65. See *Giles*, 554 U.S. at 379–80 (Souter, J., concurring) (writing for himself and Justice Ginsburg, and arguing that the historical record is “not calibrated finely enough to answer the narrow question here,” but agreeing that the result is consistent with the historical record and equitably sound); *id.* at 402–03 (Breyer, J., dissenting) (writing for himself, Justice Stevens, and Justice Kennedy, and suggesting that it is a mistake to assume that common law judges would have *rejected* later-arising hearsay objections merely because no lawyer had yet argued for their creation).

66. GILBERT, *supra* note 10, at 152–53.

67. See, e.g., 3 BLACKSTONE, *supra* note 12, at 373 (noting that “a witness may frequently depose that in private, which he will be ashamed to testify in a public solemn tribunal”); SIR MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 163 (Univ. of Chi. Press, 1971) (reprinted from the third edition, originally published in 1739) (noting that “in private . . . oftentimes Witnesses will deliver that which they will be ashamed to testify publicly”).

speaking; neither the examining judge nor the accused could ask clarifying questions that might encourage a witness to either admit a falsehood or clarify an ambiguous statement; and the jury would not have the opportunity to view the witness's "Quality, Carriage, Age, Condition, Education, and Place of Commorance," which were commonly thought to be relevant to the credit that testimony should receive.⁶⁸

The first concern—that out-of-court statements lack the security of oath—gives little support for the Confrontation Clause, at least given modern assumptions and social realities. To begin with, some of the hearsay statements to which the Clause is currently applied, such as a statement given under oath during a formal interrogation session, do in fact gain whatever trustworthiness such oaths can provide.⁶⁹ Conversely, applying the Clause will not necessarily prevent juries from hearing unsworn statements.⁷⁰

And even when the Clause would actually work to preclude the use of unsworn statements, we may still feel less sure than Gilbert that sworn testimony is always more reliable than unsworn statements. In the age in which Gilbert was writing, it was still common to presume that sworn testimony from an uninterested and unimpeached witness must be true, but in the present age we tend to take a more particularized view of credibility. The sworn testimony of a jailhouse informant who is getting a killer deal in exchange for their testimony might well be less trustworthy than an unsworn statement from a disinterested bystander witness, for example. What is more, there is no particular reason to think that juries do not understand the impact of an oath on the credibility of a witness's testimony. Now that we place more trust in juries to judge each witness's credibility for themselves, it would be odd to say that they could untangle the complicated threads of a witness's bias but that the difference between sworn and unsworn statements would boggle them. Lastly, the

68. HALE, *supra* note 67, at 164; *accord* 3 BLACKSTONE, *supra* note 12, at 374.

69. *See, e.g.*, FED. R. EVID. 804(b)(3) (admitting statements against interest, which are often made during formal police interrogation following arrests). *Cf.* Crawford v. Washington, 541 U.S. 36, 40, 68–69 (2004) (holding that the admission of a statement made under a parallel state law provision violated the Confrontation Clause).

70. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 817–19, 828–29 (2006) (holding that an unsworn statement, made during a 911 call, was admissible against a criminal defendant, even though the declarant did not appear to testify at trial).

requirement of an oath might indeed deter some deliberate lying,⁷¹ but it will have little to no deterrent effect against witnesses who believe they are telling the truth, but whose memories are either simply mistaken or else reshaped through suggestion during the lengthy pretrial process.⁷²

The second worry—that would-be perjurers might find it easier to lie in private than in open court, in the full view of the accused defendant—is worth more credit. First, note that this concern does represent the one scenario in which the oath may make a difference, because someone who knows they are telling a lie may prefer to do so in a way that avoids the consequence of a potential perjury conviction.⁷³ To avoid this danger, a potential perjurer might seek out opportunities to make unsworn statements out-of-court that might implicate the defendant, in the hope that he can accomplish his objective with less personal risk. Second, both common sense and some experimental evidence suggest that emotions of guilt and shame may make it harder to tell a lie that will cause someone else harm when that person is present.⁷⁴ Third, there may be something to the notion that the publicity of an encounter likewise makes it feel more awkward to tell serious lies.⁷⁵ Fourth, many people may have a preference to lie by omission, “leaving things out” in order to leave a false impression rather than relating out-and-out false facts. For witnesses with such a preference, cross-examination may be daunting, because it may

71. See discussion *infra* notes 73–76 and accompanying text.

72. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 99–104 (2012) (describing the ways that witnesses can unconsciously incorporate false information into their recollections over time, either spontaneously or through deliberate suggestion).

73. Cf. 18 U.S.C. § 1621 (2012) (listing, among the elements of the crime of perjury, the requirement that the defendant must have “taken an oath . . . that he will testify . . . truthfully”).

74. Cf. Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 *HUM. REL.* 57 (1965) (finding that participants were far less willing to intentionally give harmful electric shocks to another person when they were in close proximity with that person than when they could cause harm without observing the results).

75. See Olin Guy Wellborn III, *Demeanor*, 76 *CORNELL L. REV.* 1075, 1092 (1991); see also Melissa Bateson et al., *Cues of Being Watched Enhance Cooperation in a Real-World Setting*, 2 *BIOLOGY LETTERS* 412 (2006) (finding that merely being exposed to a poster depicting eyes made people more likely to exhibit generous behavior in their workplaces). *But cf.* Keisuke Matsugasaki et al., *Two Failed Replications of the Watching Eyes Effect*, 6 *LETTERS ON BEHAV. EVOLUTIONARY SCI.* 17 (2015) (failing to replicate this finding in two controlled experiments, using Japanese undergraduate students as participants).

force them to address subjects that they would rather avoid.⁷⁶

Finally, one of the hardest things about lying is the cognitive demands of doing so while maintaining consistency with facts that might otherwise reveal the deception. If lying is cognitively demanding under ordinary conditions, it should generally be harder when one must prepare to address whatever topics an advocate might raise during cross-examination. Unfortunately, the modern practice of allowing attorneys to prepare witnesses for cross-examinations, even to the point of rehearsing their testimony, may undercut this last value.⁷⁷ Even if witnesses would otherwise fear telling lies out of a worry that they could not keep up with the cross-examination questions without betraying their guilt, this worry might be assuaged through enough practice sessions with a friendly attorney. Still, not every case has high enough stakes to warrant that level of preparation, so this last factor may still suggest that there is some additional deterrent value based on a fear of slipping up during cross-examination, especially in cases where the witness would not normally receive much coaching.

A third concern about out-of-court statements is that a jury will have less ability to ascertain their truthfulness than if the statement had been made in their presence in the courtroom. Some of the foundations of this view in the era preceding the Clause's adoption were repugnant. In particular, it was common to assume, based on little evidence, that a witness's high social standing and overall good character in the community were predictive of their honesty, while the lack of those attributes was indicative of a propensity to lie.⁷⁸ Some vestiges of this view survive in modern day evidence law,⁷⁹ but they have little support in social science or modern common sense, and do not deserve our further attention.

A related worry was that a juror viewing a live witness

76. See SIMON, *supra* note 72, at 181.

77. *Id.*

78. See HALE, *supra* note 67, at 164 (referring to the value of letting a jury see the witness's "Quality, Carriage, Age, Condition, Education, and Place of Commorance" as a means of deciding how much credit to accord to their testimony); accord 3 BLACKSTONE, *supra* note 12, at 374; see generally Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017) (relating the troubled history of the use of social status as a proxy for competence and credibility).

79. See Simon-Kerr, *supra* note 78, at 187–207 (illustrating several remnants of these ideas in current evidence doctrine and practice).

give perjured testimony might notice the deception through clues in their demeanor and behavior on the stand, whereas they might be deceived by that testimony if it came in in the form of a hearsay statement.⁸⁰ Unfortunately, after extensive testing by psychological researchers, this view is unsupported. Although many people believe they can spot liars, both laypeople and experts barely outperform random guessing when they try to detect lies based on demeanor cues.⁸¹ In fact, when people are asked what cues they look for to detect liars, and their answers are compared with the behavior of people who are actually lying, it turns out that common sense misses the mark.⁸² For instance, people expect liars to visibly reveal their nervousness through cues such as reduced eye contact and increased fidgeting, but in fact liars are typically able to consciously control such cues, and thus they make the same amount of eye contact, and fewer hand movements, when compared with truth-tellers.⁸³ Given the mismatch between what people look for in liars and what they actually do, it should not be surprising that attending solely to these visual cues of lying actually *worsens* lie detection accuracy, by comparison with hearing their speech or reading their words in the form of a transcript.⁸⁴ And the situation may be worse in the courtroom than in the laboratory, because inducing *stress* or motivating a witness to be believable tends to reduce the

80. See HALE, *supra* note 67, at 163 (observing that “many times the very Manner of a Witness’s delivering his Testimony will give a probable Indication whether he speaks truly or falsely”); accord 3 BLACKSTONE, *supra* note 12, at 374 (opining that “yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it”).

81. See Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 229–30 (2006) (conducting a meta-analysis of over 200 deception studies, and concluding that both experts and non-experts have accuracy rates below 55 percent).

82. Siegfried L. Sporer & Barbara Schwandt, *Moderators of Nonverbal Indicators of Deception: A Meta-Analytic Synthesis*, 13 PSYCHOL. PUB. POL’Y & L. 1, 24–27 (2007).

83. *Id.* at 20–21, 25–26.

84. See Bond, Jr. & DePaulo, *supra* note 81, at 225 (finding that participants could detect lies just as readily when reading a transcript as when viewing an audiovisual presentation, but that their performance actively declined when they were given only a video of a person speaking to evaluate); cf. Aldert Vrij, *Criteria-Based Content Analysis: A Qualitative Review of the First 37 Studies*, 11 PSYCHOL. PUB. POL’Y & L. 3, 22–23 (2005) (reviewing field and laboratory studies of a content-focused review of transcripts produced through a semi-structured interviewing technique, and finding average accuracy rates in the low seventieth percentile range for detecting truthful and deceptive statements).

rate at which observers believe truthful testimony.⁸⁵ Since courtroom witnesses typically find the experience stressful and wish to be believed, this may lower lie detection accuracy even below what is found in the laboratory—or at least, counteract some of the advantages that jurors obtain through gaining more information against which to test courtroom accounts. To put it plainly, admitting hearsay will not reduce jurors' ability to detect lies through demeanor evidence, but rather, it may help them do a better job by focusing their attention on the content of the words rather than on the unreliable demeanor cues.⁸⁶

To be sure, we might still think that live testimony will help jurors detect deception, despite the fact that it involves misleading demeanor cues, if advocates were often able to convincingly demonstrate that witnesses were lying through cross-examination.⁸⁷ But this argument fares little better, especially under modern conditions of practice. When witnesses are planning to lie on the stand, they will be highly motivated to try and construct a coherent account, and to anticipate possible cross-examination questions and prepare to answer them. What is worse, even if they attempt to follow ethical rules that bar them from helping a witness commit perjury, lawyers may still unwittingly assist a perjurer in preparing to resist effective cross-examination, simply because they have no simple way of knowing which witnesses are truthful.⁸⁸ A zealous prosecutor who believes a defendant is guilty might easily convince themselves that even an unlikely story might

85. Bond, Jr. & DePaulo, *supra* note 81, at 227 (finding that motivated truth-tellers were believed less often than those who had no motive to be believed). They did not observe any pattern of decreased accuracy in their review of the studies that manipulated motivation, but this may be because such studies would typically include a balanced number of truths and lies for participants to detect, so that an increase in disbelief of liars balanced out the increased distrust of the truth-tellers in the overall accuracy ratio. If the real world trial process typically includes more truth-telling witnesses than deliberate perjurers (which seems to be a reasonable assumption), then we might expect a decrease in trust in truthful witnesses to lead to an overall loss in accuracy in deception-detection judgments.

86. See generally Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837–51 (2011) (arguing, for these and other reasons, that some decisions based on some forms of hearsay, such as deposition transcripts, are likely to produce more accurate outcomes than decisions based on live testimony).

87. See 3 BLACKSTONE, *supra* note 12, at 374 (noting that “the confronting of adverse witnesses” may provide opportunities for the discovery of truths that a witness might prefer to hide).

88. See SIMON, *supra* note 72, at 181.

be true, and then assist the witness in rehearsing that tale until it is fluent and convincing. And the defense attorney may find it hard to shake this confidence on cross-examination, laboring under conditions of information disadvantage, as they will be rationally reluctant to engage in aggressive cross-examination unless they can be assured that a witness will admit something of value.⁸⁹

What if we shift our attention from cases involving deliberate perjury to honest errors by witnesses? On the one hand, in such circumstances the value that the Confrontation Clause might bring in deterring misconduct gives us little benefit, because an honestly mistaken witness would have little reason to engage in stratagems giving rise to unconfrontable out-of-court statements. On the other hand, jurors may not be helped as much by a live confrontation with a mistaken witness as intuition might initially suggest. First, the live testimony of the witness at trial usually occurs long after the initial events in question, making it *more* susceptible to memory errors than statements made earlier. Second, jurors often use witness confidence as a proxy for the accuracy and reliability of their memories and perceptions, and stories told at trial are often rehearsed with an eye towards increasing their persuasive force, which can artificially boost the witness's confidence.⁹⁰ Moreover, even when this is not the case, the simple fact that the witness receives confirmatory feedback from the police or the prosecution may increase their confidence beyond what was felt initially, and their exposure to other evidence in the case (regardless of the source) might contaminate their memories in a way that makes inaccurate testimony harder to detect.⁹¹

Finally, there is a legitimate concern that unconfronted testimony, if ambiguous, may be given more weight than it deserves, particularly when follow-up questioning would expose the fact that the witness had less confidence than he expressed

89. *Id.* at 182.

90. *Id.* at 159–60 (noting that people commonly use features such as “richness of detail,” “consistency,” and “confidence” to assess the reliability of a witness’s memory, but that all of these lose some degree of diagnosticity due to the many suggestive influences that arise during the pretrial phase of a case); *see also* Wellborn III, *supra* note 75, at 1089 (noting that, in mock jury experiments, participants “are unable to do better than chance in distinguishing between accurate and inaccurate eyewitness identifications” and that those participants generally “accord inappropriate weight to witness confidence”).

91. *See* SIMON, *supra* note 72, at 159–60.

at that time, or was relying on surprisingly shaky foundations for his conclusions. But although this might make unconflicted and ambiguous statements *weaker* evidence than live testimony given in court, there is little reason to think that jurors are not able to rationally discount the probative force of out-of-court statements under such conditions. To the contrary, some experimental evidence suggests that jurors might properly apply credibility discounts to unconflicted hearsay statements,⁹² which undercuts any suggestion that admitting such statements is likely to result in a systematic increase in erroneous verdicts.

Thus, a brief survey of the reasons classically given for excluding unconflicted hearsay statements shows that some of these rationales are worth little credence in light of modern knowledge about jury reasoning and contemporary aspects of trial practice. In particular, there is little reason to think that the exclusion of unconflicted evidence will help juries better assess the credibility of witnesses. By contrast, the strongest of the historic rationales for the rule relies on its ability to deter deliberate deception, by forcing witnesses to make statements under oath in a high-stress situation where they cannot conveniently avoid facts that they would rather not discuss.

III. RESHAPING CONFRONTATION DOCTRINE TO BETTER DETECT LIES AND DETERMINE THE TRUTH

By its direct terms, the Confrontation Clause does not mandate that any evidence be excluded. Rather, it merely imposes a requirement that prosecutors permit their witnesses to be “confronted”—that is, cross-examined—by a defendant. In modern practice, the notion that all parties to a case have a right to cross-examine adverse witnesses has become so obvious that it rarely requires stating as a rule of trial

92. See, e.g., Justin Sevier, *Testing Tribe’s Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L. REV. 870, 923–24 (2015) (reporting the results of two mock jury experiments, in which participants both attended to potential weaknesses in hearsay testimony, and generally found that “jurors discount hearsay evidence in a systematic, defensible manner”). *But see* Amye Warren et al., *The Believability of Children and Their Interviewer’s Hearsay Testimony: When Less Is More*, 87 J. APPLIED PSYCHOL. 525 (2002) (finding that their participants found a child witness’s statement *more* convincing when reported as a hearsay statement by an adult than if they saw a video of the child’s own statements).

procedure.⁹³ As a result, modern application of the clause has focused primarily on its use as a tool for excluding evidence in situations where cross-examination cannot be secured. It is doubtful, however, that there was any broad consensus at the time of enactment that the exclusion of such evidence had been enshrined as a durable constitutional principle, rather than left up to the courts for common law development. In the remainder of this Part, I will first defend the notion that the Clause is best read as a requirement placed upon prosecutors to present any available witnesses to be cross-examined by the defense. I will then illustrate that this reading is quite consistent with the way that early authorities handled cases involving confrontation rights. Finally, I will consider situations involving hearsay statements by witnesses who are no longer available to testify. As I will explain, courts should exclude such statements only when doing so is likely to deter conduct designed to frustrate the ability of a defendant to confront adverse witnesses.

A. *Interpreting the Text of the Clause*

To begin with, consider the language of the Clause itself: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁹⁴ To a modern reader this construction might seem strangely passive, given that we would now speak of an accused’s positive right to cross-examine witnesses, but this phrasing is tied to the transitory moment in history when it was enacted. At the time these amendments were proposed, criminal trials were undergoing a slow transition from a proceeding in which the judge primarily examined the witnesses with the parties merely having the opportunity to suggest lines of questioning, towards a more adversarial style of proceeding in which the parties (or their attorneys, if they were lucky enough to have them) did the questioning themselves. Thus, in its origins the right to meet witnesses face-to-face was often framed passively, as when Sir Walter Raleigh demanded that the court “let [his] accuser come face to face, and *be deposed*.”⁹⁵ Thus, in his initial

93. Cf. FED. R. EVID. 611 (regulating the scope of cross-examination, without explicitly providing that any party has a right to cross-examine witnesses).

94. U.S. CONST. amend. VI.

95. 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS, *supra* note 9, at 19

draft of the amendments that became the Bill of Rights, James Madison largely copied the earlier provisions in many state constitutions that protected a right “to be confronted,”⁹⁶ and this language was left untouched (and undiscussed)⁹⁷ in the subsequent legislative maneuvering regarding the new amendments.

This language, by its plain terms, would have required that Raleigh’s accusers be produced during trial, thus righting what was regularly viewed as a historical injustice. More pertinently to the minds of the colonists, it also forbade a set of practices that had been greatly loathed by the colonists, which was the Stamp Act’s substitution of proof by affidavit, deposition, or ex parte examination for live witness testimony subject to cross-examination. Under the Act’s provisions, those who provided evidence of violations were promised a share of any forfeited property, and if they wished, the courts would keep their identities secret from their accusers.⁹⁸ They could give testimony either by written deposition or via a private examination with the fact-finding judge (who served at the King’s pleasure).⁹⁹ Under these conditions, frequent perjury was all but guaranteed, and the colonists rightly objected that this procedure would not fairly distinguish between the innocent and the guilty. With the newly adopted Confrontation Clause in place, the remedy would once again be simple: the prosecution must identify its witnesses and present their testimony in open court.

B. Early Colonial Authorities Treat the Clause as an Afterthought

Thus, from the historical vantage point, the primary purpose of the Clause would be to guarantee a right that now goes without question but was then situated on precarious footing. The core of this new right required that defendants get

(emphasis added).

96. See, e.g., Virginia Declaration of Rights § 8 (1776); Delaware Declaration of Rights and Fundamental Rules § 14 (1776); Vt. CONST. of 1777, ch. 1, X.

97. For example, during the House debates regarding what became of the Sixth Amendment, there was substantial debate regarding the content of the provisions for the vicinage from which a jury must be drawn and the nature of the compulsory process right. By contrast, no discussion of the Confrontation Clause is recorded in the minutes. See 5 ANNALS OF CONG. 753, 759–60 (1789).

98. See Pollitt, *supra* note 35, at 397.

99. *Id.*

an opportunity to get a face-to-face encounter with witnesses who could have been brought to court to testify but were kept away by prosecutors. The extension of the Clause's protections to exclude evidence by unavailable witnesses would have been, at most, an afterthought. And indeed, when one reads early American treatises describing the law of evidence, one is struck by the near absence of any reference to the Confrontation Clause as a basis for excluding testimony.

Consider Simon Greenleaf's three-volume evidence law treatise, published in the mid-1800s,¹⁰⁰ which represents the first systematic summary of the developing American law of evidence.¹⁰¹ There are three key portions of Greenleaf's treatise that are notable in determining the originally understood scope of the confrontation right. First, Greenleaf gives extensive treatment to the scope of the still-developing hearsay rule over the course of eight full chapters.¹⁰² At various points in this discussion, he addresses situations where a prior statement from a now-unavailable witness might be admitted, such as in the case of prior testimony by a person now deceased.¹⁰³ To the extent he maintains that such testimony is not admissible, he seems to rely on general principles of hearsay law and common law authorities, without any reference to constitutionalized confrontation protections at the state or federal level.¹⁰⁴ What is more, he does not indicate that this is a universal principle that trumps all other hearsay exceptions. Rather, he enumerates many forms of unopposed evidence as properly admissible, either in all cases or where the witness is unavailable, without offering any caveats regarding confrontation problems in criminal cases.¹⁰⁵ Even where he

100. See generally SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (5th ed., 1850).

101. See Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 369 (2010).

102. See generally GREENLEAF, *supra* note 100, at 126–299.

103. *Id.* at 212–22.

104. See, e.g., *id.* at 164 (stating that although it is subject to many exceptions, “the general rule of law rejects all hearsay reports . . . given by persons not produced as witnesses,” without making any distinctions between civil and criminal cases, or citing constitutional provisions as support for the proposition); *id.* at 166 (stating that unopposed prior *testimony* by an unavailable witness must be excluded, but relying on common law support for the proposition, rather than referencing the constitution) (emphasis added).

105. See, e.g., *id.* at 129–30 (discussing the admissibility of state of mind evidence, without regard to the availability of the witnesses); *id.* at 132–33 (discussing proof of pedigree by hearsay statements, even when the declarants

pays special attention to the fact that dying declarations may be admitted despite the absence of a confrontation opportunity, he makes no mention of this being due to an exception to any constitutional principle; rather, he merely voices it as a possible way in which existing doctrine might be defective as a matter of policy.¹⁰⁶ Likewise, although he identifies the need to protect the “right to cross-examine” as a motivation underlying the limited scope of the exception for prior testimony or depositions from deceased witnesses,¹⁰⁷ he once again makes no mention of any constitutional limitations, and his discussion suggests that the same common law principles apply in both civil and criminal cases.¹⁰⁸ Thus, Greenleaf’s extended treatment of the circumstances under which hearsay must be excluded *entirely ignores* constitutional protections for the right to confront witnesses, suggesting strongly that he did not view the two rights as closely intertwined.

At other points, Greenleaf turns his attention more directly to the confrontation right itself. In one section, he discusses the general *common law* right to cross-examine a witness called by an opposing party.¹⁰⁹ His treatment in this section makes no distinction between the scope of the right in civil or criminal cases, and cites both civil and criminal cases interchangeably.¹¹⁰ Nor does he suggest at any point that this right to cross-examine a witness might override generally applicable common law hearsay rules regarding the admissibility of out-of-court statements.

Finally, in a separate volume that focuses entirely on situations that arise only in criminal cases, he briefly turns his attention to the *constitutional* right of confrontation.¹¹¹ Whereas he devoted more than a hundred pages of analysis to the common law rule of hearsay and its exceptions, his discussion of the confrontation right is two pages long, suggesting that he viewed it as a comparatively simple provision. He describes Confrontation Clause rights in

were dead and thus beyond confrontation); *id.* at 150–51, 160–61 (discussing the admissibility of certain business records, including in cases where the person who made the record was now deceased).

106. *Id.* at 210–11.

107. *Id.* at 214.

108. *Id.* at 212–22.

109. *See id.* at 562–68.

110. *See id.*

111. *See* GREENLEAF, *supra* note 100, at 12–14.

opposition to the result in Raleigh's case, and the practice under the Marian statutes of admitting a witness's *ex parte* examination, taken by a magistrate, as secondary evidence in cases where first-hand testimony could not be obtained.¹¹² He then suggests that, although some states had similar statutes still in force at the time of his writing, the Constitution might require *exclusion* of such evidence in cases where no provision was made for cross-examination when the examination was taken.¹¹³ But he expresses the principle somewhat tentatively, citing only three cases in support of it, and he makes no suggestion that the confrontation principle would apply more generally to exclude otherwise admissible out-of-court statements whenever they could not be confronted. In short, the notion that the Confrontation Clause might limit otherwise applicable hearsay exceptions was expressed only once in Greenleaf's lengthy treatise, and only with respect to a single, mostly abolished, statutory hearsay exception.

Caselaw from the period is similarly ambiguous, regularly presenting the same limitation on the use of *ex parte examinations* or *depositions* in criminal cases, but rarely making it clear whether this was a constitutional limit or merely the invocation of a court's common law authority to define and develop the hearsay rule itself. Consider, as one example, the trial of Aaron Burr relating to his backing of a military expedition with the alleged aim of capturing and controlling parts of the Louisiana territory, which was presided over by Chief Justice Marshall, serving in his capacity as a Circuit Judge.¹¹⁴ The prosecutor in that case called a witness to testify as to an overheard statement by Harman Blennerhassett, which tended to implicate Burr.¹¹⁵ Chief Justice Marshall begins his discussion by citing "the rule of evidence which rejects mere hearsay testimony . . . [in] trials of a criminal *or* civil nature."¹¹⁶ He then gives a brief defense of the rule's importance, during which he states that it would make no sense to admit mere hearsay when "a declaration in

112. *Id.*

113. *Id.* at 13.

114. *United States v. Burr*, 25 Fed. Cas. 187 (C.C.D. Va. 1807).

115. *Id.* at 193. The opinion gives no indication that Burr was present when the statement was made, nor that he had an opportunity to confront Blennerhassett at some previous point. *See id.*

116. *Id.* (emphasis added).

court should be unavailing, unless made upon oath.”¹¹⁷ Likewise, he says that it would be strange “[that] 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.”¹¹⁸ But he makes no further mention of the constitutional right during his lengthy discussion of the admissibility of this hearsay statement, instead referring back to the “general rule” of hearsay exclusion and its “exceptions,” especially those applicable to statements by co-conspirators and agents.¹¹⁹ Although he never states the point directly, the reader is left with the firm impression that Marshall believed the issue at hand was a question regarding the scope of the common law hearsay exceptions and that the constitutional right to confront witnesses was a related but distinct principle.

Other cases, decided soon after the adoption of similar provisions in state constitutions, likewise seem to source the exclusion of unfronted hearsay by unavailable witnesses as a common law right rather than a matter of constitutional constraint. For instance, in *State v. Webb*, judges of the North Carolina Superior Court rejected the notion that a deposition taken in a prisoner’s absence could be used against him at trial, but they founded this ruling upon common law principles, making no mention of the confrontation right protected by the state’s constitution.¹²⁰ Likewise, in *Finn v. Commonwealth*, the General Court of Virginia considered the admissibility of testimony given in a prior case against a criminal defendant, by a witness who had now left the jurisdiction, and held that it could not be admitted.¹²¹ But in the course of this decision, the court rested its decision entirely on common law authorities, and it never mentioned that the right to confront accusers was protected by the Virginia Declaration of Rights.¹²² What is more, in *State v. Hill*, the Court of Appeals of South Carolina considered another case involving the deposition of a witness who died before trial in which the defendant was not present at

117. *Id.*

118. *Id.*

119. *Id.* at 193–95.

120. *State v. Webb*, 2 N.C. 103 (N.C. 1794). North Carolina’s original constitution provided defendants the right “to confront the accusers and witnesses with other testimony.” N.C. CONST. of 1776, Declaration of Rights VII.

121. *Finn v. Commonwealth*, 26 Va. 701, 706–08 (Va. 1827).

122. *Id.*; cf. Virginia Declaration of Rights § 8 (1776).

the time of the deposition.¹²³ The analysis follows a familiar pattern, citing common law authorities, and reaches the same result as *Webb* and *Finn*, despite the fact that South Carolina's constitution contained no protection whatsoever for the confrontation right.¹²⁴ Thus, although the pattern was not without exception,¹²⁵ the overall picture one gets from reviewing cases decided soon after the adoption of state law confrontation rights mirrors what we saw from the *Burr* case. Questions involving the admissibility of out-of-court statements were typically analyzed by reference to the common law scope of the hearsay rule, and the addition of a confrontation right in state constitutions seems to have played no apparent role in the analyses.

Thus, both the text of the Confrontation Clause itself, and its early use in caselaw and treatise authorities, seem to suggest that it was understood to be a narrow provision preventing prosecutors from examining witnesses out-of-court and withholding their production at trial, rather than a broader attempt to constitutionalize the protections of the hearsay rule for unopposed testimony. Richard Friedman has argued that this conclusion is untenable because the Clause speaks of the need to confront "the witnesses" rather than "the available witnesses."¹²⁶ But this point misses the forest for the trees. To be sure, the Clause would be clearer if it included such language. Nonetheless, the Clause commands only that the defendant "be confronted" with adverse witnesses, and it does not, by its own terms, give any instructions regarding the admissibility of out-of-court statements when that command cannot be obeyed. Nor do we see any clear pattern from early authorities of treating the Clause as an important authority to be construed when such cases arose. Looked at in context, the Clause can best be understood as a narrow remedy to a particular and recently experienced evil, rather than as a broad attempt to constitutionalize a still-evolving field of common law. This construction makes it much easier to comprehend why so few commentators or courts would be giving the Clause much thought when discussing

123. 20 S.C.L. 607, 608–10 (S.C. Ct. App. 1835).

124. *Id.*

125. *Cf.* *Johnston v. State*, 10 Tenn. 58, 59 (Ct. Err. & App. 1821) (analyzing a similar question with reference to Tennessee's constitutional right "to meet the witnesses face to face").

126. *See* Friedman, *supra* note 13, at 1034–35.

hearsay law; like the Third Amendment, it was seen as proscribing an abusive royal practice that colonial authorities had no interest in resurrecting.

C. Addressing Extrajudicial Conduct Designed to Undermine the Confrontation Right

I am not the first to come to the conclusion that the Confrontation Clause requires the production of available witnesses but does not *directly* require the exclusion of hearsay statements from unavailable declarants.¹²⁷ Critiquing prior versions of this position, Friedman also suggested that allowing the testimony of a witness who was made unavailable by prosecutorial misconduct would severely undercut the Clause's utility.¹²⁸ He likewise suggested that it would be improper to let a jury rely on testimony when a witness refused to answer cross-examination questions, or died before cross-examination could occur, and he suggested that the Clause must analogously prohibit unopposed hearsay even when the witness becomes unavailable due to unforeseeable accidents.¹²⁹ It might seem to be an adequate response to say that such things can, and should, be prohibited by the evidence rules,¹³⁰ at least to the extent that the statements seem to be unreliable. Nonetheless, we could still worry that state laws might give inadequate protection in such situations, and thus undermine the values the confrontation right is designed to further.

Happily, there is a middle position that can fend off the worst of such abuses, while still leaving a clear demarcation between the proper roles of confrontation rights and hearsay rules. In analogous contexts, the Supreme Court has promulgated prudential exclusionary rules designed to deter

127. The earliest similar argument can be traced to Justice Harlan's concurring opinion in *California v. Green*, in which he suggested that either the Confrontation Clause itself, or at least its application to the States via the Due Process Clause, should do no more than bar the state from refusing to produce an available witness. See 399 U.S. 149, 172–74 (1970); accord *Graham C. Lilly, Notes on the Confrontation Clause and Ohio v. Roberts*, 36 FLA. L. REV. 207, 213–15 (1984) (briefly suggesting a similar approach). My own theory goes a bit further than Justice Harlan's, however. As I will discuss below, I maintain that the Supreme Court could justifiably go further than this, and choose to bar the use of some unavailable witness hearsay as a means of deterring prosecutors or witnesses from undermining the Clause's core protections.

128. See Friedman, *supra* note 13, at 1035.

129. *Id.*

130. See *Green*, 399 U.S. at 174 (Harlan, J., concurring).

violations of underlying constitutional rights, even where the explicit promise of a constitutional rule can no longer be brought to fruition.¹³¹ Thus, as a means of ensuring that Fourth Amendment rights are sufficiently protected, courts regularly exclude evidence when it is the fruit of an unreasonable search.¹³² Excluding such evidence does not prevent the unlawful search from occurring, so it does not actually directly implement the right to be free from such searches, but it does reduce the incentive that officers might otherwise have to bend the rules in order to secure convictions.¹³³ We could similarly believe that excluding some unopposed testimony from unavailable witnesses might be a proper means of deterring prosecutors and other persons from engaging in conduct that would make it impossible for courts to provide the confrontation opportunity that the Clause requires.

In fact, such a choice would rest on firmer textual footing than the Fourth Amendment's exclusionary rule, given that the Due Process Clause provides overlapping power to proscribe unfair or unreliable evidence in criminal cases.¹³⁴ For instance, the Court has used the Clause as a basis for excluding unreliable eyewitness-identification testimony, at least in cases where the police have used unnecessarily suggestive procedures.¹³⁵ Using such cases as a second analogy, we might think that some out-of-court statements by unavailable witnesses should likewise be excluded, at least to the extent that they involved misconduct that is likely to produce unreliable evidence.

But if we perceive the Confrontation Clause in this way—

131. See *Davis v. United States*, 564 U.S. 229, 236–37 (2011) (explaining that the exclusion of evidence arising from a Fourth Amendment violation is not a personal right guaranteed by the Constitution, but rather a judge-made doctrine designed to deter future violations).

132. *Id.* See generally *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to the states); *Weeks v. United States*, 232 U.S. 383 (1914) (adopting the exclusionary rule in federal practice).

133. See *United States v. Leon*, 468 U.S. 897, 906 (1983) (noting that the “wrong condemned by the Amendment is fully accomplished by the unlawful search or seizure itself,” but that the rule still has value through its “deterrent effect”) (quotation marks and citations omitted).

134. See *Manson v. Brathwaite*, 432 U.S. 98, 99, 109–14 (1977) (holding that the Due Process Clause required the exclusion of some out-of-court eyewitness identification evidence, but only if it was obtained by the use of unnecessarily suggestive police procedures under circumstances suggesting that the identification itself was unlikely to be reliable).

135. *Id.*; *Perry v. New Hampshire*, 565 U.S. 228, 231–33 (2012).

as a textual rule requiring the production of unavailable witnesses, protected by a judge-made exclusionary doctrine meant to deter parties from engaging in deliberate conduct that would undermine that protection and produce unreliable evidence—then it would also follow that exclusion should not be automatic in all cases where unconflicted testimony was offered. In the Fourth Amendment context, the Supreme Court has recognized that exclusion has costs as well as benefits. In particular, in some cases the excluded evidence might be highly relevant and probative on the question of guilt, leading to the possibility that “guilty defendants may go free,” which would undermine the “truth-finding function” of our courts.¹³⁶ Likewise, when the right is undermined by accident, such as when officers conduct a search in good faith reliance on existing precedent that is later overturned, then the threat of exclusion would not motivate them to change their conduct.¹³⁷

Thus, before determining that evidence must be excluded to ensure that the defendant’s underlying confrontation right is not undermined, courts should first examine both the costs and the benefits that might flow from such exclusion. In the following Sections, I will explore how such a balancing approach might handle three common circumstances faced by courts involving unconflicted hearsay statements: statements by available witnesses; statements by witnesses who became unavailable due to the fault of the prosecutor or the witness themselves; and statements by witnesses who become unavailable by some other cause, such as accidental death or the defendant’s own actions.

IV. ASSESSING THE IMPACT OF A PRODUCTION-FOCUSED INTERPRETATION OF THE CLAUSE

As set out above, the Confrontation Clause can sensibly be read, not as a rule that has a primary objective of excluding out-of-court statements, but instead as a demand that prosecutors present available witnesses and allow them to be cross-examined by the defendant. Any application to exclude evidence would occur secondarily, by means of a judicially created rule designed to deter prosecutors or witnesses from seeking to undermine the right’s primary protections. This

136. *Leon*, 468 U.S. at 907; see *Davis*, 564 U.S. at 237.

137. *Davis*, 564 U.S. at 241.

interpretation is also quite consistent with early colonial authorities, many of whom tended to view the admissibility of statements by unavailable declarants as a matter of the developing common law of hearsay with little reference to constitutional confrontation protections. As I shall seek to show below, by considering the circumstances in which judges ought to exclude evidence as a means of protecting the underlying right, such an approach would permit judges to exclude evidence in those cases where it is particularly likely to be unreliable, while preserving the evidentiary value of out-of-court statements when they were made in situations that do not give rise to reliability concerns. Below, I shall consider the proper exclusionary force of the Clause in three different types of situations: when a witness is available and could be called to the stand, when a witness is unavailable due to their own fault or due to the fault of the prosecutor, and when a witness is unavailable due to unforeseen accidents or the defendant's own actions or choices.

A. *Applying the Clause in the Case of Available Witnesses*

The prototypical harm that the Confrontation Clause is designed to prevent is a prosecutor's election to offer unopposed testimony in lieu of producing an available witness. By its plain terms, the Clause would authorize a judge to order a prosecutor to bring her witness to the courtroom in order to provide the defendant with an opportunity for confrontation. Such an order would literally result in the defendant "be[ing] confronted" with the witness. Moreover, it makes eminent sense to use an exclusionary remedy to protect the defendant's underlying confrontation right in such cases.

First, the fact that the prosecutor has chosen to rely on hearsay rather than produce the witness sends a strong signal that the confrontation opportunity may be unusually helpful for the defendant's case. As a general rule, prosecutors will prefer to present evidence in a vivid and memorable form.¹³⁸ Thus, they will generally prefer to call a strong witness to the stand in order to convey their information directly to the jury

138. See also *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997) (speaking of the importance of presenting evidence in a "colorful" form that possesses "descriptive richness" in order to hold a jury's attention and to "satisfy jurors' expectations about what proper proof should be").

rather than rely on hearsay evidence. The fact that they *avoid* calling a witness in a particular case may indicate that they are worried that the witness will recant his prior statement or otherwise reveal his unreliability if subjected to cross-examination. It may also indicate that they do not think this danger can be overcome by preparing the witness to testify. Therefore, although cross-examination of a prepared witness often has less force under modern conditions than it is customary to assume, in these specific kinds of cases it may be especially valuable. Moreover, the fact that a witness is likely to recant or be effectively impeached also indicates that the statement itself is more likely to be perjured or otherwise unreliable. So in short, the benefits of cross-examination, and the harm of admission without it, are higher than usual when prosecutors introduce hearsay statements given by available declarants.

An additional reason to exclude hearsay statements by available witnesses is that the witness's availability to testify will usually mitigate any evidentiary costs of excluding the evidence. When hearsay statements by an available witness are excluded, the proffering party can still introduce their testimony by presenting them on the stand, and in fact this will generally be a more reliable presentation for the reasons given above.¹³⁹ By contrast, when prosecutors shy away from producing a witness who has given a prior statement, even when the statement itself cannot be used, that is a strong signal that the underlying testimony will be of little value to a jury.

Finally, there are good reasons why a judge might wish to prospectively exclude the hearsay statements as a means of forcing production of a witness, rather than allowing them to come in and then ordering production based on the core confrontation right. When a statement has already come in from an available witness who the prosecutor failed to call to the stand, there is some possibility that an overzealous prosecutor might then fail to produce the witness if ordered, claiming that the witness has gone beyond their reach. A court would then be forced to choose between providing a limiting

139. See Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 924 (1992) (arguing that the hearsay rule is necessary to preserve our system's basic preference for the testimony of live witnesses in lieu of out-of-court statements).

instruction to disregard the testimony (which might not be sufficient protection of the confrontation right)¹⁴⁰ or declaring a mistrial (which will either result in a significant expense of resources over the course of a new trial or a guilty defendant going free). The preemptive exclusion of unconfrosted testimony by available witnesses allows a court to avoid this awkward circumstance.

Despite the fact that the core of the Confrontation Clause most clearly applies to testimony by available witnesses, there are two modern lines of cases in which its application remains controversial. Some states, worrying that it may be too traumatizing to call victims of child sexual abuse to the stand in the defendant's presence, have recently created hearsay exceptions to enable their out-of-court statements to be used instead.¹⁴¹ Although there are still concerns regarding unreliable or perjured accusations in these cases,¹⁴² the potential for live testimony to be emotionally traumatizing does give prosecutors a more defensible reason to be reluctant to produce a witness. As a result, courts might explore the possibility of interpreting "availability" under the Clause more narrowly than it has been defined by the Federal Rules of Evidence in order to encompass such concerns.¹⁴³ Alternatively, they might expand the notion of "confrontation" to include an examination by a defense-appointed expert in child victims so that such production could serve as an alternative way to satisfy the Confrontation Clause.

The other recent controversy has centered around the use

140. *Bruton v. United States*, 391 U.S. 123, 137 (1968) (rejecting the notion that limiting instructions provide "an adequate substitute for petitioner's constitutional right of cross-examination").

141. *E.g.*, FLA. STAT. § 90.803(3)(23) (2012) (creating a hearsay exception for statements made by child victims alleging abuse, subject to a court's findings that the statement was trustworthy); *see also* Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 534 (1988) (noting that "at least twenty states" had adopted similar hearsay exceptions at the time that the article was published).

142. *See* Edwin J. Mikkelsen et al., *False Sexual-Abuse Allegations by Children and Adolescents: Contextual Factors and Clinical Subtypes*, 46 AM. J. PSYCHOTHERAPY 556, 556–57 (1992) (noting that estimates of false reporting generally ranged from two-to-eight percent of cases, with significantly higher rates arising in the context of custody disputes).

143. *Cf.* FLA. STAT. § 90.803(3)(23)(a)(2)(b) (expanding the statutory definition of "unavailability" in such cases to include cases where the court finds "that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm").

of out-of-court affidavits or “certificates” in lieu of live testimony by available forensic expert witnesses. Such practices give the closest modern analogue to the Stamp Act practice of taking *ex parte* examinations and offering them as a deliberate and systematic substitute for live testimony. Moreover, many authorities have begun to express legitimate concerns regarding the validity of such testimony.¹⁴⁴ Defendants often have little prospect of securing their own expert witnesses to reexamine forensic findings, so their sole hope of showing the possible limitations of forensic techniques lies in cross-examination.¹⁴⁵ The Supreme Court has therefore rightly decided that most hearsay statements from forensic experts should be excluded so that prosecutors must produce the experts for confrontation if they wish to use their findings against a defendant.¹⁴⁶ Some suggest that requiring production of forensic experts will incur substantial costs, and thus will encourage prosecutors to rely on less reliable eyewitness evidence instead.¹⁴⁷ But at least until states provide some other avenue for ensuring that defendants can meaningfully address the validity of expert findings, the same underlying concerns apply here as in the general use of available witness hearsay.

B. Applying the Clause When Unavailability Is the Fault

144. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES, NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 6–8 (2009) (noting that many forms of forensic investigation lack any agreed upon, standardized operating procedures; that most states do not require any particular training or accreditation for forensic investigators or laboratories; and that “there is a notable dearth of peer-reviewed, published studies establishing the scientific bases and validity of many forensic methods”); see, e.g., Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. Rev. 725, 726–27 n.5 (2011) (noting that in recent years “scandals involving crime laboratories have rippled across the nation”).

145. See Edward J. Imwinkelried, *Impoverishing the Trier of Fact: Excluding the Proponent's Expert Testimony Due to the Opponent's Inability to Afford Rebuttal Evidence*, 40 CONN. L. REV. 317, 328–29 (2007) (noting that courts rarely provide assistance to indigent defendants who claim that they need an expert witness to properly present their defense); Mnookin et al., *supra* note 144, at 774–75 (noting that many existing laboratories are directly affiliated with police and prosecutorial offices).

146. See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

147. Paul F. Rothstein, *Unwrapping the Box the Supreme Court Justices Have Gotten Themselves into: Internal Confrontations over Confronting the Confrontation Clause*, 58 HOW. L.J. 479, 491–92 (2015); see *Melendez-Diaz*, 557 U.S. at 340–43 (Kennedy, J., dissenting).

of the Prosecutor or the Witness

The next situation involves cases where the declarant is unavailable, but the reason why they cannot appear can be traced to their own choice or a choice by the prosecutor. In such circumstances, the unavailability might be a temporary condition, such as where the witness has voluntarily left the reach of mandatory process and is refusing to attend the trial voluntarily but could choose to return. Likewise, the witness might be invoking a privilege that they have the power to waive, or which the prosecutor could nullify through a grant of immunity from prosecution. Of course, in some rare cases it might also be true that the prosecutor or the witness made a choice resulting in *irrevocable* unavailability. For instance, the witness might have committed suicide to avoid testifying,¹⁴⁸ or the prosecutor might have threatened them so severely that they have gone into hiding and cannot be found to be served with a trial subpoena.¹⁴⁹ In either situation, the costs of excluding the witness's hearsay declarations in order to protect the underlying confrontation right will generally be outweighed by the benefits such exclusion will provide to the trial process.

The former situation, where the witness is currently unavailable but where that unavailability can be undone by either the prosecutor or the witness, is actually closely analogous to the situation where the witness is formally available to testify. The easiest situation to analyze is where the prosecutor has affirmatively acted to make the witness unavailable, such as by threatening to prosecute them (or a loved one) for an unrelated wrong unless they leave the jurisdiction or invoke a privilege.¹⁵⁰ Plainly, the fact that a prosecutor would go to such lengths to avoid confrontation indicates both that such confrontation might provide important insights and that the prior statement is of little intrinsic

148. See, e.g., *United States v. Lemonakis*, 485 F.2d 941, 956–57 (D.C. Cir. 1973) (involving a suicide note written a week before the writer killed himself, including some passages that were clearly intended to affect the outcome in a pending case). The appellate court believed that the note should have been admitted for the purpose of impeaching the declarant, but not for its truth. *Id.* at 956 n.24.

149. Cf. *United States v. Morrison*, 535 F.2d 223, 225–29 (3d Cir. 1976) (involving a prosecutor who induced a previously willing defense witness to invoke her privilege against self-incrimination by repeatedly threatening her with prosecution during a “bizarre” and “highly intimidating personal interview”).

150. *Id.*

reliability. And just as with the available witnesses, the prosecutor could choose to revoke their prior threats and make it possible for the witness to appear on the stand. Finally, excluding such testimony may help to deter prosecutors from engaging in this troubling conduct by denying them any advantage that they might gain through it. In short, where witnesses are unavailable due to prosecutorial conduct, courts should readily exclude their prior, unconflicted statements.

The situation is not as troubling when it is the witness who takes steps to avoid being called during trial, but a prophylactic exclusionary rule still makes sense in such cases as a means of deterring perjury. Consider, for instance, the situation in which a defendant's spouse makes incriminating statements against him to the police but then invokes her testimonial privilege to avoid testifying against him at trial.¹⁵¹ In these types of cases, we have somewhat less reason to think that the person choosing to avoid confrontation is doing so based on an informed judgment that cross-examination will be particularly damaging because the witness will often lack significant experience with the trial process. Nonetheless, this sort of procedure still raises a strong risk that a witness *might* have offered a false accusation and then used their privilege in order to avoid having to repeat it under oath or endure cross-examination. Excluding these statements undercuts any such incentive to give false statements that the witness would decline to repeat in a live trial environment. Conversely, where the witness is telling the truth, the rule will simply give them an incentive to waive their privilege and give confrontable testimony at trial, reducing the evidentiary costs of an exclusionary rule.

The modern Supreme Court cases most squarely fitting within this category are *Hammon v. Indiana* and *Davis v. Washington*, which were consolidated and decided by a single opinion.¹⁵² In the *Hammon* case, a witness gave a statement to the police accusing her husband of a domestic battery and signed an affidavit to perpetuate her accusation. She was then subpoenaed by the prosecutor to appear at his trial, but she

151. *United States v. Chapman*, 866 F.2d 1326, 1329–30, 1331–33 (11th Cir. 1989) (involving a wife who gave incriminating statements against her husband during an interview with police and then later invoked her spousal testimonial privilege to refuse to repeat the same account during trial).

152. *See generally* *Davis v. Washington*, 547 U.S. 813 (2006).

failed to appear, and the prosecutor instead proffered her prior statements.¹⁵³ In the *Davis* case, a woman called 911 and accused the defendant of hitting her. The state prosecuted him for violating a no-contact order, but they were unable to locate the woman (who was the sole witness to the alleged assault) and chose to introduce the transcript of her 911 call to prove that Davis had attacked her.¹⁵⁴ The Supreme Court decided that the former statement was sufficiently formal and accusatory to be labelled as “testimonial” and thus held that it should have been excluded, but decided that the 911 call should be admitted because the declarant’s primary purpose in making the call was to resolve an ongoing emergency, not to produce evidence against the defendant.¹⁵⁵ Leaving aside this questionable distinction, if we focus instead on the reasons why each witness was unavailable, there would seem to be cause for concern in both cases. To be sure, some battery victims might avoid appearing at trial out of fear of reprisal, but on the other hand the initial accusations leading to the arrest might be more likely to produce such reprisals than the mere repetition of the same accusations at a later time. And at the same time, some battery accusations are false, and allowing hearsay statements to be admitted when the witness herself refuses to cooperate further with the prosecution makes this conduct both more efficacious and less costly for the wrongful accuser. As a result, a sensible exclusionary policy would likely require confrontation in both cases.

Of course, there may also be rare circumstances in which the prosecutor or the witness engage in conduct that permanently places the witness in a condition of unavailability. A witness might make incriminating statements and then commit suicide, for instance, or a prosecutor might threaten a witness so severely that she goes into hiding, making it impossible for the defense to serve her with a subpoena or encourage her to attend trial. On the one hand, in such circumstances there is no comforting hope that the exclusion of the prior statement will result in the production of better evidence because the witness is truly beyond the reach of both the court and the prosecuting authority. On the other hand,

153. *Hammon v. State*, 829 N.E.2d 444, 447 (Ind. 2005), *rev’d sub nom.*, *Davis v. Washington*, 547 U.S. 813 (2006).

154. *State v. Davis*, 111 P.3d 844, 847 (Wash. 2005), *aff’d*, 547 U.S. 813 (2006).

155. *Davis*, 547 U.S. at 827, 832.

such conduct undermines the truth-seeking functions of the courts so gravely and presents such a risk that the statement might be perjured that it will still make sense for a court to exclude it.

C. Applying the Clause When Witnesses Are Unavailable Without Prosecutorial or Witness Fault

The final scenario arises when a witness becomes unavailable, but this unavailability was not brought about by either their own choices or the prosecutor's conduct. One way this can arise is when the defendant acts to make the witness unavailable, either as part of an intentional strategy to keep them from giving testimony at trial or for unrelated reasons. Alternatively, sometimes witnesses die due to natural causes, or based on the acts of others with no connection to the defendant. At present, unfronted testimonial hearsay is generally excluded even when the witness's unavailability is no one's fault, or the defendant's fault, with narrow exceptions. But if the Court were to understand the exclusion of such testimony as a discretionary rule designed to further the underlying values of the Confrontation Clause rather than as part of its core mandate, the logical result would be that all statements fitting into this category (and not subject to the hearsay rule's own exclusionary force) would be freely admissible against the defendant.

Consider first the scenario in which a witness makes a statement and then dies before trial due to an accident or an assault that has no connection with the pending case.¹⁵⁶ There is little reason to think that such statements present the systematic risks of perjury or unreliability that arise when prosecutors try to avoid confrontation of available witnesses or when witnesses give statements and then try to evade subsequent confrontation. Since no interested party is *choosing* to prevent confrontation in such cases, there is no reason to think either that the witness would have been more willing to lie or that the confrontation would be unusually fruitful. Here, we have a scenario where, due to no one's fault, the

156. *Cf.* *United States v. Brooks*, 966 F.2d 1500, 1501-02 (D.C. Cir. 1992) (approving the admission of a prior statement by the government's chief witness, a police officer who had been murdered in an unrelated incident before the trial began).

Confrontation Clause's direct guarantee that the defendant "be confronted" by this testimony cannot be provided. But there is now no reason to think that exclusion will serve the underlying purposes of the Clause. Since the unavailability does not result from a tactical choice, it will not be deterred by a rule allowing the use of the statement. Moreover, because there is no particular reason to think the statements will be perjured, the primary evil that the Clause is designed to avoid is not particularly likely to arise.

Against this line of reasoning, Richard Friedman has suggested that "[i]f the witness testified at trial on direct examination but died before cross-examination, without fault of the accused, the court presumably would not allow the testimony to support a verdict."¹⁵⁷ If we accept this premise, it would seem to follow by analogy that unconfrosted hearsay should be similarly restricted. But it is far from clear that the result he assumes is either required by existing law or desirable as a matter of policy. In support of his hypothetical, he cites authorities that support excluding direct testimony when the witness *refuses* to answer questions on cross-examination,¹⁵⁸ but that is more analogous to the situations considered in the prior Section, where unavailability results from the witness's own choices.

Friedman's cited case does refer to two other notable cases.¹⁵⁹ In the first, the witness suffered a heart attack during direct examination, but here the court's primary concern was that the jury might assume (since direct examination had not been concluded) that the witness would have offered strong inculpatory testimony *had he been able to finish his statement*.¹⁶⁰ The concern, therefore, was not that his actual statements were unreliable because unconfrosted, but rather that the jury had no idea what he would have said and might make unreliable assumptions now that he had been silenced.¹⁶¹ In the other case, the court excluded testimony when a witness became so ill after direct examination that cross-examination was not possible.¹⁶² But this case, like the earlier authority¹⁶³

157. Friedman, *supra* note 13, at 1035.

158. *Id.* at 1035 n.112 (citing one case and two treatises).

159. See *Commonwealth v. Kirouac*, 542 N.E.2d 270, 273 n.5 (Mass. 1989).

160. See *United States v. Malinsky*, 153 F. Supp. 321, 323 (S.D.N.Y. 1957).

161. *Id.*

162. *People v. Cole*, 43 N.Y. 508, 512 (1871).

163. *Kissam v. Forest*, 7 Hill 463 (1841).

it cites in support, relied upon a common law principle rather than any constitutional confrontation right, so they can be reconsidered in light of changing knowledge and experience.¹⁶⁴ And those cases in fact reveal some disagreement regarding the strength and scope of the principle, with a chancellor in *Kissam v. Forrest* voicing the opinion that the testimony is still entitled to some weight. But all of this is a slender reed on which to rest the broad exclusion of otherwise admissible hearsay statements by witnesses who become unavailable before trial. Friedman maintains that admission under these circumstances is not “appropriate,”¹⁶⁵ but it is far from clear why a rational jury could not properly discount the testimony based on its out-of-court and unopposed nature, and there is certainly no reason to suspect that it is systematically likely to be perjured or otherwise unreliable.

Similar reasoning applies when it is the defendant who prevents the witness from appearing in court, regardless of the defendant’s motivation. Of course, the principle has the most support when the defendant acts with the specific purpose of making the witness unavailable, both because such an act evidences that the defendant does not think his confrontation will significantly weaken the testimony, and because of the strong need to deter such conduct by denying the defendant any benefit from it.¹⁶⁶ But although the Supreme Court has held that the doctrine must be limited to that circumstance,¹⁶⁷ the reasons for admission are still quite strong when the defendant makes a witness unavailable for other reasons. Just as when a witness dies of natural causes before trial, the witness who was murdered by the defendant for unrelated reasons has given a statement when they had no reason to think they would not eventually be confronted, making it less likely that the statement is a deliberate lie. There is thus no person whose conduct would likely be changed for the better by excluding the evidence. Moreover, there is once again no reason to think that the witness or the prosecutor worried that cross-examination would be especially fruitful or to think that the evidence is systematically unreliable.

164. New York did not provide any constitutional protection for confrontation rights until 1938. Compare N.Y. CONST. art. I, § 6 (1938), with N.Y. CONST. art. I, § 6 (1894).

165. Friedman, *supra* note 13, at 1035.

166. See *Giles v. California*, 554 U.S. 353, 359–61, 377 (2008).

167. *Id.*

In short, whether or not the defendant acted with a major purpose of preventing the witness from testifying, exclusion under such circumstances robs the jury of potentially useful evidence without incentivizing any party or witness towards truthful behavior. Thus, the primary goals of preventing parties or witnesses from either perjuring themselves or trying to frustrate confrontation are absent, and we are left with a difficult judgment about whether admitting or excluding the testimony will do more for the trial's reliability. Such uncertain questions are better addressed by hearsay law, which can be more flexibly developed over time as we gain more knowledge to inform these complicated policy choices.

This line of reasoning would suggest that several of the Supreme Court's recent Confrontation Clause decisions reached a questionable result. Most obviously, in *Giles v. California* the Court held that the Clause bars state courts from admitting statements made by a witness who was murdered by the defendant, except in those rare cases where the defendant acted for the specific purpose of preventing future testimony.¹⁶⁸ For all the reasons discussed above, this decision is unlikely to have significantly improved the trial's reliability, and it certainly did nothing to incentivize truthful behavior or the production of available witnesses.

More controversially, the Court's decision in *Crawford v. Washington* may also be questioned, as in that case the witness became unavailable only because the *defendant* exercised his right to invoke a spousal testimonial privilege.¹⁶⁹ Given that the state had held prior statements by the wife otherwise admissible despite the privilege,¹⁷⁰ it is strange to think that requiring exclusion furthers the value of confrontation in any meaningful way. Here, both the witness and the prosecutor were willing to present the testimony and allow it to be confronted, making any concerns about potential perjury quite remote. By contrast, it was the defendant's own actions that thwarted the confrontation opportunity. If we returned to an understanding of the Clause as furthering the defendant's right

168. *Id.*

169. See 541 U.S. 36, 40 (2003). A lower court opinion made it clear that it was at the *defendant's* election that she was unable to testify. *State v. Crawford*, 107 Wash. App. 1025 (2001) (noting that "Michael [Crawford] invoked the marital privilege to prevent her from testifying"), *rev'd*, 54 P.3d 656 (Wash. 2002), *rev'd and remanded*, 541 U.S. 36 (2004).

170. *Crawford*, 541 U.S. at 40.

to *actually be confronted* by witnesses and required exclusion only when it would serve to protect that underlying value, there is little reason to allow the defendant to electively bar the witness from testifying in court and then complain that he could not ask her questions on cross-examination.

Finally, there is an interesting middle ground between the category of strategic unavailability and accidental unavailability. In some cases, a prosecutor might procure a statement, or a witness might make one, without the *intent* that the witness will later become unavailable but with the *knowledge* that unavailability is likely to occur in the future. For example, a witness might make an incriminating statement at a time when they know they are unlikely to survive until a trial.¹⁷¹ There is little reason in such cases to worry that the witness is *actively* trying to evade confrontation, but the witness might still feel somewhat freer to stretch or bend the truth, knowing that they will never have to repeat the performance under oath in a court of law. Still, enforcing an exclusionary rule here cannot serve any deterrence function, while excluding such testimony will also rob courts of a great deal of possibly truthful testimony. Judges might reasonably choose to keep the rule simple and leave the admissibility of such statements to be governed by hearsay law. Alternatively, one attractive middle ground would involve excluding such statements only where a prosecutor knew of the impending unavailability but neglected to take advantage of reasonably feasible opportunities to obtain a deposition, which would have provided the defendant with a confrontation opportunity.¹⁷²

CONCLUSION

To return to where we began, current Confrontation Clause doctrine has become unnecessarily complex, as the Supreme Court tries to articulate an exclusionary rule for unfronted hearsay based on scanty evidence of historical practice at the time of the founding. These interpretations of the Clause may sometimes do active harm by preventing a jury

171. See, e.g., *Fossyl v. Milligan*, 317 F. App'x 467, 471, 476 (6th Cir. 2009) (involving a witness who made accusatory statements about the defendants two months before her death from cancer).

172. This policy is already incorporated within the federal hearsay rules. See FED. R. EVID. 804(a)(5) (requiring that a party wishing to invoke the unavailability exceptions take a witness's deposition if possible).

from considering reliable evidence bearing directly on the guilt of an accused, under circumstances where the absence of confrontation is neither a deliberate choice nor likely to cause a great deal of harm to the truth-seeking function of a trial. They may also work a greater harm by distracting our courts from addressing problems that are more likely to result in wrongful convictions, such as faulty forensics or overreliance on eyewitness evidence.

Fortunately, a return to first principles offers an attractive way out of this doctrinal quagmire. There is little evidence to suggest that there was any broadly shared consensus view interpreting the language of the Confrontation Clause as a means of constitutionalizing those portions of the hearsay rule that applied to unfronted prior statements. Rather, it seems to have been a rational response to a recent crisis involving the deliberate substitution of hearsay evidence for the testimony of *available* witnesses. The language of the Clause guarantees that witnesses be brought to court to be confronted, so that any extension to require the exclusion of testimony when that guarantee is impossible to bring into fruition is a matter of uncertain implication and inference. But interpreting the Clause as a guarantee of confrontation opportunities when they are possible, rather than as a broad exclusionary rule regardless of their possibility, does not obligate courts to admit all unfronted testimony by unavailable witnesses. Many such statements will be excluded by the ordinary operation of hearsay rules, especially those statements that are most likely to result in unfairness at trial. And even when otherwise permitted by the hearsay rule, courts could rightfully exclude the statements of unavailable witnesses when that unavailability is the fault of the witness or the prosecutor, in order to ensure that all parties have the incentive to testify truthfully and preserve the availability of witnesses for subsequent confrontation.