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Does *Crawford* Provide a Stable Foundation for Confrontation Doctrine?

Roger W. Kirst[†]

The United States Supreme Court presented a new interpretation of the Sixth Amendment Confrontation Clause in *Crawford v. Washington*.¹ In his opinion for the Court, Justice Scalia examined the historical background of the Clause to determine the original meaning of its text. He concluded from the historical record that the primary object of the Clause was preventing the prosecution from using testimonial hearsay. Justice Scalia rejected the interpretation of the Court's decision in *Ohio v. Roberts*² that allowed the prosecution to use testimonial hearsay upon a judicial finding that it was reliable. He concluded that testimonial hearsay can be used by the prosecution only if the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.

The Court in *Crawford* unanimously reversed the state judgment, but the Court was not unanimous in support of Justice Scalia's interpretation and application of the history of confrontation. Chief Justice Rehnquist concurred in the judgment in an opinion joined by Justice O'Connor.³ The Chief Justice presented his own review of the historical record to support his argument that Justice Scalia's approach was based on the wrong distinction, too categorical, and unnecessary to decide the case. The Chief Justice did not argue that the statement in *Crawford* was admissible. Nor did he argue for the admissibility of any particular statement that might be

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¹ 541 U.S. 36 (2004).

² 448 U.S. 56 (1980).

³ *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring).

excluded under the testimonial interpretation presented by Justice Scalia.

The impact of *Crawford* is not the result of what the Court actually did. Its unanimous reversal of a conviction based in part on a custodial statement of an accomplice who did not testify at trial was consistent with the Court's prior Confrontation Clause decisions.⁴ Justice Scalia used a new label in describing the statement as testimonial hearsay, but the Supreme Court had never allowed the prosecution to use such hearsay without confrontation. Although Justice Scalia listed several state and federal decisions that had interpreted *Roberts* as allowing judicial screening for reliability to overcome a lack of confrontation,⁵ that interpretation of *Roberts* had never been used by the Supreme Court to affirm a conviction. The Chief Justice said he dissented from the decision to overrule *Roberts*,⁶ but Justice Scalia did not say *Roberts* was overruled. Instead, Justice Scalia included *Roberts* among the Court's cases in which the results were largely consistent with the principles he derived from the historical record.⁷

The impact of *Crawford* comes from Justice Scalia's emphasis that the Confrontation Clause should be interpreted according to its original meaning, his conclusion that testimonial hearsay was at least the primary object of the Sixth Amendment and perhaps its sole concern, and his suggestion that the distinction between testimonial and nontestimonial statements should be used to organize confrontation doctrine. Justice Scalia emphasized the importance of this distinction by commenting that it could be consistent with the Framers' design to exempt nontestimonial statements from any confrontation requirement.⁸ Justice Scalia did not provide a complete definition of a testimonial statement, and he did not explain what the confrontation rule might be for nontestimonial statements if there should be one. Those gaps have left other courts to struggle as they try to rebuild confrontation doctrine on *Crawford's* combination of the testimonial interpretation, original meaning, and history.

⁴ See *Lilly v. Virginia*, 527 U.S. 116 (1999); *Douglas v. Alabama*, 380 U.S. 415 (1965).

⁵ *Crawford*, 541 U.S. at 62-65.

⁶ *Id.* at 69 (Rehnquist, C.J., concurring).

⁷ *Id.* at 58 (majority opinion).

⁸ *Id.* at 68.

Confrontation doctrine does not have to be completely rebuilt after *Crawford*, and it does not have to be rebuilt on the basis of *Crawford* alone. Justice Scalia discussed most of the Supreme Court's prior confrontation cases when he explained why the testimonial interpretation was not inconsistent with the holdings in those cases. His statement that his objections were directed only to the rationales in some decisions confirms that most prior doctrine should be still valid after *Crawford*. Part I of this Article will review the evolution of confrontation doctrine in the Supreme Court in order to describe the pre-*Crawford* history that is essential to understanding *Crawford* and its effect.

Crawford must be read carefully. All the cases Justice Scalia used to illustrate the vice of the *Roberts* test were decided by state and federal appellate courts; none were from the Supreme Court. That means *Crawford* should have less effect on the confrontation doctrine the Court had already established even if it will require substantial changes in the ways some other courts had been interpreting the Court's opinions. It is also important to recognize where Justice Scalia's effort to outline the full sweep of the testimonial interpretation did not completely summarize all the limitations and conditions of the Court's confrontation doctrine. Part II of this Article will review *Crawford* and identify areas where the summary in *Crawford* is not necessarily a complete statement of established confrontation doctrine.

Justice Scalia's discussion of the original meaning of the Confrontation Clause emphasized English common law. He described the civil-law mode of criminal procedure and the use of *ex parte* examinations as the practices used in the notorious English treason cases, the practices invited by the English Marian statutes, and the practices targeted by the English right of confrontation.⁹ Justice Scalia explained his reliance on English history by declaring that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law."¹⁰ Justice Scalia also described controversial examination practices that were used in the Colonies and listed the declarations of rights adopted around the time of the Revolution that guaranteed a right of confrontation.¹¹ He

⁹ *Id.* at 50.

¹⁰ *Id.* at 54.

¹¹ *Crawford*, 541 U.S. at 47-48.

connected the English history to the Sixth Amendment by describing the English experience as the practices “the founding-era rhetoric decried.”¹² He concluded that there could not be a reliability exception for a statement that would be the modern equivalent of an abuse at which the Confrontation Clause was directed.

Justice Scalia used the historical opposition to *ex parte* testimony as evidence that the original concern addressed by the Clause was primarily or even exclusively testimonial hearsay.¹³ He did not present any founding-era evidence that explicitly confirms that the Framers had no concern with nontestimonial hearsay. Justice Scalia’s conclusion rests on silence in the historical record. Silence alone can be misinterpreted if the record is read with an erroneous assumption about the context. The question framed by Justice Scalia was based on an implicit assumption that the purpose of the Confrontation Clause was excluding some hearsay. He did not discuss whether the Framers might have had a different purpose. An alternative interpretation of the ratification history that produced the Sixth Amendment is that the Framers intended to protect confrontation; excluding hearsay was only an effect and not its sole purpose. When the ratification history is read without an assumption about the question it will answer, the silence of the Framers about the details of the hearsay rule suggests the original meaning was not limited to testimonial hearsay. Part III of this Article will discuss why the ratification history shows that the Confrontation Clause is not a reference to the English common law of hearsay; the Clause requires confrontation.

The ratification history also shows that the original meaning of the Confrontation Clause did not include specific confrontation rules. It would be more accurate to describe the original meaning as a process in which the courts would develop and apply rules that protect the right of confrontation. The Supreme Court’s pre-*Crawford* opinions have provided a foundation for this process by identifying two elements of the right of confrontation. One element was described more than a century ago in *Mattox v. United States* as the ability of the jury to look at a witness and “judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is

¹² *Id.* at 50.

¹³ *Id.*

worthy of belief.”¹⁴ Justice White in *California v. Green* described the same element when he considered whether the trier of fact had “a satisfactory basis for evaluating the truth of the prior statement.”¹⁵ That element also appeared in *Dutton v. Evans*,¹⁶ *Mancusi v. Stubbs*,¹⁷ and *Roberts v. Ohio*.¹⁸ The Court in *Mattox* also described a second element of the right of confrontation as the defendant’s opportunity for “testing the recollection and sifting the conscience of the witness.”¹⁹ More recently, Justice Blackmun in *Roberts* described a purpose of confrontation as “ensuring the defendant an effective means to test adverse evidence.”²⁰ That element was also included in *Lee v. Illinois*.²¹ Together, these two elements define a purpose of confrontation as protecting the defendant’s ability to contest the evidence before the factfinder. Part IV of this Article will describe how these two elements provide a foundation for developing confrontation limits on hearsay evidence that are consistent with the Framers’ purpose of protecting the right of confrontation.

The history of confrontation doctrine in the Supreme Court has been a search for an interpretation that is both consistent with the historical record and readily usable in the courtroom in a criminal trial. That search has been complicated by the inevitable distortion that is created as other courts convert the Court’s doctrine to shorthand tests. The idea of indicia of reliability discussed in *Roberts* provided too little guidance when it was reduced to a reliability test. The testimonial interpretation may also lead to distortions if confrontation doctrine is refined using only the guidance found in *Crawford*.

As trial and appellate courts develop the labels presented in *Crawford*, they can rebuild confrontation doctrine with workable tests that are consistent with the original meaning of the Confrontation Clause if they ask whether the defendant has an effective means to test adverse evidence and whether the trier of fact has a satisfactory basis for evaluating

¹⁴ 156 U.S. 237, 242-43 (1895).

¹⁵ 399 U.S. 149, 161 (1970).

¹⁶ 400 U.S. 74, 89 (1970).

¹⁷ 408 U.S. 204, 213 (1972).

¹⁸ 448 U.S. 56, 65-66 (1980).

¹⁹ 156 U.S. at 242.

²⁰ 448 U.S. at 65.

²¹ 476 U.S. 530, 543 (1986).

a statement. These two elements do not require judicial balancing at trial for each statement. They permit the appellate courts to define the types of statements a defendant would be able to contest before the factfinder. The two elements avoid the need to research arcane questions about English common law. They draw attention to the actual word in the Sixth Amendment, confronted, instead of requiring inferences from a word that is not in the text, such as testimony. The two elements are supported by the ratification history that led to the Sixth Amendment. They are consistent with the results of all the Court's confrontation cases from *Reynolds v. United States*²² through *Crawford*. Of equal importance, they help explain the results in those cases and show how the Court's decisions can be extended to cover new facts. Focusing on the purpose of confrontation does not mean prosecutors will never be able to use prior statements. This focus identifies reasons a statement might be admissible even though the defendant cannot confront the declarant at trial in the usual manner of cross-examination, and reasons a court should exclude some statements if the declarant is not available for confrontation before the factfinder. Part V of this Article will describe how the Court's two elements of the purpose of confrontation can be used to understand the confrontation doctrine the Court had developed before *Crawford* and to develop new confrontation rules for the questions the Court left unanswered in *Crawford*.

I. THE CONFRONTATION CLAUSE IN THE SUPREME COURT

Crawford cannot be understood without considering the history that preceded it. Any effort by the Supreme Court to describe an overall theory of confrontation has been rather recent as well as occasional. The Confrontation Clause was adopted in 1791. For the next 174 years, the United States Supreme Court applied it in only a few federal criminal cases.²³ Some of the Court's opinions included comments about the purpose of the Clause,²⁴ but no opinion tried to provide an overall theory of confrontation. The Confrontation Clause began to get more attention in 1965, when the Court held in

²² 98 U.S. 145 (1878).

²³ See, e.g., *Motes v. United States*, 178 U.S. 458, 467 (1900); *Kirby v. United States*, 174 U.S. 47, 55 (1899); *Mattox*, 156 U.S. at 240; *Reynolds*, 98 U.S. at 158.

²⁴ See *infra* notes 333-44 and accompanying text.

Pointer v. Texas that a defendant in a state trial was entitled “to be tried in accordance with the protections of the confrontation guarantee of the Sixth Amendment” under the standards that would govern a federal trial.²⁵ In his majority opinion in *Pointer*, Justice Black followed the conventional style by focusing on the facts; he did not describe an overall theory of confrontation. That style allowed the Court to decide *Pointer* and the next few cases²⁶ without the need to anticipate every issue that might be raised by different facts, but it provided little guidance for new fact situations. The search for a more complete theory of the Confrontation Clause began in 1970.

A. *Justice Harlan’s Dilemma*

The first effort by any Justice to describe an overall scope and structure for the right of confrontation came in Justice Harlan’s concurring opinion in *California v. Green*.²⁷ *Green* differed in two ways from every prior confrontation decision of the Supreme Court. It was the first time the Court reviewed a case in which another court had found a confrontation violation, and it was the first time the Court concluded that another court had read the Clause too broadly. In *Green*, the California Supreme Court had interpreted the Court’s then-recent confrontation decisions as requiring that cross-examination occur at the same time as the statement was made.²⁸ The United States Supreme Court rejected the requirement of contemporaneous cross-examination and reversed the state court.²⁹ In his majority opinion, Justice White focused on two issues – when the prosecution could use prior cross-examined testimony of an unavailable witness³⁰ and when the prosecution could use a prior statement of a witness who is subject to adequate cross-examination at trial.³¹ He did not try to describe a broader principle that would include both specific rules.

²⁵ 380 U.S. 400, 406 (1965).

²⁶ *Barber v. Page*, 390 U.S. 719 (1968); *Bruton v. United States*, 391 U.S. 123 (1968).

²⁷ 399 U.S. 149, 172 (1970) (Harlan, J., concurring).

²⁸ *People v. Green*, 451 P.2d 422, 426 (Cal. 1969).

²⁹ *California v. Green*, 399 U.S. at 164, 170.

³⁰ *Id.* at 165-68.

³¹ *Id.* at 162-64, 168-70.

In his concurring opinion, Justice Harlan wrote that other courts needed more guidance than provided in Justice White's opinion and that it was important to dispel the misconception that confrontation should be equated with cross-examination.³² Justice Harlan framed the question as "whether and to what extent the Sixth Amendment 'constitutionalizes' the hearsay rule of the common law."³³

Justice Harlan began his analysis in *Green* by identifying two polar readings of the Confrontation Clause. At one pole, the Clause would have little or no effect if it were read "to confer nothing more than a right to meet face to face all those who appear and give evidence at trial."³⁴ At the other pole, the Clause would have too much effect if it was "interpreted as a blanket prohibition on the use of any hearsay testimony."³⁵ After rejecting both polar readings, Justice Harlan still had to find a way to distinguish between admissible hearsay and hearsay that would create a constitutional violation.

Justice Harlan first identified a broad principle that did not tie the Clause to the hearsay rule. He tentatively concluded that the Clause was meant "to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses," which would be supplemented by judicial application of evidence rules.³⁶ He proposed that the availability of the declarant should be the test for defining the right of confrontation.³⁷ He then cataloged several Supreme Court decisions in order to show that confrontation had not been equated with cross-examination and that these holdings supported the requirement that the prosecution produce any available witness.³⁸

Later the same year, Justice Harlan decided that making availability the sole and controlling principle for confrontation doctrine would be a mistake. His approach in *Green* would have meant there was a confrontation violation in *Dutton v. Evans*, but Justice Harlan instead wrote another concurring opinion to explain why he had provided the fifth

³² *Id.* at 172 (Harlan, J., concurring).

³³ *Id.* at 173.

³⁴ *Id.* at 175.

³⁵ *Green*, 399 U.S. at 175.

³⁶ *Id.* at 179 (Harlan, J., concurring).

³⁷ *Id.* at 182-83.

³⁸ *Id.* at 183.

vote for rejecting the defendant's confrontation argument.³⁹ In his concurring opinion, Justice Harlan explained that he thought a prosecutor should not have to produce every available declarant because doing so would be both inconvenient and sometimes of little value to a defendant.⁴⁰ His specific examples were official statements, learned treatises, trade reports, business records, and laboratory analyses.⁴¹ He apparently could not resolve the dilemma he had described in *Green* because he saw no way to reconcile the admission of some hearsay with the "seemingly absolute command" of the Confrontation Clause.⁴² Therefore, he went back to one of the polar readings he had rejected in *Green* and concluded in *Dutton* that the Clause applied only to the "mode of procedure," not to whether the prosecutor could use hearsay evidence.⁴³ He proposed as an alternative that state trials should be governed by the Fourteenth Amendment's Due Process Clause instead of the Confrontation Clause.⁴⁴

At the time he wrote, Justice Harlan's opinion in *Green* was the most substantial discussion of the historical record of the Confrontation Clause in any Supreme Court opinion. He explained his inability to find more than "scant information"⁴⁵ in the historical record with the well-known comment that "the Confrontation Clause comes to us on faded parchment."⁴⁶ The image generated by that comment persists long after the statement has become false. The parchment is not faded. In the decades since *Green* there has been extensive research into every corner of confrontation doctrine. That research has brought forth a substantial body of published material on the history of confrontation in criminal procedure, about its history as a political idea, about English and American criminal procedure before and after the Revolution, and about the adoption of the Confrontation Clause.⁴⁷

³⁹ *Dutton v. Evans*, 400 U.S. 74, 93 (1970) (Harlan, J., concurring).

⁴⁰ *Id.* at 95-96.

⁴¹ *Id.* at 96.

⁴² *Id.*

⁴³ *Id.* at 94, 95-96.

⁴⁴ *Id.* at 96-97.

⁴⁵ *California v. Green*, 399 U.S. 149, 179 (1970) (Harlan, J. concurring).

⁴⁶ *Id.* at 173-74.

⁴⁷ See, e.g., 30 & 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE (1997 & 2000); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995).

Justice Scalia's opinion in *Crawford* described more of the historical record than Justice Harlan had sketched in *Green*, but Justice Scalia was trying to resolve the same dilemma that Justice Harlan had framed in *Green*. Justice Scalia was also trying to define the kind of hearsay the Clause was meant to exclude. *Crawford* demonstrates that the search for an overall theory of confrontation is still governed by Justice Harlan's approach to the text of the Clause, even though no other Justice has ever endorsed his conclusions in either *Green* or *Dutton*.

B. Justice Blackmun's Theory in Roberts

Justice Blackmun described his overall theory of confrontation in nine paragraphs and six footnotes in Part II of *Roberts*.⁴⁸ Given the widespread belief that this discussion adopted a reliability test for applying the Confrontation Clause, it is important to recognize its modest beginnings. Part II does not appear to be the major focus of the *Roberts* opinion. In fact, Justice Blackmun himself did not use the theory he described in Part II to organize his discussion of the specific issues in the case. Nor did Justice Blackmun use his general theory when he explained the holding of *Roberts* in Parts III and IV. Three Justices dissented in an opinion by Justice Brennan on the specific issue of whether the declarant had been shown to be unavailable.⁴⁹ That dissent did not mention Justice Blackmun's overall theory of confrontation. As a result, *Roberts* itself provides little explanation of the rules Justice Blackmun described. There is no apparent source in any pre-*Roberts* opinion, book, or law review article for the language Justice Blackmun used to describe his overall theory in Part II. Nevertheless, there is still much that can be learned from reading *Roberts*.

In *Roberts*, the defendant had been convicted of forgery, receiving stolen property, and possession of heroin.⁵⁰ The daughter of the victim was a possible witness on the forgery and stolen property charges. Defense counsel had called her at the preliminary hearing, apparently in the hope that she would corroborate the defendant's story that she had given him her father's property. That hope disappeared as the daughter's

⁴⁸ *Ohio v. Roberts*, 448 U.S. 56, 62-68 (1980).

⁴⁹ *Id.* at 77 (Brennan, J., dissenting).

⁵⁰ *Id.* at 58, 60.

preliminary hearing testimony refuted the defendant's story. At the time of trial, the daughter could not be found; the prosecution used her preliminary hearing testimony that had been created by the defense.⁵¹ By a vote of 4-3, the Ohio Supreme Court held that using her prior testimony was a confrontation violation even though the daughter was unavailable.⁵² The majority gave two reasons. The first was that the issues and defense strategy are quite different between a preliminary hearing and trial.⁵³ The second reason was that Justice White's opinion in *California v. Green* was not controlling since the defense questioning of the witness in *Roberts* was not cross-examination.⁵⁴

The Supreme Court rejected both conclusions of the state court. In Part III of *Roberts*, Justice Blackmun identified the controlling precedent as the section of *Green* in which the Court permitted the prosecution to use the prior testimony of an unavailable declarant.⁵⁵ Defense counsel had actually questioned the witness in *Roberts* in a way that followed the form and purpose of cross-examination without being limited by an objection or judicial ruling.⁵⁶ Justice Blackmun concluded Part III of *Roberts* by reemphasizing that there was no reason to decide the issue differently than it had been decided in *Green*.⁵⁷ In Part IV of *Roberts*, Justice Blackmun concluded that the facts before the trial court were sufficient to show that the daughter was unavailable.⁵⁸

The style and scope of Justice Blackmun's analysis in both Parts III and IV are completely consistent with his own description of the Court's "common law tradition" in which "the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions."⁵⁹ The holding in Parts III and IV resolved all the issues raised by the parties. Justice Blackmun said that the Court would not decide issues it did not have to reach.⁶⁰ He did not discuss whether the opportunity to cross-examine would suffice by

⁵¹ *Id.* at 59-60.

⁵² *State v. Roberts*, 378 N.E.2d 492, 497 (Ohio 1978).

⁵³ *Id.* at 496.

⁵⁴ *Id.* at 497.

⁵⁵ *Ohio v. Roberts*, 448 U.S. at 67-73.

⁵⁶ *Id.* at 70-71.

⁵⁷ *Id.* at 73.

⁵⁸ *Id.* at 75-77.

⁵⁹ *Id.* at 64.

⁶⁰ *Id.* at 70.

itself or whether de minimis cross-examination would be enough. He described defense counsel's questions to illustrate that they were the equivalent of "significant cross examination," but he did not suggest any detailed standard for the sufficiency of the prior examination.⁶¹ Nevertheless, Justice Blackmun preceded his analysis of the facts of *Roberts* with Part II of his opinion in which he did not discuss the facts at all.

Justice Blackmun began Part II by framing the issue as "the relationship between the Confrontation Clause and the hearsay rule with its many exceptions."⁶² He first considered whether the language of the Clause should be read literally to require the exclusion of any statement by an absent declarant, but he labeled that interpretation as "long rejected as unintended and too extreme."⁶³ Justice Blackmun then excluded the possibility that the right of confrontation might have no effect on the use of hearsay, because the "historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay."⁶⁴ That discussion considered and rejected the two polar readings Justice Harlan had tried to reconcile in *Green* and *Dutton*, although Justice Blackmun did not mention that Justice Harlan had previously framed this issue.

Justice Blackmun's restatement of the difficulty in applying the constitutional text brought him to the point where Justice Harlan had conceded in *Dutton*⁶⁵ that it was impossible to draw a line between admissible statements and those that would violate the right of confrontation. Unlike Justice Harlan, Justice Blackmun did not concede the task was impossible. Instead he proposed expanding the set of rules. His first rule was that in the usual case "the prosecution must either produce, or demonstrate the unavailability of, the declarant."⁶⁶ Justice Blackmun then added a refinement that would allow the prosecution to use only statements by unavailable declarants that had adequate indicia of reliability.⁶⁷ He described the indicia of reliability as sufficient

⁶¹ *Roberts*, 448 U.S. at 70-71.

⁶² *Id.* at 62.

⁶³ *Id.* at 63.

⁶⁴ *Id.*

⁶⁵ *Dutton v. Evans*, 400 U.S. 74 (1970).

⁶⁶ *Roberts*, 448 U.S. at 65.

⁶⁷ *Id.* at 66.

to overcome a confrontation objection if the statement falls “within a firmly rooted hearsay exception.”⁶⁸ Finally, he suggested a rule for the hearsay that did not fit within a firmly rooted exception: “In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”⁶⁹

Justice Blackmun supported his statement that certain hearsay exceptions do not create a confrontation violation with a footnote that listed two Supreme Court decisions that had discussed dying declarations,⁷⁰ one Court decision that had allowed the prosecution to use the cross-examined prior-trial testimony of an unavailable witness,⁷¹ and a law review comment that had endorsed the hearsay exception for business and public records.⁷² He broadened his authority with quotations from *Green* and *Dutton* about the similar roots and values of hearsay rules and the Confrontation Clause.⁷³ Justice Blackmun did not discuss whether his earlier statement of a categorical rule that the declarant must be unavailable was consistent with his suggestion that business records would always bear adequate indicia of reliability. The purpose of the business records exception would be lost if the prosecution had to call every person who made the records, but Justice Blackmun did not discuss why his confrontation rules made it harder for a prosecutor to use business records by requiring both unavailability and indicia of reliability.

Justice Blackmun provided no examples of particularized guarantees of trustworthiness. The very lengthy footnote attached to that statement contained only his review of the scholarly commentary and concluded that its “mutually critical character” meant that the Court should continue with what he described as its “demonstrated success in steering a middle course.”⁷⁴ Equally important, Justice Blackmun did not state that particularized guarantees of trustworthiness would allow the prosecution to use a prior statement. His language is

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 66 n.8 (citing *Pointer v. Texas*, 380 U.S. 400, 407 (1965); *Mattox*, 156 U.S. at 243-44).

⁷¹ *Roberts*, 448 U.S. at 66 n.8 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972)).

⁷² J. Brooks Greer, III, Comment, *Hearsay, the Confrontation Clause, and Related Problems*, 30 LA. L. REV. 651, 668 (1970).

⁷³ *Roberts*, 448 U.S. at 66.

⁷⁴ *Id.* at 68 n.9.

phrased carefully to require exclusion if there are no particularized guarantees of trustworthiness, but it does not say they will be sufficient. That phrasing left the question of whether anything else might provide indicia of reliability for future decisions.

The “indicia of reliability” label had a short and varying history before Justice Blackmun used it in *Roberts*. A closer look into how the phrase got its start is required to determine whether Justice Blackman used it in the reliability-only sense that Justice Scalia attacked so strongly in *Crawford*. Justice White first used the phrase in *Green* to describe state hearsay rules that violated the right of confrontation.⁷⁵ Next, Justice Stewart used the phrase in *Dutton* in a different sense when he summarized the reasons the hearsay statement in the case could be admitted without confrontation.⁷⁶ The label had been first used as a test in the way it was used in *Roberts* by then-Justice Rehnquist in *Mancusi v. Stubbs*.⁷⁷

In *Mancusi*, the hearsay was testimony from a prior trial that had been given by a witness who had later returned to Sweden⁷⁸ and was unwilling to return for the second trial.⁷⁹ Justice Rehnquist used the “indicia of reliability” phrase from *Dutton* in describing what the Court’s decisions had required to afford “the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”⁸⁰ He cited the opinion in *California v. Green* for that standard.⁸¹ Justice Rehnquist then reviewed the facts and concluded that the opportunity to cross-examine and the actual cross-examination at the first trial meant that the transcript “bore sufficient indicia of reliability and afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”⁸²

Justice Blackmun’s holding in *Roberts* applied exactly the same rule Justice Rehnquist had stated and followed in *Mancusi*. In Part III of *Roberts*, Justice Blackmun rejected a defense argument that the Court should weigh the inherent

⁷⁵ *California v. Green*, 399 U.S. 149, 161 (1970).

⁷⁶ *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

⁷⁷ 408 U.S. 204, 216 (1972) (quoting *Dutton*, 400 U.S. at 89).

⁷⁸ *Id.* at 209.

⁷⁹ *Id.* at 212.

⁸⁰ *Id.* at 213 (quoting *Dutton*, 400 U.S. at 89).

⁸¹ *Id.* (citing *Green*, 399 U.S. at 161).

⁸² *Mancusi*, 408 U.S. at 216 (quoting *Dutton*, 400 U.S. at 89) (internal quotation marks omitted).

reliability or unreliability of the hearsay.⁸³ Instead, Justice Blackmun said that the adequate opportunity to cross-examine the witness and the actual examination meant that the transcript “bore sufficient indicia of reliability and afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”⁸⁴

Justice Blackmun’s general approach in Part II of *Roberts* did not call for a “mere judicial determination of reliability,” as Justice Scalia described it in *Crawford*.⁸⁵ In *Roberts*, Justice Blackmun used the full phrase of “indicia of reliability” four times in three paragraphs.⁸⁶ Only in the concluding reference to firmly rooted hearsay exceptions did he shorten the phrase to “reliability.”⁸⁷ He described “indicia of reliability” by quoting Justice Rehnquist’s language from *Mancusi* that included the trier of fact’s basis for evaluating the statement.⁸⁸ Justice Blackmun included an explanation of the underlying purpose of the Clause: “Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence.”⁸⁹

The propositions that confrontation requires that the defendant be able to test adverse evidence and that the trier of fact have a basis for evaluating the truth of a statement do not obviously lead to the conclusion that the Clause requires only judicial screening for reliability. The *Roberts* test Justice Scalia rejected in *Crawford* was well-removed from its 1980 source.

The language of *Roberts* should be read in the context of 1980, the year the case was decided. At the time of *Roberts* the Federal Rules of Evidence were still new. Their eventual adoption in 1975 led to a new attitude about the hearsay rule. At the very least, the Federal Rules of Evidence were intended to remove many of the limits of the hearsay rule by defining new hearsay exceptions and expanding existing hearsay exceptions. In addition, the Federal Rules of Evidence

⁸³ *Ohio v. Roberts*, 448 U.S. 56, 72-73 (1980).

⁸⁴ *Id.* at 73 (quoting *Mancusi*, 408 U.S. at 216) (internal quotation marks omitted).

⁸⁵ *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

⁸⁶ *Roberts*, 448 U.S. at 65-66.

⁸⁷ *Id.* at 66.

⁸⁸ *Id.* at 73.

⁸⁹ *Id.* at 65.

produced a different way of thinking about the hearsay rule. Under the common law hearsay rule, a prosecutor in a criminal case could not expect to use many out-of-court statements. The prosecutor had to find the witnesses, get them to court, have them testify, and allow the defense to cross-examine. That requirement could be avoided only if the prosecution could use one of the few hearsay exceptions. The Supreme Court's early decisions applying the Confrontation Clause to state prosecutions did not require a complete theory of confrontation for every fact situation.⁹⁰ The Justices recognized that the state prosecutors using accomplice statements were taking shortcuts instead of getting the witnesses to testify as they should.

One obvious effect of the Federal Rules of Evidence is that codification has made the hearsay exceptions more accessible. Another effect is that the hearsay exceptions can be read like a code – as no more than literal categories that can be applied without evaluating the policy implications each time they are applied. The hearsay exceptions can be quickly expanded by amendments that may appear justified on the basis of assumed and limited facts, instead of being developed slowly and incrementally on the basis of the varied facts of a succession of cases. The wisdom of codification is not the issue here. Its effects, however, should not be ignored when evaluating what Justice Blackmun may have been trying to do in *Roberts* in 1980.

C. *Confrontation Doctrine after Roberts*

In the following decades, the Supreme Court did not consistently use Justice Blackmun's overall theory. Instead, the Court gave more attention to deciding each case by focusing on its facts. The rule in *Roberts* that any declarant must be shown to be unavailable was set aside as too broad. The language in *Roberts* about a firmly rooted hearsay exception was cited in cases that provided illustrations of hearsay exceptions that were firmly rooted, but no opinion tried to catalogue every exception that was firmly rooted. The Court used the *Roberts* framework and discussed particularized guarantees of trustworthiness only in cases that reversed convictions, so the Court never identified any facts where the

⁹⁰ See *Pointer*, 380 U.S. at 406.

guarantees were sufficient to admit the hearsay. The following sections summarize these cases because their details are important to assessing whether *Crawford* presented an accurate and complete description of the effect of *Roberts*.

1. Unavailability

Justice Blackmun's first rule about unavailability was quickly abandoned in the Court's first confrontation case after *Roberts*. The issue in *United States v. Inadi*⁹¹ was whether the prosecution could use statements under the co-conspirator exception without showing that the declarant was unavailable.⁹² The Third Circuit had reversed the conviction on the ground that *Roberts* did not include any exception for co-conspirator statements in its statement of the unavailability requirement.⁹³ The first task Justice Powell addressed in his opinion for the majority was rejecting *Roberts* as controlling precedent.⁹⁴ He described *Roberts* as deciding only whether preliminary hearing testimony could be used without confrontation at trial.⁹⁵ He cited Justice Blackmun's disclaimer of "any intention of proposing a general answer to the many difficult questions arising out of the relationship between the Confrontation Clause and hearsay."⁹⁶ He concluded that *Roberts* "must be read consistently with the question it answered, the authority it cited, and its own facts."⁹⁷

After Justice Powell set aside *Roberts*, he discussed whether a co-conspirator statement could be admitted over a confrontation objection even if the declarant was available.⁹⁸ He distinguished a co-conspirator statement from prior testimony and described the context of the conspiracy as making a co-conspirator statement "usually irreplaceable as substantive evidence."⁹⁹ He then concluded that a statement of a co-conspirator could be used by the prosecution even if the declarant was available to testify.¹⁰⁰

⁹¹ 475 U.S. 387 (1986).

⁹² *Id.* at 388.

⁹³ *United States v. Inadi*, 748 F.2d 812, 818 (1984), *rev'd*, 475 U.S. 387 (1986).

⁹⁴ *Inadi*, 475 U.S. at 392.

⁹⁵ *Id.* at 392-93.

⁹⁶ *Id.* at 392.

⁹⁷ *Id.* at 394.

⁹⁸ *Id.* at 394-96.

⁹⁹ *Id.* at 396.

¹⁰⁰ *Inadi*, 475 U.S. at 400.

Justice Marshall, writing for himself and Justice Brennan, argued in dissent that the Court had intended in *Roberts* to establish an analytical framework that would be applicable to all out-of-court statements.¹⁰¹ Justice Blackmun joined Justice Powell's opinion for the majority; he did not comment on Justice Powell's treatment of *Roberts*. The only issue in *Inadi* was whether the prosecution had to show that the declarant was unavailable, so there was no need to interpret any more of the language in *Roberts*.

The second time the Court considered the unavailability rule of *Roberts* came in *White v. Illinois*.¹⁰² In *White*, the evidence of a sexual assault included three statements by the victim at the scene that were admitted under the exception for a spontaneous declaration and statements by the victim at the hospital that were admitted under the medical examination exception.¹⁰³ The victim did not testify, but the trial judge was not asked to find that the victim was unavailable. The Supreme Court granted certiorari only on the confrontation issue, so it assumed that the evidence fit each hearsay exception.¹⁰⁴ In his opinion for the Court, Chief Justice Rehnquist rejected the defense assertion that *Roberts* required the prosecution to show the declarant was unavailable. He repeated the analysis from *Inadi* that had limited the authority of *Roberts* on unavailability to cases involving prior testimony.¹⁰⁵ The Chief Justice then concluded that there was no reason apart from *Roberts* to require that the declarant be unavailable if a prior statement was admitted under an established hearsay exception.¹⁰⁶ The result in *White* confirmed the statement in *Inadi* that the Court would not apply Justice Blackmun's general approach in *Roberts* to every confrontation issue.

2. A Firmly Rooted Hearsay Exception

Justice Blackmun's rule about a firmly rooted hearsay exception was not rejected in later Court cases in the same way as his rule about unavailability, but it was not consistently

¹⁰¹ *Id.* at 402-03 (Marshall, J., dissenting).

¹⁰² 502 U.S. 346 (1992).

¹⁰³ *Id.* at 350-51.

¹⁰⁴ *Id.* at 351 & n.4.

¹⁰⁵ *Id.* at 353-54.

¹⁰⁶ *See id.* at 354-57.

applied either. In *Bourjaily v. United States* the prosecution had used recorded co-conspirator statements by the defendant's accomplice to an FBI agent.¹⁰⁷ The accomplice did not testify.¹⁰⁸ In his opinion for the Court, Chief Justice Rehnquist concluded that the recording was admissible.¹⁰⁹ He cited *Inadi* as having held that the unavailability rule in *Roberts* did not apply to a co-conspirator statement and described *Roberts* as "only 'a general approach.'"¹¹⁰ Then he rejected the argument that the trial judge should have screened the statements for reliability using a quotation from *Roberts* that stated that an independent inquiry into reliability is not required if the hearsay exception is firmly rooted.¹¹¹ He did not define the category of firmly rooted exceptions. Instead, he demonstrated that the Court had long considered co-conspirator statements as not being excluded by the hearsay rule.¹¹² The Chief Justice never directly discussed why co-conspirator statements were not excluded by the Confrontation Clause. In his opinion he assumed that to be the rule and ended the discussion after explaining why *Roberts* had not altered the continued validity of that rule.¹¹³

Chief Justice Rehnquist also discussed firmly rooted hearsay exceptions in his opinion for the Court in *White v. Illinois*, but he did not consider how the term might have been defined in *Roberts*.¹¹⁴ The issue in *White* was whether the trial judge had to find that the declarant was unavailable before the prosecution could introduce a spontaneous statement or a statement for medical diagnosis.¹¹⁵ The Chief Justice rejected the defense argument that *Roberts* required unavailability; he said that issue had been settled by *Inadi's* limitation of *Roberts* to its particular facts.¹¹⁶ In discussing the reasons apart from *Roberts* why unavailability should not be required, the Chief Justice described firmly rooted exceptions as having sufficient indicia of reliability.¹¹⁷ That supported his conclusion that the

¹⁰⁷ 483 U.S. 171 (1987).

¹⁰⁸ *Id.* at 182.

¹⁰⁹ *Id.* at 181.

¹¹⁰ *Id.* at 182.

¹¹¹ *Id.* at 183.

¹¹² *Id.* at 183.

¹¹³ *Bourjaily*, 483 U.S. at 182-84.

¹¹⁴ *White v. Illinois*, 502 U.S. 346, 355-57, 355 n.8 (1992).

¹¹⁵ *Id.* at 348-49.

¹¹⁶ *Id.* at 353-54.

¹¹⁷ *Id.* at 355 n.8.

Confrontation Clause did not require unavailability because such a requirement would exclude statements with substantial probative value.¹¹⁸

White never proposed that the trial judge would test any specific statement for indicia of reliability. The Chief Justice instead described indicia of reliability as sufficient for any statement that fit the two firmly rooted exceptions considered in *White*.¹¹⁹ This discussion of firmly rooted hearsay exceptions does not lead to the individualized judicial screening of reliability that Justice Scalia rejected in *Crawford*. The Chief Justice referred only to the weight the context of any excited statement might have for the trier of fact and the guarantees of credibility for any statement for medical treatment that might be considered by the trier of fact.¹²⁰

3. Particularized Guarantees of Trustworthiness

The Court's treatment of the third rule in Justice Blackmun's general approach in *Roberts* falls in the middle between its rejection of his rule on availability and its favorable references to firmly rooted hearsay exceptions. The Supreme Court never found that any statement had particularized guarantees of trustworthiness that would allow the hearsay to be admitted without confrontation, but two different Justices created the appearance that there are such statements by using that part of *Roberts* to organize the majority decision in two separate cases. In both *Lee v. Illinois*¹²¹ and *Idaho v. Wright*¹²² the Court rejected arguments by state prosecutors that the particular statement in each case could be used because it was reliable hearsay, but the Court did not completely negate the possibility that other facts might lead to a different result. The Court as well did not reject the idea that the right of confrontation could be overcome by showing that a statement was reliable.

In *Lee v. Illinois*, the defendant's conviction was based in part on the confession of an accomplice who did not testify.¹²³ As a result, the defendant never had a chance to cross-examine

¹¹⁸ *Id.* at 356-57.

¹¹⁹ *Id.* at 355 n.8.

¹²⁰ *White*, 502 U.S. at 355-56.

¹²¹ 476 U.S. 530 (1986).

¹²² 497 U.S. 805 (1990).

¹²³ *Lee*, 476 U.S. at 536, 538.

the accomplice. In his majority opinion, Justice Brennan quoted the statement in *Roberts* that the purpose of the Clause is to augment accuracy “by ensuring the defendant an effective means to test adverse evidence.”¹²⁴ In dissent, Justice Blackmun quoted language that had first been used in *California v. Green* when he declared that the mission of the Clause is to assure that “the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement”;¹²⁵ that statement used the same language he had quoted in *Roberts*.¹²⁶ Neither Justice, however, gave those terms any further mention. Both opinions discussed only whether the accomplice statement was reliable. Justice Brennan rejected the State’s argument that the accomplice statement was factually interlocking with the defendant’s own statement; for that reason he found that using the statement violated the defendant’s right of confrontation.¹²⁷ He did not discuss whether the defendant would have had an opportunity to test the statement. Similarly, Justice Blackmun’s argument that the accomplice statement was reliable did not discuss whether the factfinder would have a basis for evaluating its truth.

The debate between the majority and dissent in *Lee* appeared to be framed around the assumption that the prosecution could use an accomplice statement if it were sufficiently reliable, even though the defendant never had an opportunity to examine the declarant. As Justice Scalia noted in *Crawford*, the Court’s reversal of the state decision in *Lee* meant that the Court did not hold that reliability alone would suffice.¹²⁸

The first reference to *Lee* in a Supreme Court opinion came in *New Mexico v. Earnest*.¹²⁹ As in *Lee*, the conviction in *Earnest* was based on a confession of an accomplice the defendant did not cross-examine.¹³⁰ In a Per Curiam opinion, the Court vacated the state judgment and remanded for further proceedings not inconsistent with *Lee*.¹³¹ Then-Justice

¹²⁴ *Id.* at 543 (quoting *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)).

¹²⁵ *Id.* at 548 (Blackmun, J., dissenting) (alteration in original) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 161 (1970)).

¹²⁶ *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972), quoting *California v. Green*, 399 U.S. 149, 161 (1970)).

¹²⁷ *Id.* at 545-46.

¹²⁸ See *Crawford v. Washington*, 541 U.S. 36, 58-59 (2004).

¹²⁹ 477 U.S. 648 (1986).

¹³⁰ *New Mexico v. Earnest*, 703 P.2d 872, 875 (1985).

¹³¹ *New Mexico v. Earnest*, 477 U.S. at 648.

Rehnquist gave more guidance in a concurring opinion that described *Lee* as establishing that an opportunity for cross-examination was not always required.¹³² He described *Lee* as setting out a test for determining the admissibility of a codefendant's confession that is factually interlocking with the defendant's own confession.¹³³ In his brief opinion he did not describe *Lee* as having established that the test was a general standard of reliability. Whether or not Justice Rehnquist's concurrence in *Earnest* was an accurate summary of the meaning of *Lee*, that interpretation was not presented in *Crawford*. Both Justice Scalia and Chief Justice Rehnquist agreed that the statement in *Crawford* was inadmissible without mentioning *Earnest*.

Justice Blackmun's general approach in *Roberts* appeared again in *Idaho v. Wright*.¹³⁴ In *Wright*, the hearsay statements were made by a two-and-a-half-year-old victim two days after the victim's older sister had reported sexual abuse in the family.¹³⁵ The declarant made the statements to an examining pediatrician after police and welfare officials took her into custody.¹³⁶ The trial court admitted the hearsay under the state's residual hearsay exception.¹³⁷ The Idaho Supreme Court reversed after finding that the hearsay did not fit any traditional hearsay exception and that it lacked particularized guarantees of trustworthiness.¹³⁸ In the United States Supreme Court, the State argued that the totality of circumstances provided particularized guarantees of trustworthiness; the State relied on both the circumstances of how the statement was made and other evidence that corroborated the truth of the statement.¹³⁹

Justice O'Connor wrote the majority opinion in *Wright* that affirmed the conclusion of the state court that admitting the victim's statement violated the right of confrontation. Justice O'Connor, however, did not endorse the reasoning of the state court that the constitutional flaw was the lack of procedural safeguards.¹⁴⁰ She rejected the argument of the

¹³² *Id.* at 649 (Rehnquist, J., concurring).

¹³³ *Id.* at 649 n.*.

¹³⁴ 497 U.S. 805 (1990).

¹³⁵ *Id.* at 809.

¹³⁶ *Id.*

¹³⁷ *Id.* at 811.

¹³⁸ *State v. Wright*, 775 P.2d 1224, 1230-31 (1989), *aff'd*, 497 U.S. 805 (1990).

¹³⁹ *See Idaho v. Wright*, 497 U.S. 805, 819 (1990).

¹⁴⁰ *Id.* at 818-19.

prosecution that the statement could be used if other evidence corroborated the truth of the statement.¹⁴¹ She did accept the argument that particularized guarantees of trustworthiness could be factors that “relate to whether the child declarant was particularly likely to be telling the truth.”¹⁴² She amplified the focus on whether the statement was truthful by describing particularized guarantees of trustworthiness as “relevant circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief.”¹⁴³

Although Justice O’Connor did not say that her opinion in *Wright* was intended to replace *Roberts*, she did discuss the reliability of the statement in a way that appeared to go beyond *Roberts*. Justice O’Connor defined the issue as whether the statement had “particularized guarantees of trustworthiness.”¹⁴⁴ She defined proper guarantees as ones that surround the making of the statement, and she rejected any use of corroboration of the facts by other evidence.¹⁴⁵ The common theme that tied her discussion together was reliability. Justice O’Connor applied these tests and found that only two of the factors stated by the trial court related to the circumstances of the making of the statement – whether a two-and-a-half-year-old child would have a motive to make up such a story of sexual assault and whether one would expect a child of that age to fabricate a statement about sexual abuse.¹⁴⁶ Those two factors were not enough to allow the statement to be used. It is possible to conclude from Justice O’Connor’s opinion that the child’s statement could have been used if there had been more facts supporting admissibility, but that is only one possible inference from Justice O’Connor’s analysis.

None of the Justices in *Wright* disagreed with Justice O’Connor’s focus on the reliability of the hearsay. The dissenting opinion by Justice Kennedy accepted Justice O’Connor’s premise that the issue was whether the hearsay was trustworthy.¹⁴⁷ Justice Kennedy argued only that the Court should not reject corroboration; he thought that judges should be able to use corroborating evidence to find that the

¹⁴¹ *Id.* at 819.

¹⁴² *Id.* at 822.

¹⁴³ *Id.* at 819.

¹⁴⁴ *Id.* at 822.

¹⁴⁵ *Wright*, 497 U.S. at 822.

¹⁴⁶ *Id.* at 826.

¹⁴⁷ *Id.* at 827 (Kennedy, J., dissenting).

hearsay was trustworthy.¹⁴⁸ Justice Blackmun joined Justice Kennedy's dissenting opinion without comment, so he did not discuss whether Justice Kennedy had correctly interpreted *Roberts*.

In *Crawford*, Justice Scalia distinguished *Lee* from the possible inferences that could be drawn from Justice Brennan's opinion.¹⁴⁹ Justice Scalia could have interpreted *Wright* in the same way in *Crawford*, but he did not. Instead, he ignored *Wright* completely. Justice Scalia had joined Justice O'Connor's majority opinion in *Wright* but he did not mention *Wright* even though he otherwise listed all the Court's confrontation cases as generally faithful to the original meaning of the Confrontation Clause.¹⁵⁰

A careful reading of *Wright* shows that even the focus on reliability in Justice O'Connor's opinion does not compel the conclusion that a hearsay statement could be admitted "upon a mere finding of reliability" of the particular declarant's statement. None of the factors Justice O'Connor said could be used required the trial judge to evaluate the trustworthiness or reliability of the particular declarant. Each factor began with the undisputed fact that the declarant was two-and-a-half years old and then considered the knowledge and reasoning capacity of any child of that age. The factors that did relate to the trustworthiness or reliability of the particular declarant were those that *Wright* said could not be used.

Wright may have had more impact than *Roberts* in creating the appearance that the Confrontation Clause could be satisfied by a judicial finding of reliability. Even Justice Scalia described the issue in those terms in 1990. In *Maryland v. Craig*, announced on the same day as *Idaho v. Wright*, Justice Scalia dissented from the decision to allow a child witness in a sexual abuse trial to testify by closed circuit television.¹⁵¹ In the course of arguing that the Confrontation Clause should be applied literally to require face-to-face confrontation of every witness who testified, Justice Scalia discussed the application of the Clause to hearsay evidence.¹⁵² He described the limits on hearsay as necessary to prevent the prosecution from subverting the right of confrontation by calling a witness to

¹⁴⁸ *Id.* at 828.

¹⁴⁹ *Crawford v. Washington*, 541 U.S. 36, 58-59 (2004).

¹⁵⁰ *Id.* at 57-59.

¹⁵¹ 497 U.S. 836, 860 (1990) (Scalia, J., dissenting).

¹⁵² *Id.* at 863.

repeat a hearsay statement.¹⁵³ Justice Scalia summarized the Court's opinions as "focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) 'is otherwise assured.'"¹⁵⁴

Justice Scalia's summary of confrontation doctrine in *Craig* may not seem accurate after *Crawford*, but the summary was not central to his opinion. In 1990, no Justice was trying to provide a substitute for *Roberts*. They had no reason to do so because the Court had not been consistently treating *Roberts* as the foundation for confrontation doctrine. For similar reasons, *Wright* should not be read as a new foundation but rather as another instance of the Court developing confrontation doctrine on a case-by-case basis. The result is more important than each detail in the discussion. The holding in *Wright* could have been described in *Crawford* as not inconsistent with *Crawford's* interpretation of the Confrontation Clause, even if the Court no longer endorses all the inferences that could be drawn from *Wright*.

D. *The History of the Testimonial Interpretation*

Justice Scalia's dissent in *Maryland v. Craig* is important for a second reason. It was the first appearance of a key part of what eventually became the testimonial interpretation of the Confrontation Clause in *Crawford*. There was no hearsay issue in *Craig* because the victim testified; the only issue was the use of closed-circuit television. In her majority opinion, Justice O'Connor concluded that a trial judge could permit the use of television on a finding of necessity.¹⁵⁵ In discussing that question, she surveyed both the Court's confrontation cases that had involved hearsay and its confrontation cases that had involved trial procedure.¹⁵⁶ Justice O'Connor then concluded from both sets of precedent that something less than face-to-face confrontation at trial would suffice if "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."¹⁵⁷

¹⁵³ *Id.* at 865.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 860 (majority opinion).

¹⁵⁶ *Id.* at 844-50.

¹⁵⁷ *Craig*, 497 U.S. at 850.

In his dissent, Justice Scalia argued that the Court's confrontation cases on the use of hearsay involved a different issue from its cases on trial procedure.¹⁵⁸ He did not contest Justice O'Connor's summary of the hearsay cases because he was making a different point. He argued that the confrontation rules about hearsay were based on a limitation that was implicit in the Confrontation Clause. His point was that the requirement of face-to-face confrontation was explicit and therefore stronger than the implicit limitation on hearsay. Part of his reasoning was that the language of the Sixth Amendment gave a defendant the right to be confronted by the "witnesses against him," a phrase Justice Scalia interpreted as meaning all those who give testimony at trial.¹⁵⁹

The next step in the evolution of the testimonial interpretation came two years later in *White v. Illinois*¹⁶⁰ when the United States submitted an Amicus Curiae brief in support of the State.¹⁶¹ That brief argued that the Confrontation Clause did not impose any limits on the prosecution's use of the particular hearsay in the case – an excited utterance and a statement to medical personnel for the purpose of medical treatment.¹⁶² It cited Justice Scalia's dissent in *Craig* for the proposition that the Clause applied only to those who provide testimony at trial or its functional equivalent and argued that neither statement had been made by such a "witness against" the defendant.¹⁶³

The United States described this interpretation as an intermediate position between the two polar readings Justice Harlan had described in *Green*.¹⁶⁴ This interpretation did not limit the Confrontation Clause to the witnesses who actually appear, but it did not extend the Clause to every hearsay statement.¹⁶⁵ At the heart of this interpretation was a definition of the functional equivalent of in-court testimony as "affidavits, depositions, prior testimony, or other statements (such as confessions) that are made with a view to legal

¹⁵⁸ *Id.* at 863 (Scalia, J., dissenting).

¹⁵⁹ *Id.* at 862.

¹⁶⁰ 502 U.S. 346 (1992).

¹⁶¹ Brief for the United States as Amicus Curiae Supporting Respondent, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113).

¹⁶² *Id.* at 21.

¹⁶³ *Id.* at 18 (citing *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting)).

¹⁶⁴ *Id.* at 19-20 & 19 n.10.

¹⁶⁵ *Id.*

proceedings.”¹⁶⁶ The United States did not offer this interpretation in an effort to expand the protection offered by the Confrontation Clause to defendants; its Amicus Brief in support of the State of Illinois was an effort to substantially reduce the scope of the Clause.

Chief Justice Rehnquist rejected the interpretation offered by the United States in his majority opinion in *White*. He described the interpretation as a narrow reading that would limit the effect of the Confrontation Clause to *ex parte* affidavits or similar statements “made for the principal purpose of accusing or incriminating the defendant.”¹⁶⁷ The Chief Justice said that the Court would continue on its middle course that did not equate hearsay with confrontation even though it allowed hearsay within an established exception to be used without confrontation.¹⁶⁸

Justice Thomas wrote a concurring opinion in *White*, joined by Justice Scalia, that also described the interpretation offered by the United States as a narrow reading of the Confrontation Clause.¹⁶⁹ Justice Thomas argued that the Court’s analysis of confrontation doctrine under the two standards defined in *Roberts* implied that “the Confrontation Clause bars only unreliable hearsay.”¹⁷⁰ He suggested replacing the distinction between reliable and unreliable hearsay with a distinction between testimonial materials and all other hearsay.¹⁷¹ Justice Thomas surveyed the history of the Sixth Amendment and concluded that it did not seem likely that the drafters intended to allow the prosecution to use an *ex parte* affidavit just because it was reliable.¹⁷² He did not suggest that the Sixth Amendment history provided a single definition of testimonial materials. Instead, he said only that “[o]ne possible formulation” was “affidavits, depositions, prior testimony, or confessions.”¹⁷³ The hearsay involved in *White* did not fall into any of those categories, so Justice Thomas could state that the Court had reached the correct result by

¹⁶⁶ *Id.* at 18-19.

¹⁶⁷ *White*, 502 U.S. at 352 (majority opinion).

¹⁶⁸ *Id.* at 352-53.

¹⁶⁹ *Id.* at 365-66 (Thomas, J., concurring).

¹⁷⁰ *Id.* at 363.

¹⁷¹ *Id.* at 365.

¹⁷² *Id.* at 363.

¹⁷³ *White*, 502 U.S. at 365.

allowing the prosecution to use excited utterances and a statement for medical diagnosis.

E. The Prelude in Lilly v. Virginia

Following *White*, the Supreme Court took a seven-year break from debating confrontation doctrine. In *Lilly v. Virginia*, the Court considered whether the Confrontation Clause permitted the prosecution to use an entire confession of an accomplice that contained some statements against penal interest and other statements that accused the defendant.¹⁷⁴ The state court had rejected the defendant's confrontation argument after concluding that the statement was a statement against penal interest and that the penal interest exception was firmly rooted under state law.¹⁷⁵ The Supreme Court was unanimous that admitting the statement was a confrontation violation, but none of the five opinions was supported by a majority. Each opinion suggested a different way of organizing confrontation doctrine.

Justice Stevens organized the analysis in his lead opinion around *Roberts*.¹⁷⁶ He began by assuming that the assertion of the Fifth Amendment by the accomplice made his trial testimony unavailable.¹⁷⁷ Justice Stevens described the test in *Roberts* as allowing such a statement if it fit a firmly rooted hearsay exception or contained particularized guarantees of trustworthiness.¹⁷⁸ On the first test, he stated conclusively that an accomplice confession inculcating the defendant was not within a firmly rooted hearsay exception.¹⁷⁹ If such a statement were to be admitted it could only be under the second test, a test that was not met under the facts before the Court.¹⁸⁰ The analysis by Justice Stevens might have made *Roberts* the foundation of confrontation doctrine, but Justice Stevens was not writing for a majority. The five Justices who did not join his opinion made clear that they did not agree with his reliance on *Roberts*.

¹⁷⁴ 527 U.S. 116, 120 (1999).

¹⁷⁵ *Lilly v. Commonwealth*, 499 S.E.2d 522, 533-34 (Va. 1998).

¹⁷⁶ *Lilly*, 527 U.S. at 124-39.

¹⁷⁷ *Id.* at 124 n.1.

¹⁷⁸ *Id.* at 124-25.

¹⁷⁹ *Id.* at 134.

¹⁸⁰ *Id.* at 139.

Chief Justice Rehnquist wrote for the second-largest grouping of three Justices.¹⁸¹ He did not object to using the two *Roberts* tests, but he did not agree with the application of either test by Justice Stevens to the facts before the Court. The Chief Justice did not dissent from the holding that the state court had permitted the prosecution to use hearsay evidence that violated the Confrontation Clause. His first objection was that the Court did not need to categorically exclude all accomplice confessions from the category of firmly rooted hearsay exceptions.¹⁸² His second objection was the Court should allow the state courts to review whether the confession had particularized guarantees of trustworthiness.¹⁸³ Both arguments were consistent with a case-by-case approach to the development of confrontation doctrine in which the Court identifies a particular rule for the specific facts without trying to announce a global rule for other facts.

Three Justices wrote alone. Justice Scalia wrote a one paragraph concurring opinion that described the issue as settled under the testimonial interpretation Justice Thomas had proposed in his concurring opinion in *White*.¹⁸⁴ His opinion, while cryptic, made clear that he did not agree with the effort of Justice Stevens to base confrontation doctrine on *Roberts* and that he did not agree with the Chief Justice that the Court should continue to define confrontation on a case-by-case basis.¹⁸⁵ Justice Thomas likewise reiterated the testimonial interpretation he had proposed in *White*.¹⁸⁶ His own one-paragraph opinion showed that he did not endorse the effort of Justice Stevens to base confrontation doctrine on *Roberts*. Unlike Justice Scalia, Justice Thomas also agreed with the Chief Justice that the state court should have the first chance to decide if the confession had particularized guarantees of trustworthiness.¹⁸⁷ Justice Thomas did not discuss whether a judge should admit or exclude the statement if it was both formalized testimonial material and contained particularized guarantees of trustworthiness.

¹⁸¹ *Id.* at 144 (Rehnquist, C.J., concurring).

¹⁸² *Lilly*, 527 U.S. at 145-46.

¹⁸³ *Id.* at 148.

¹⁸⁴ *Id.* at 143 (Scalia, J., concurring).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 143 (Thomas, J., concurring).

¹⁸⁷ *Id.* at 143-44.

Justice Breyer gave advance billing to *Crawford* in his concurring opinion by describing the debate as whether the Sixth Amendment protects trustworthiness or confrontation.¹⁸⁸ He did not take a position on that issue because it was not necessary to the unanimous conclusion that there was a confrontation violation. Instead, he simply signaled that at least some Justices might be willing to consider other ways to interpret the Confrontation Clause.

II. *CRAWFORD V. WASHINGTON*

The Petition for Certiorari in *Crawford* framed one question about the application of the Court's confrontation doctrine to its specific facts and then offered the Court a chance to return to the broad question it had left unresolved in *Lilly*. The two questions were:

I. Whether the Confrontation Clause of the Sixth Amendment permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement "interlock" with the defendant's custodial statement.

II. Whether this Court should reevaluate Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statement.¹⁸⁹

The Court granted certiorari on both questions.¹⁹⁰ While both Justice Scalia's opinion and the examination of *Crawford* have focused primarily on the second question, there are lessons that can be learned from the Court's specific answer to the first one as well. This Part will review the analysis of both questions in *Crawford*, take notice of the lack of debate about *Roberts* in *Crawford*, and consider whether *Crawford* accurately summarized the confrontation doctrine the Court had already established.

A. *The Testimonial Interpretation*

The defendant in *Crawford* was convicted of assault by a jury that heard the custodial statements of both the

¹⁸⁸ *Lilly*, 527 U.S. at 140, 142 (Breyer, J., concurring).

¹⁸⁹ 71 U.S.L.W. 3753 (U.S. June 10, 2003) (No. 02-9410).

¹⁹⁰ *Crawford v. Washington*, 539 U.S. 914 (2003).

defendant and his wife.¹⁹¹ The defendant did not deny stabbing the victim, but he did claim self-defense. That defense had some support from the account in the defendant's custodial statement that "I could a swore I seen [the victim] goin' for somethin' before"¹⁹² His self-defense claim was undercut by his wife's custodial statement in which she responded to a question about whether the victim had anything in his hands before the stabbing by saying: "A. (pausing) um um (no)."¹⁹³ The defendant's wife did not testify because of the state marital privilege, so the State offered the tape recording of her statement.¹⁹⁴ The State argued it was a statement against her penal interest because she admitted she had led the defendant to the victim's apartment and facilitated the assault.¹⁹⁵ The trial judge admitted the statement after finding it had particularized guarantees of trustworthiness under the test in *Roberts*.¹⁹⁶

The Washington Court of Appeals reversed the conviction.¹⁹⁷ It concluded that his wife's entire statement was inadmissible because parts were self-exculpatory¹⁹⁸ and the parts that were against her penal interest were not sufficiently reliable to satisfy either the state hearsay rule or the right of confrontation.¹⁹⁹ The Court of Appeals relied on *Lilly*²⁰⁰ and the United States Supreme Court's interpretation of the federal penal interest exception in *Williamson v. United States*.²⁰¹ It distinguished *Lee*²⁰² because the statements of the defendant and his wife were dissimilar on whether the victim had something in his hand when he was stabbed.

The Washington Supreme Court reversed the Court of Appeals and reinstated Crawford's conviction.²⁰³ It concluded that the statements of the defendant and his wife were

¹⁹¹ Crawford v. Washington, 541 U.S. 36, 40-41 (2004).

¹⁹² *Id.* at 38.

¹⁹³ *Id.* at 40.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ State v. Crawford, No. 25307-1-II, 2001 WL 850119, at *7 (Wash. Ct. App. July 30, 2001) (unpublished opinion).

¹⁹⁸ *Id.* at *4.

¹⁹⁹ *Id.* at *4-5.

²⁰⁰ *Id.* at *6-7 (citing *Lilly v. Virginia*, 527 U.S. 116 (1999)).

²⁰¹ *Id.* at *3 (citing *United States v. Williamson*, 512 U.S. 594 (1994)).

²⁰² *Id.* at *5 (citing *Lee v. Illinois*, 476 U.S. 530 (1986)).

²⁰³ State v. Crawford, 54 P.3d 656, 664 (Wash. 2002).

interlocking and virtually identical.²⁰⁴ It turned the discrepancies between their stories about whether and when the victim had a weapon into a point of similarity by describing both statements as “ambiguous as to whether [the victim] ever actually possessed a weapon.”²⁰⁵ The Washington Supreme Court based its analysis on its 1993 decision in *State v. Rice*,²⁰⁶ in which it had followed the United States Supreme Court’s decision in *Lee v. Illinois*.²⁰⁷ It did not discuss whether *Lee* was still a good precedent on the validity of the interlocking confession theory and it never mentioned *Lilly v. Virginia*.²⁰⁸

The facts of *Crawford* did not require reevaluating confrontation doctrine to identify the errors of the Washington Supreme Court. On the facts relevant to self defense, the two statements did not interlock as much as the confessions in *Lee*. The Supreme Court had effectively supplanted *Lee* in *Idaho v. Wright*²⁰⁹ when it rejected factual corroboration as a means to establish reliability.²¹⁰ The interlocking confession theory was not mentioned by any Justice in *Lilly* and had all but disappeared from other appellate decisions in recent years. In fact, it had been the grounds in only one unpublished appellate opinion and had been mentioned in only three other appellate opinions.²¹¹ The language from *Lee* cited by the Washington Supreme Court was not part of the holding because the conviction in *Lee* had been reversed. *Lee* had been cited in the concurring opinion in *Earnest*,²¹² but no Supreme Court opinion had ever affirmed a conviction on the basis of the interlocking confession theory. Chief Justice Rehnquist concluded his concurring opinion in *Crawford* by stating that it would have been sufficient to cite *Wright* as grounds for reversal.²¹³ The result in *Crawford* makes clear that no Justice thought that any application of *Lee* would support admitting the hearsay in *Crawford*; the reversal was unanimous.

²⁰⁴ *Id.* at 664.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 661 (citing *State v. Rice*, 844 P.2d 416 (Wash. 1993)).

²⁰⁷ *Rice*, 844 P.2d at 427 (citing *Lee*, 476 U.S. 530).

²⁰⁸ 527 U.S. 116 (1999).

²⁰⁹ 497 U.S. 805 (1990).

²¹⁰ See *supra* text accompanying notes 140-48.

²¹¹ See Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 SYRACUSE L. REV. 87, 136-37 (2003).

²¹² See *New Mexico v. Earnest*, 477 U.S. 648, 649 n.* (1986) (Rehnquist, J., concurring).

²¹³ *Crawford v. Washington*, 541 U.S. 36, 76 (Rehnquist, C.J., concurring).

The narrowest interpretation of *Crawford* on its specific facts made no change at all in the Court's doctrine. The Court reversed the decision of the Washington Supreme Court after holding that the statement of the defendant's wife could not be used unless she testified and was subject to cross-examination at trial. Justice Scalia's suggestion that her statement could have been used if she had testified at trial²¹⁴ went beyond the facts but it was consistent with cases such as *Green*.²¹⁵ He also suggested that her testimony could have been used if she had testified at a preliminary hearing at which the defendant had cross-examined her.²¹⁶ That suggestion also went beyond the facts, but it was consistent with the Court's decisions in *Green*²¹⁷ and *Roberts*.²¹⁸ Justice Scalia stated that there were no facts that would suffice to establish that the particular statement had indicia of reliability,²¹⁹ but that statement did not undercut any Supreme Court decision.

Justice Scalia did not discuss how and why the Washington Supreme Court reached its interpretation that a confrontation objection required a judicial evaluation of the reliability of the statement. He did not discuss whether *Roberts* had instructed judges to screen each statement to determine its reliability. He did not discuss whether other courts were misreading *Roberts*, reading *Roberts* correctly but extending it incorrectly beyond its facts, or reading and extending *Roberts* correctly in ways that eventually showed where *Roberts* was flawed as a foundation. Those questions might not have been important because the state court decision was wrong in any event. Those questions, however, can be very important in deciding how to define an accurate interpretation of the Confrontation Clause that other courts can and will apply correctly.

Justice Scalia did explain why the Washington trial court had erred by allowing the prosecution to use a hearsay statement after evaluating it for reliability instead of asking whether the defendant had a chance to cross-examine the declarant. From his review of the historical record, Justice

²¹⁴ *Id.* at 60 n.9 (majority opinion).

²¹⁵ See *California v. Green*, 399 U.S. 149 (1970). See also *United States v. Owens*, 484 U.S. 554 (1988).

²¹⁶ *Crawford*, 541 U.S. at 57.

²¹⁷ *Green*, 399 U.S. 149.

²¹⁸ *Ohio v. Roberts*, 448 U.S. 56 (1980).

²¹⁹ *Crawford*, 541 U.S. at 68-69.

Scalia identified two propositions. First, he described the Confrontation Clause as intended to prevent the prosecution from routinely using confessions and statements to investigating magistrates by declarants who did not testify at trial.²²⁰ Second, he concluded that such statements could be used only if the declarant was unavailable and the defendant had a prior opportunity to cross-examine the declarant.²²¹

Justice Scalia described the prior opportunity for cross-examination as a necessary condition for introducing the statement, not just a sufficient condition.²²² Establishing that the prior opportunity to cross-examine was a necessary condition meant that there could not be any alternatives or substitutes. It meant that the reliability of the statement could not be the equivalent of cross-examination and that judicial evaluation of the reliability of a statement could not be a substitute for the right of confrontation. That conclusion was also implicitly supported by Justice Scalia's historical review because none of the evidence he presented suggested that reliability was the proper test. Chief Justice Rehnquist did not contest that issue in his concurrence. He did not agree that the distinction between testimonial and nontestimonial hearsay had been as important as it was described by Justice Scalia, but the Chief Justice did not argue that reliability had been considered an alternative test to cross-examination.²²³

Justice Scalia's discussion of the scope of his interpretation of the Confrontation Clause was framed in the same terms as the dilemma described by Justice Harlan in *Green* and by Justice Blackmun in *Roberts*.²²⁴ Justice Scalia suggested the Clause could provide a right to confront only those who testify at trial, a right to confront every person whose statement is offered at trial, or a right somewhere in between.²²⁵ He rejected both polar interpretations, as had Justice Harlan and Justice Blackmun, and then adopted an in-between interpretation the Court had not previously endorsed.

Justice Scalia rejected the narrowest coverage of the Clause because it was contrary to an inference he drew from its

²²⁰ *Id.* at 50-53.

²²¹ *Id.* at 53-54.

²²² *Id.* at 55.

²²³ *See id.* at 69-76 (Rehnquist, C.J., concurring).

²²⁴ *See supra* text accompanying notes 34-35, 63-64.

²²⁵ *Crawford*, 541 U.S. at 42-43.

history.²²⁶ He described the history of confrontation as a political and legal concept that was at least as old as Roman times. He described the history of the Confrontation Clause as showing that it was directed at the use of *ex parte* examinations as evidence for the prosecution.²²⁷ Therefore, the Clause must do more than guarantee a right to cross-examine those who testify at trial because it was not intended to leave the admissibility of all out-of-court statements to the law of evidence.

Justice Scalia also rejected the broadest coverage of the Clause that would make it applicable to all out-of-court statements by declaring that some hearsay was outside the core concerns of the Sixth Amendment.²²⁸ He described those statements most clearly covered by the Confrontation Clause as “testimonial.” Justice Scalia acknowledged that he had not provided a comprehensive definition of that label, but he said that at a minimum a statement was testimonial if it was made in police interrogation or in testimony at a preliminary hearing, before a grand jury, or at a former trial.²²⁹

Justice Scalia reviewed the Court’s confrontation decisions to demonstrate that their results were consistent with his testimonial interpretation of the Confrontation Clause.²³⁰ The Court had allowed the prosecution to use prior testimony of an unavailable witness who had been cross-examined. It had not allowed the prosecution to use prior testimony of a witness who was not unavailable or the prior testimony of a witness the defendant had no opportunity to cross-examine. He emphasized that the Court had excluded prosecution use of accomplice confessions that were testimonial in *Lilly* and *Lee*, and reconciled the approval of the admission of the accomplice statement in *Dutton* by describing it as not testimonial.²³¹ He asserted that other than one minor and arguable exception in *White*, the Court had never accepted anything other than a prior opportunity for cross-examination as sufficient to allow the prosecution to use a testimonial statement.²³² Justice Scalia did not examine how his

²²⁶ *Id.* at 50-51.

²²⁷ *Id.* at 50.

²²⁸ *Id.* at 51.

²²⁹ *Id.* at 68.

²³⁰ *Id.* at 57-59.

²³¹ *Crawford*, 541 U.S. at 57.

²³² *Id.* at 58 n.8 & 59 (citing *White v. Illinois*, 502 U.S. 346 (1992)).

suggestion that confrontation analysis had been going in the wrong direction for twenty-four years since *Roberts* could be consistent with his conclusion that the Court had been reaching correct results during those same years.

At first, the statement in *Crawford* that confrontation alone will allow the prosecution to use a testimonial statement may appear to be a bright-line rule because the rule as stated allows no exceptions or balancing. In another sense, however, the statement in *Crawford* is only another balancing test, with the balancing now being carried out in deciding whether any statement should be labeled testimonial. The emphasis on the historical record in *Crawford* may suggest that it is a balancing test controlled by history and therefore a balance that does not consider present-day factors. Whether and how the Court applies *Crawford* in future cases may depend on how well this balancing test accords with the historical record and whether it provides a workable foundation for confrontation doctrine

B. *The Missing Debate in Crawford*

The opinions in *Crawford* involve only the appearance of a debate about *Roberts*. Justice Scalia identified the *Roberts* test as reducing the right of confrontation to a question of reliability. He targeted the “unpardonable vice of the *Roberts* test,”²³³ “*Roberts*’ failings,”²³⁴ and “*Roberts*’ unpredictable and inconsistent application.”²³⁵ He said “the *Roberts* test is inherently, and therefore permanently, unpredictable.”²³⁶ The Chief Justice began his opinion in *Crawford* as a “dissent from the Court’s decision to overrule *Ohio v. Roberts*”²³⁷ and conceded that “the Court of course overrules *Ohio v. Roberts*.”²³⁸

Despite the references to *Roberts*, *Crawford* was not a debate about the holding in *Roberts* or the Court’s application of the *Roberts* test. Justice Scalia specifically included *Roberts* when he described the holdings of the Supreme Court cases that were “largely consistent” with the two propositions he derived from the historical record.²³⁹ Justice Scalia did not

²³³ *Id.* at 63.

²³⁴ *Id.* at 65.

²³⁵ *Id.* at 66.

²³⁶ *Id.* at 68 n.10 (emphasis omitted).

²³⁷ *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring).

²³⁸ *Id.* at 75.

²³⁹ *Id.* at 57-58 (majority opinion).

identify any case in which the Supreme Court had reached the wrong result by applying the *Roberts* test. Even his footnote questioning the implications of *White v. Illinois* for issues the Court had not specifically addressed in that case did not assign any blame to reliance on the *Roberts* test.²⁴⁰ The Chief Justice argued that the Court should not change course, but he did not defend the *Roberts* test nor describe the *Roberts* test as the course the Supreme Court should continue to follow.

In *Crawford*, the Justices were debating whether and how the Court should describe an overall theory of confrontation. On the issue of whether the Court should do that, Justice Scalia was following the lead of Justice Blackmun in *Roberts*. *Roberts* was the first and only other time the Court had proposed an overall theory of confrontation. On the issue of how to do that, Justice Scalia described a theory that was quite different from the one Justice Blackmun proposed in *Roberts*. Nevertheless, Justice Scalia followed the lead of Justice Blackmun and Justice Harlan before him by assuming that an overall theory of confrontation should identify the kinds of hearsay excluded by the right of confrontation. In contrast, on the issue of whether to describe an overall theory, the Chief Justice rejected the approach of Justice Scalia as well as that of Justice Blackmun; he argued that the Court should not describe an overall theory of confrontation of any kind. The course the Chief Justice wanted the Court to continue following was a case-by-case development of confrontation doctrine by addressing the facts of each case.

C. *Pre-Crawford Confrontation Doctrine after Crawford*

Justice Scalia illustrated some implications of the testimonial interpretation with brief descriptions of the confrontation rules addressed in the Court's pre-*Crawford* cases. His endorsement of the results in those cases means that the rules they established should still be viable after *Crawford*. His summaries of those rules, however, require careful attention to nuances in the prior cases.

1. Dying Declaration

Justice Scalia did not contest that a dying declaration could be used without confrontation, in part because the

²⁴⁰ *Id.* at 58 n.8.

Supreme Court had recognized the dying declaration in *Mattox*.²⁴¹ He went on to concede that even a testimonial dying declaration might be admissible without confrontation.²⁴² For that conclusion he cited English common law decisions and an English treatise.²⁴³ He suggested that this would be the only exception for a testimonial statement because it is *sui generis* in the English common law.²⁴⁴ Justice Scalia's assumption that the scope of any exception should be defined by English common law may explain why he did not include a caution that the discussion of the dying declaration exception in *Mattox* was dictum. It may also explain why he did not mention that the Court could still consider further limitations or qualifications for dying declarations, as he did when he suggested that spontaneous declarations might have to be made immediately. *Crawford* may suggest that any statement is admissible if it can be labeled a dying declaration, but there is still no case in which the Supreme Court has affirmed a conviction on that basis.

2. Forfeiture

Justice Scalia also endorsed a second exception to the bright-line rule for testimonial statements when he stated that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."²⁴⁵ For this proposition, Justice Scalia used a "See" signal and cited *Reynolds v. United States*.²⁴⁶ There are many questions about the forfeiture doctrine that were not discussed in this brief mention in *Crawford*. Justice Scalia did not discuss whether the original meaning of the Sixth Amendment had been followed in *Reynolds* in 1879. He did not suggest any limits on the rule of forfeiture that might be derived from *Reynolds*, even though elsewhere in *Crawford* he emphasized the need to read the facts of Supreme Court precedent precisely.

Reynolds did not involve an ordinary hearsay statement. The hearsay was prior testimony at an earlier trial

²⁴¹ *Mattox v. United States*, 156 U.S. 237, 243-44 (1895).

²⁴² *Crawford*, 541 U.S. at 56 n.6.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 62.

²⁴⁶ *Id.* (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1879)).

of the same defendant under a different indictment.²⁴⁷ The defendant had been present and had a full opportunity to cross-examine.²⁴⁸ There was evidence that the defendant was actively involved in preventing the witness from testifying. That involvement was continuous and ongoing at the time the prior testimony was offered.²⁴⁹ The Court found that the prosecution had made an adequate showing that the witness was not available.²⁵⁰ The Supreme Court cited two English cases that had allowed the prosecution to use prior testimony – an examination and a deposition – in both of which the defendant had kept the witness away.²⁵¹ The Supreme Court cited two state cases as holding the same without discussing their facts.²⁵² It then cited three American treatises as support for its statement that “if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence.”²⁵³

Reynolds did not consider whether the forfeiture rule would apply if the defendant had killed the witness as part of the original crime without specifically intending to make the witness an unavailable hearsay declarant. That is a different kind of wrongdoing because its effect cannot be undone at the time of trial, while in *Reynolds* the defendant could have changed his mind and permitted the witness to attend and testify. *Reynolds* did not consider whether the defendant’s wrongdoing would have mattered if the hearsay had been something other than prior testimony at a trial in which the defendant had already had one chance to confront the declarant.

In criticizing the reliability test, Justice Scalia wrote that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”²⁵⁴ That criticism could apply as well to some versions of a forfeiture rule. Should forfeiture depend on no more than a judicial finding that a defendant’s alleged commission of the crime contributed to the

²⁴⁷ *Reynolds*, 98 U.S. at 158.

²⁴⁸ *Id.* at 161.

²⁴⁹ *Id.* at 159-60.

²⁵⁰ *Id.* at 160.

²⁵¹ *Id.* at 158.

²⁵² *Id.*

²⁵³ *Reynolds*, 98 U.S. at 158-59.

²⁵⁴ *Crawford*, 541 U.S. at 62.

unavailability of live testimony? That possibility would raise the question of whether dispensing with confrontation because the judge thinks the defendant is obviously guilty is akin to dispensing with the jury verdict because the defendant is obviously guilty. That question was not answered in *Reynolds* or *Crawford*.

How much the forfeiture exception is limited to the facts of *Reynolds* may determine how broad the exception becomes, but any exception undercuts the possibility that the historical interpretation of *Crawford* will clarify confrontation doctrine with a bright-line rule. At the same time, the endorsement of the forfeiture exception without examining how it fits into the historical record raises a question about whether the testimonial interpretation will provide a stable and coherent foundation for confrontation doctrine.

3. Prior Testimony

Justice Scalia gave substantial attention to the Supreme Court's precedent on prior testimony.²⁵⁵ He summarized the cases that required the government to show that the witness was not available to testify at trial, the cases that had excluded confessions where the defendant had no opportunity to cross-examine, and the cases that allowed prior testimony only if the defendant had an adequate opportunity to cross-examine.²⁵⁶ Justice Scalia described *Roberts* as a case in which the defendant had examined the witness and emphasized in his discussion of *Lee* that it was important to recognize precisely what the Court actually held.²⁵⁷ In his conclusion, however, he summarized the Court's prior holdings too broadly.

In the text, Justice Scalia stated that “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”²⁵⁸ By listing the prior opportunity to cross-examine as sufficient, Justice Scalia went beyond the holdings of the Court's two primary cases: *Green* and *Roberts*. In *Green*, Justice White had described the witness at the preliminary hearing as

²⁵⁵ *Id.* at 57-58.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 58-59.

²⁵⁸ *Id.* at 59.

“subjected to extensive cross-examination by respondent’s counsel.”²⁵⁹ In *Roberts*, Justice Blackmun described how “[d]efense counsel questioned [the witness] at some length” at the preliminary hearing as “counsel continued to explore the underlying events in detail.”²⁶⁰

Justice Blackmun stated that the state court opinion in *Roberts* had raised the issue of whether *Green* had suggested that “the mere opportunity to cross-examine rendered the prior testimony admissible.”²⁶¹ He explicitly said the Court “need not decide” whether that was correct.²⁶² He further said that the Court need not “decide whether *de minimis* questioning is sufficient.”²⁶³ No matter how much the general theory in *Roberts* might be rejected, Justice Blackmun limited the scope of its specific holding by reserving this issue. *Crawford* does not establish that the Court has accepted that a prior opportunity to cross-examine is sufficient. In addition, expanding the rule to allow the prosecution to use former testimony on no more than a prior opportunity to cross-examine or *de minimis* questioning raises an issue that was not subject to historical analysis in *Crawford*.

4. Trial Confrontation

Similarly, Justice Scalia’s statement that a testimonial statement can be used if “the declarant appears for cross-examination at trial” suggests that the appearance will suffice.²⁶⁴ This statement was supported by a citation to page 162 in Part II of *Green*,²⁶⁵ with no mention that in Part IV of *Green* the Supreme Court remanded the case for further factfinding because a mere appearance by the declarant was not enough.²⁶⁶ In *Green*, Justice White stated that the application of the rule in a typical case would be proper because the witness at trial would give a different version of the facts from the prior statement and be subject to cross-examination with respect to both versions.²⁶⁷ In *Green*, the

²⁵⁹ *California v. Green*, 399 U.S. 149, 151 (1970).

²⁶⁰ *Ohio v. Roberts*, 448 U.S. 56, 58, 71 (1979).

²⁶¹ *Id.* at 70 (emphasis omitted).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004).

²⁶⁵ *Id.*

²⁶⁶ *California v. Green*, 399 U.S. 149, 168-70 (1970).

²⁶⁷ *Id.* at 168.

declarant's presence with an apparent lapse of memory might have affected the right to cross-examine in a way that would create a confrontation problem, so the Court framed the question on remand as whether there was sufficient cross-examination at trial.²⁶⁸

In *Crawford*, Justice Scalia may have come closer to describing the limits imposed by part IV of *Green* when he said that a statement could be used "so long as the declarant is present at trial to defend or explain it."²⁶⁹ However, that language still focuses on presence and ability to act without requiring that the record show the declarant actually did defend or explain the statement. The requirement of an actual examination is a detail that can be easily overlooked by an attorney or judge who assumes that the latest Supreme Court mention of a topic provides a complete statement of every rule. Since this is also a detail that has not been examined under the testimonial theory of *Crawford*, it remains another reason to be hesitant about whether *Crawford* has provided a complete foundation for confrontation doctrine.

5. Business Records

Justice Scalia declared that statements within other common law hearsay exceptions, such as business records, were not testimonial.²⁷⁰ The Chief Justice approved of that exception and expanded it to include business records and official records.²⁷¹ Neither opinion mentioned that the Court has never directly addressed the confrontation issues raised by the hearsay exception for business records or official records. Even if the common ground in the two opinions creates the appearance that the Court will probably not require confrontation for every business record or official record, that does not necessarily mean that every application of those labels will be sufficient to overcome a confrontation objection. The Court has not yet examined whether the historical record supports the classification of every business record as a nontestimonial statement.

²⁶⁸ See *id.* at 168-69.

²⁶⁹ *Crawford*, 541 U.S. at 60 n.9.

²⁷⁰ *Id.* at 56.

²⁷¹ *Id.* at 76 (Rehnquist, C.J., concurring).

III. LEARNING MORE FROM THE HISTORICAL RECORD

Justice Scalia used the historical record in *Crawford* to address two related but different questions about confrontation doctrine. The first question asked whether admitting a statement on the basis of a judicial evaluation that it was reliable was consistent with the best interpretation of the original meaning of the Sixth Amendment. On that question, *Crawford* made clear that a judicial finding of reliability was not sufficient to overcome the textual requirement that a defendant have the right to confront the witnesses.²⁷² Unless that reading of history can be challenged in some way with new evidence, *Crawford* appears to have made a permanent alteration to the direction in which confrontation doctrine had been moving.

The second question asked whether the historical record could be used to create a workable test that would exclude all improper hearsay statements but permit the prosecution to use evidence that does not violate the right of confrontation. The proposal in *Crawford* that the distinction should be whether the statement is testimonial is an interpretation of the historical record that can be examined on several points. This Part will consider whether there might be alternative conclusions about the original meaning of the Confrontation Clause. It will describe what the ratification history shows about the original meaning, discuss the dangers of reading the historical record from a modern perspective, and examine the roots of *Crawford* in the history of the Supreme Court's search for confrontation doctrine.

A. *The Ratification Debates as a Source for the Original Meaning*

Justice Scalia did not survey the history of confrontation in an unbroken sweep from Roman times to today. Instead, his history consists of specific points organized chronologically without being necessarily connected. That may be the only way to present so much history within a single Court opinion, but it leaves open the possibility that the Framers' generation did not know all the historical evidence that can now be assembled and may have interpreted it differently from the

²⁷² *Id.* at 68-69 (majority opinion).

way it is interpreted today. Presenting the history chronologically can also suggest a causation relation that may not necessarily be accurate.

Some of these questions are raised by Justice Scalia's discussion of the confrontation history in the 16th and 17th centuries in England and in the Colonies.²⁷³ For England, he discussed the well-known prosecution of Lord Raleigh on the basis of a confession by a witness who was examined before Privy Council.²⁷⁴ He gave more emphasis to the caselaw concerning examinations of suspects and witnesses by justices of the peace under statutes of Queen Mary's reign.²⁷⁵ When he turned to the Colonies his examples were different. The controversial examination practices he described were the use of gubernatorial commissions to examine witnesses in Virginia and the enforcement of the Stamp Act in the admiralty courts in Massachusetts.²⁷⁶ Justice Scalia then listed the Colonial declarations of rights adopted around the time of the Revolution without discussing whether they were a response to the Marian statutes he had emphasized or a response to the Colonial experience. There may have been a major difference. One study of the Fifth Amendment self-incrimination clause describes the colonial use of the Marian statutes by magistrates to control the lower classes as unobjectionable to the upper classes who protested the expanded jurisdiction of the admiralty courts to punish smuggling.²⁷⁷

Justice Scalia used even fewer sources for the original meaning of the Sixth Amendment when he reached the time of the Constitution. He cited only two sources from the ratification history. Each quotation confirmed that the founding-era rhetoric decried the omission of a right of confrontation from the proposed Constitution, but it is hard to find any details about that right in either quotation. It is also hard to know how much significance to attribute to silence about nontestimonial hearsay without knowing whether the speaker was a lawyer who might have known about the details of evidence law in a criminal case.

²⁷³ *Id.* at 43-48.

²⁷⁴ *Id.* at 44.

²⁷⁵ *Crawford*, 541 U.S. at 43-47.

²⁷⁶ *Id.* at 47-48.

²⁷⁷ Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1107-11, 1115-17, 1121 (1994).

The first person Justice Scalia quoted was Abraham Holmes of Massachusetts, a delegate to the Massachusetts ratifying convention:

The mode of trial is altogether indetermined; . . . whether [the defendant] is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told . . . [W]e shall find Congress possessed of powers enabling them to institute judicatories little less auspicious than a certain tribunal in Spain, . . . the *Inquisition*.²⁷⁸

Secondary sources have described Abraham Holmes as someone who was self-educated in the law and the president of a local court of sessions,²⁷⁹ but that description does not fit Mr. Holmes in 1788. His unpublished autobiography makes clear that his minor judicial career began several years later and that he gave up his judicial career when he was finally admitted to practice law.²⁸⁰ By 1788, he had done no more than begin to read a few law books; none of them concerned criminal law, criminal procedure, or evidence. His autobiography does not mention any experience in a criminal trial before he spoke about confrontation in 1788.

The second person Justice Scalia quoted was an anonymous Antifederalist who used the name Federal Farmer in a published essay:

Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.²⁸¹

Justice Scalia identified Federal Farmer as R. Lee.²⁸² That attribution is in accord with one possibility that Federal

²⁷⁸ *Crawford*, 541 U.S. at 48-49 (quoting 2 DEBATES ON THE FEDERAL CONSTITUTION 110-11 (J. Elliot ed., 2d ed. 1863)).

²⁷⁹ See 30 WRIGHT & GRAHAM, *supra* note 47, § 6347, at 709; THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, pt. 1, at 1011-12 (Bernard Bailyn ed., 1993).

²⁸⁰ Abraham Holmes, *Memoirs of Abraham Holmes, Esq., 1754-1839* (no date) (unpublished manuscript on deposit at the Rochester Historical Society, Rochester, Massachusetts).

²⁸¹ *Crawford*, 541 U.S. at 49 (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), *reprinted in* 1 B. SWARTZ, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 469, 473 (1971)).

²⁸² *Id.* at 49.

Farmer was Richard Henry Lee,²⁸³ a Virginia politician who was not a lawyer and had, at most, one year of judicial experience as a justice of the peace over thirty years earlier.²⁸⁴ Other scholars have identified Federal Farmer as the merchant Melancton Smith of New York, again not a lawyer or judge.²⁸⁵

There are other sources in the ratification debates Justice Scalia might have quoted, but those sources likewise cannot be confirmed to have been lawyers or judges. For example, Brutus was another anonymous Antifederalist writer who also wrote about confrontation.²⁸⁶ Brutus has often been identified as Robert Yates, a New York judge at the time, but the literature suggests other potential identities who were not lawyers.²⁸⁷ The doubts that any statements about confrontation in the ratification debates were made by a judge or lawyer has to raise a question about whether any quotation is a reliable commentary on the rules of evidence.

On the critical question of evidence about the meaning of the Sixth Amendment itself, Justice Scalia included only a single sentence that “[t]he First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.”²⁸⁸ Justice Scalia did not mention James Madison, considered the actual author of the Sixth Amendment, but it does not appear that Madison left any useful clues about the meaning of the Confrontation Clause. The First Congress changed the wording in the proposed Amendment from “accusers and witnesses” to just “witnesses” without leaving any useful legislative history,²⁸⁹ so there is no way to know whether that change is significant to the search for the original meaning. That does not mean that there are no other clues to what might have been the original meaning of the words used in the Confrontation Clause. One clue requires considering the context in which the objections about confrontation were raised.

²⁸³ See 30 WRIGHT & GRAHAM, *supra* note 47, § 6347, at 682 n.237.

²⁸⁴ See Biographical Directory of the United States Congress: 1774-1989, at 1357-58 (Bicentennial ed., 1989).

²⁸⁵ See Robert H. Webking, *Melancton Smith and the 'Letters from the Federal Farmer'*, 44 WM. & MARY Q. 510 (1987).

²⁸⁶ See 30 WRIGHT & GRAHAM, *supra* note 47, § 6347, at 686 & 733-34.

²⁸⁷ See Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 38 n.119 (1996).

²⁸⁸ *Crawford*, 541 U.S. at 49.

²⁸⁹ See EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 206-22 (1957).

The inquiry about the context of the objections can begin with Abraham Holmes, the speaker Justice Scalia quoted from the ratification debates. Mr. Holmes was one of 364 delegates to the Massachusetts ratification convention.²⁹⁰ Many representatives listed on the delegate roster have titles of Honorable, Reverend, Esquire, or a military rank, but Abraham Holmes was one of many whose only title was Mister.²⁹¹ The few lines from his speech quoted by Justice Scalia are only a small fraction of Mr. Holmes's entire speech. Mr. Holmes did not limit his speech to the two objections to the Constitution quoted in *Crawford*: that the Constitution did not establish a right to confront witnesses and that it did not guarantee a defendant the advantage of cross-examination. In his speech, Mr. Holmes also objected to at least fifteen other omissions from the Constitution.²⁹² The topics ranged from some covered later by the Bill of Rights, such as the lack of protection against compelled self-incrimination,²⁹³ to the less serious, such as not providing for the frequency of court sessions.²⁹⁴ There were other complaints about rights that are still not recognized, such as compensating acquitted defendants for their loss of liberty and loss of time.²⁹⁵

The same description provides the context for Federal Farmer, the second quotation in *Crawford* from the ratification debates. Federal Farmer's list of objections was almost as long as that of Mr. Holmes, with at least nine of them addressing the evils that would arise from the Constitution plus six more arguing for other rights that should be protected by a bill of rights.²⁹⁶

Justice Scalia made a traditional argument by using the ratification history as a surrogate for legislative history. He did not, however, appear to recognize that this approach may warp the ratification history so far out of context that it becomes misleading. This approach has the effect of re-casting

²⁹⁰ DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, at 31-43 (Bradford Pierce & Charles Hale eds., 1856).

²⁹¹ *Id.* at 31-43.

²⁹² 2 DEBATES ON THE FEDERAL CONSTITUTION 109-12 (J. Elliot ed., 2d ed. 1863), reprinted in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 689-91 (Bernard Schwartz ed., 1971) [hereinafter DOCUMENTARY HISTORY].

²⁹³ 2 DOCUMENTARY HISTORY, *supra* note 292, at 691.

²⁹⁴ *Id.* at 690.

²⁹⁵ *Id.*

²⁹⁶ 1 DOCUMENTARY HISTORY, *supra* note 292, at 469-75.

the Antifederalists as the defenders of confrontation; it implicitly assumes that the Federalists played an opposing role as the enemies of confrontation. Of course, the Federalists were the opponents of the Antifederalists, but it was not on the subject of confrontation. No one has ever presented any evidence that the opposing sides actually debated the meaning of confrontation in the way the terms of a modern statute might be debated or negotiated. The Federalists had no apparent interest in taking the other side on many objections raised by the Antifederalists; they certainly showed no interest in restricting a defendant's right to confront prosecution witnesses. The full speech of Abraham Holmes and the full text of Federal Farmer presented reasons to reject the Constitution. They were Antifederalist statements and should be read as only that.

The ratification debates show both that the right of confrontation was being debated by nonlawyers and that no one objected that an issue involving the details of a criminal trial was being debated by nonlawyers. That means there is no evidence that anyone thought the debate was about the precise scope of the right of confrontation or the elements of any hearsay exceptions the courts should recognize. The context of the ratification debates suggests that the original meaning of the Confrontation Clause must be sought on a different level. Instead of the level of technical detail that might have been of interest to lawyers and meaningful to judges, both Abraham Holmes and Federal Farmer were speaking about broader political theory in arguing that the plan of the Constitution should not be accepted without some protection for the right of confrontation. Whether or not they were competent to speak about the working details of confrontation, they made no effort to do so.

Equally important is that the full content of the speech of Abraham Holmes and the letter of Federal Farmer show that they were not trying to catalogue all the details of the right of confrontation that would not be protected without constitutional protection. They were also not debating English common law. They were making political arguments about broad theory. Their omission of all the permutations cannot be taken as any evidence that they did not also care about what they did not mention. They were not responding to a demand for a bill of particulars on the question of confrontation alone. Nor were they trying to provide guidance for applying the Confrontation Clause that had not yet been drafted.

B. The Risks of a Modern Perspective

The outpouring of research on confrontation since Justice Harlan lamented the scarcity of sources in *Green* has shown how much English and American criminal procedure and evidence rules were evolving before 1791 and how much the American hearsay rule evolved after 1791. In *Green*, Justice Harlan framed his question as whether the Sixth Amendment had constitutionalized the hearsay rule.²⁹⁷ Justice Blackmun began his general theory in *Roberts* by considering the relationship between the Confrontation Clause and the hearsay rule.²⁹⁸ Each Justice assumed that they could find guidance for a modern question in the historical record even though the modern question may never have been considered in the earlier era.

It might appear that Justice Scalia avoided that problem in *Crawford* by seeking the meaning of the Sixth Amendment at the time it was written. He appeared to insulate the meaning of the Confrontation Clause from being misconstrued in modern terms by declaring that it “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”²⁹⁹ While he cited some early state cases elsewhere in his opinion, he cited English common law as his source for the common law of 1791.³⁰⁰ Justice Scalia and Chief Justice Rehnquist debated about English common law. English common law may be more accessible or more well-defined than American common law, but Justice Scalia’s survey of the historical record did not provide any evidence that the original meaning was tied to English common law. There is no mention of English common law in the statements from the ratification debates quoted by Justice Scalia.

Other explicit text in the Bill of Rights raises questions about Justice Scalia’s statement that the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law.”³⁰¹ Justice Scalia immediately followed that with “[a]s the English authorities above reveal,

²⁹⁷ *California v. Green*, 399 U.S. 149, 173 (1970) (Harlan, J., concurring).

²⁹⁸ *Ohio v. Roberts*, 448 U.S. 56, 62 (1980).

²⁹⁹ *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

³⁰⁰ *Id.* at 45-47, 54.

³⁰¹ *Id.* at 54.

the common law in 1791”³⁰² Interpreting the text of an Amendment as adopting the common law is well-known in Seventh Amendment doctrine. Of course, the Seventh Amendment declaration that “the right of trial by jury shall be preserved”³⁰³ is not matched by any text in the Sixth Amendment. The Sixth Amendment’s contrast with the Seventh Amendment is evidence that the Framers did not use language clearly intended to preserve the right of confrontation as it then existed in English common law.

Those doubts about whether Justice Scalia actually found the original meaning in *Crawford* do not necessarily undercut the specific holding of the case or even the Court’s rejection of the reliability test. There is equally no mention of a judicial reliability test anywhere in the ratification history. The doubts raised by the ratification history, however, are much more significant to the suggestion in *Crawford* that the original meaning of confrontation was limited to testimonial statements.

It is misleading to rely on hindsight to view evolution as a foreordained process. That caution applies to the evolution of the hearsay rule before and after 1791. From the modern perspective, we can observe the evolution of evidence law from its unformed structure in 1791 to the Federal Rules of Evidence. However, it was also possible in 1791 that the evolution would go in the opposite direction and the hearsay rule would wither and die. There might be no hearsay rule at all today, but there would still be a Sixth Amendment Confrontation Clause. In the same way, other steps and actors in the criminal justice system might have evolved in a different direction. For example, the preliminary examination might have disappeared if all jurisdictions decided to use indictment by a grand jury; that would mean there might be prior testimony only for an occasional retrial. The modern police force might not have evolved as a public agency. An interpretation of the Confrontation Clause should remain consistent and coherent even if there is no hearsay rule, no preliminary examination, and no public prosecutor or public police department.

Justice Scalia invoked the text of the Confrontation Clause to support his conclusion that its primary or even

³⁰² *Id.*

³⁰³ U.S. CONST. amend. VII.

exclusive focus was the specific type of out-of-court statement he labeled testimonial hearsay.³⁰⁴ He cited Noah Webster's 1828 dictionary,³⁰⁵ not exactly a contemporary source for the meaning of language used four decades earlier. The implication of his argument is that the word "witnesses" was chosen for a purpose, but he did not suggest what word might have been used in its place. All the models available in colonial charters used either "witnesses" alone or used both "witnesses" and "accusers,"³⁰⁶ but Justice Scalia did not draw any conclusions from the omission of "accusers" from the Sixth Amendment text.

Justice Scalia's use of textual interpretation to buttress his testimonial interpretation did not mention the Supreme Court cases that have established that the text of the Confrontation Clause is applicable to more than questions about hearsay. Some were cases in which he participated. For example, Justice Scalia's majority opinion in *Coy v. Iowa* established that the Confrontation Clause can be violated by a screen in the courtroom that prevents face-to-face confrontation between the defendant and witnesses.³⁰⁷ Justice Scalia dissented in *Maryland v. Craig*³⁰⁸ from Justice O'Connor's conclusion in the majority opinion that a particular closed-circuit television system did not violate the right of confrontation,³⁰⁹ but both Justices agreed that the Clause could be violated by the manner in which nonhearsay evidence was presented. In *Olden v. Kentucky*,³¹⁰ a Per Curiam opinion reversed a state conviction because the trial court's restrictions on the defendant's cross-examination of a witness did not give proper weight to the Sixth Amendment right of confrontation.³¹¹ Other cases before Justice Scalia joined the Court had established that the Clause governs the right to cross-examine

³⁰⁴ *Crawford*, 541 U.S. at 53.

³⁰⁵ *Id.* (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

³⁰⁶ See 30 WRIGHT & GRAHAM, *supra* note 47, § 6346, at 611-12.

³⁰⁷ 487 U.S. 1012, 1015-16, 1022 (1988).

³⁰⁸ 497 U.S. 836, 860 (1990) (Scalia, J., dissenting).

³⁰⁹ *Id.* at 857 (majority opinion).

³¹⁰ 488 U.S. 227 (1988) (per curiam).

³¹¹ *Id.* at 231.

a witness³¹² and the right of a defendant to be present in the courtroom to see the witnesses.³¹³

The right to cross-examine witnesses who testify at trial and the right to see and be seen by those witnesses are rights based on the text of the Confrontation Clause. They illustrate that its effect is broader than restrictions on hearsay. As Justice Scalia observed in his *Craig* dissent, these explicit rights support an implicit limitation upon hearsay evidence, “since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said.”³¹⁴ When Justice Scalia suggested that the specific words of the Confrontation Clause were chosen for the purpose of making a distinction between testimonial and nontestimonial hearsay that is not apparent in the text, he did not mention the Clause’s nonhearsay effect or his own explanation for its effect on hearsay. An explanation for this silence may be found in the Supreme Court’s confrontation doctrine history.

C. *The Roots of Crawford’s Testimonial Theory in Prior Supreme Court Doctrine*

Justice Scalia’s opinion in *Crawford* can be read as an attempt to resolve the dilemma that Justice Harlan defined in *Green* and then could not overcome in *Dutton*, and that Justice Blackmun tried to resolve in *Roberts*.³¹⁵ Justice Scalia’s approach in *Crawford* rested on an implicit assumption that Justice Harlan and Justice Blackmun had focused on the wrong word by thinking about “confrontation.” He proposed that clarity requires focusing on the word “witnesses.”³¹⁶ The switch in emphasis had been advocated in academic writings before *Crawford*.³¹⁷ It produces a newly titled “testimonial” theory about the Confrontation Clause.

The “testimonial” theory may appear to provide the overall structure for confrontation doctrine that eluded Justice

³¹² See *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

³¹³ See *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970).

³¹⁴ 497 U.S. at 865 (Scalia, J., dissenting).

³¹⁵ See *supra* text accompanying notes 34-35, 63-64.

³¹⁶ *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

³¹⁷ AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 125-31 (1997); Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 *GEO. L.J.* 1011 (1998).

Harlan and Justice Blackmun. Dividing all statements into testimonial and nontestimonial hearsay might seem to provide a simplified structure for confrontation doctrine that can be more readily applied at trial. The single rule that a prior opportunity to cross-examine is the only way to satisfy the textual requirement of confrontation provides a bright-line test. The testimonial theory may not be supported by any evidence from the ratification history, but it is a sufficiently plausible interpretation of what the Framers might have meant that there is no directly contrary evidence.

The focus on the word “witnesses” in the Confrontation Clause also has the effect of distracting attention from how the testimonial interpretation has to be adapted to make it serve as a global theory. Even when it was first advocated by Justice Thomas in his concurring opinion in *White*,³¹⁸ it was not as self-contained as it might be made to appear. Justice Thomas suggested the difficulties of trying to define the functional equivalent of in-court testimony but he proposed a rule that would apply to “formalized testimonial materials,” such as testimony.³¹⁹ Justice Scalia in *Crawford* followed his appeal to the text of the Clause by listing Justice Thomas’s definition of the functional equivalent as well as two other possible definitions suggested in the Petitioner’s Brief and an Amicus Brief.³²⁰ The need for such nontextual refinements undercuts the appearance that the text of the Clause actually supports the testimonial interpretation.

The presence of the right of confrontation in the Bill of Rights is a textual clue that the Framers might have been concerned with confrontation. The absence of any detail in the Confrontation Clause is a textual clue that the Framers did not think it was necessary to define the details of a hearsay rule. Justice Scalia provided a description of a right of confrontation that was based on the prevalent assumption that the original meaning was about hearsay. Justice Scalia’s opinion in *Crawford* did not, however, examine how the Court might interpret the Confrontation Clause if it abandoned that assumption and read the original meaning as a statement about confrontation.

³¹⁸ *White v. Illinois*, 502 U.S. 346, 358 (1992) (Thomas, J., concurring).

³¹⁹ *Id.* at 365.

³²⁰ *Crawford*, 541 U.S. at 51-52.

IV. REASONS AND A FOUNDATION FOR REVISING THE TESTIMONIAL INTERPRETATION

The questions that remain after *Crawford* should not obscure the importance of the changes it made. The decisions from federal and state courts since *Crawford* have brought to light a substantial number of interpretations of the Confrontation Clause that seem doubtful. *Crawford* has focused attention on several statutory hearsay exceptions that may have gone well beyond what the Supreme Court had ever upheld under *Roberts* or any other precedent.

The questions that remain after *Crawford* also do not negate the possibility that even an imperfect or incomplete theory may be the best theory. It may be unreasonable to expect to find any theory that is fully consistent with the historical record, practically useful in the trial courts, and sufficiently complete to provide guidance about new questions as they arise. It is always important to ask how serious the gaps might be and whether there is an alternative that is demonstrably better. This Part will examine some possible gaps in the testimonial theory of *Crawford* and describe the roots of an alternative interpretation of the Confrontation Clause.

A. *Gaps in the Testimonial Interpretation*

One danger created by *Crawford* is that the effort to base confrontation doctrine so heavily on history appears to provide no clear principles for deciding whether a particular statement is testimonial or nontestimonial, or for defining the confrontation requirements for nontestimonial statements. Without a clear principle, it will be difficult to distinguish between decisions that apply *Crawford* properly to facts the Supreme Court has not yet addressed and those that limit *Crawford* as closely as possible to its specific facts in order to minimize any actual effect on prior practice. For example, some courts have suggested that “interrogation” should be found only where it is structured and formal, so that less-structured fact gathering by police officers is outside the concern of the Confrontation Clause.³²¹ Child forensic

³²¹ See, e.g., *People v. Kilday*, 20 Cal. Rptr. 3d 161, 172-74 (Cal. Ct. App. 2004), review granted, 105 P.3d 114 (Cal. 2005); *People v. West*, 823 N.E.2d 82, 88-89

interviewers have been advised to change some of their techniques to increase the chances their interviews will be labeled nontestimonial and admitted when the child does not testify.³²² The Supreme Court can control when it might decide whether *Crawford* requires something more than delaying the start of police questioning or making small changes to an interview protocol, but other courts must decide those issues now as the criminal justice system responds to *Crawford*.

This reaction to *Crawford* is neither unusual nor improper. It appears, however, to be happening more quickly today than when *Roberts* was decided twenty-five years ago. The rapid exchange of information about a Supreme Court decision produces a quicker and broader spread of knowledge about an opinion than before, but it also permits a broader exchange of possible countermeasures and responses.

The importance of considering how the bench and bar might respond to an opinion is highlighted by the absence of any discussion in *Crawford* about why confrontation doctrine might have gone in the wrong direction after *Roberts*. *Roberts* required that a statement have indicia of reliability.³²³ It did not, however, state that particularized guarantees of trustworthiness would permit the prosecution to use a hearsay statement; rather it said that a statement must be excluded unless the statement had particularized guarantees of trustworthiness.³²⁴ The Supreme Court twice rejected arguments that the right of confrontation could be satisfied by showing that the particular statement was reliable, first in *Lee*³²⁵ and then in *Wright*.³²⁶ Nevertheless, Justice Scalia did not have to search far to find examples of other courts citing *Roberts* for the reliability interpretation.³²⁷

Crawford was not just a case about confrontation doctrine. It was also a case about whether and how well the Supreme Court can provide guidance to other courts. The conversion of *Roberts* from a decision requiring indicia of reliability to a rule permitting the prosecutor to use hearsay

(Ill. App. Ct. 2005); State v. Wright, No. A03-1948, 2005 WL 147487, at *2-4 (Minn. Ct. App. Jan. 25, 2005).

³²² Allie Phillips, *Child Forensic Interviews After Crawford v. Washington: Testimonial or Not?*, PROSECUTOR, July-Aug. 2005, at 17, 27-28.

³²³ Ohio v. Roberts, 448 U.S. 56, 66 (1980).

³²⁴ *Id.*

³²⁵ See Lee v. Illinois, 476 U.S. 530, 546 (1986).

³²⁶ See Idaho v. Wright, 497 U.S. 805, 827 (1990).

³²⁷ Crawford v. Washington, 541 U.S. 36, 62-65 (2004).

after a judicial evaluation of reliability allowed other courts to create the appearance of applying Supreme Court doctrine without the reality. Justice Scalia showed the depth of the problem in *Crawford* by comparing cases that showed how both a fact and its opposite could be presented in different opinions as evidence of reliability.³²⁸ If *Crawford* succeeds in changing confrontation doctrine, that change will come because it will no longer be enough to declare that a statement is reliable for it to be admissible.

By itself, rejecting the reliability test will not necessarily eliminate the reasons that have led courts to admit hearsay statements under their interpretation of *Roberts*. After *Crawford*, those reasons might lead a court to declare a statement nontestimonial. Whether that becomes the eventual response may depend on how well and how quickly the Court explains the principles other courts should use to recognize that a statement is testimonial.

That still leaves open the question of whether abandoning any confrontation protection for nontestimonial statements would be the best way to bring certainty or stability to confrontation doctrine. The appeal of the testimonial interpretation as a bright-line test rests on the assumptions that testimonial and nontestimonial statements are so clearly different that they can be readily distinguished, that the difference should be reflected in different confrontation requirements, and that the historical record supports the distinction and helps make the distinction. The opinions of other courts have shown that the distinctions are not easy to make, particularly without any articulated principle to guide the analysis.³²⁹

For example, an alleged accomplice may make accusations against a defendant in settings other than custodial interrogation. Some may be made in wholly private settings. If the difference in the setting for the accusation is the controlling factor, which category would be proper when an alleged accomplice makes the accusation in an apparently private setting that is actually a covert interrogation by an acquaintance who has agreed to be recorded by the police? Should the knowledge or expectation of the interrogator or the

³²⁸ *Id.* at 63.

³²⁹ *See, e.g.*, *State v. Wright*, 701 N.W.2d 802, 811-12 (Minn. 2005); *Davis v. State*, 169 S.W.3d 660, 668-72 (Tex. Ct. App. 2005).

accomplice govern whether the defendant has a right of confrontation?

An accomplice's accusation during custodial interrogation, a similar statement to a covert interrogator, and a similar private statement can be equally damaging to the defendant. The absence of the declarant from trial would mean that the defendant's inability to confront the declarant would be the same for all three statements. The already apparent search for ways to step around the holding of *Crawford* would likely produce one immediate response if future decisions establish that statements produced by covert interrogation are nontestimonial: the number of covert interrogations would increase. Covert interrogation would become much more valuable because the resulting product could be used without confrontation if the declarant became unavailable.

Crawford did not hold that private hearsay statements do not require some confrontation limits. The statement by Justice Scalia about nontestimonial statements left open three possibilities – flexibility under *Roberts*, flexibility under some rule similar to *Roberts*, or no need for any confrontation analysis.³³⁰ As Justice Breyer did in his concurring opinion in *Lilly*,³³¹ Justice Scalia has left a question that calls for further examination.

B. *Roots of a Pro-Confrontation Interpretation*

Was it necessary to abandon the text of the Confrontation Clause so quickly in trying to interpret and apply it? The primary reason it has been treated as insufficient is that it does not provide any detailed instructions about how it should be applied. The adoption process does not provide much help either because neither the ratification debates nor the record of the first Congress contain any detailed instructions. The “faded parchment” image then suggests that applying history, policy, or some combination is all that is possible. That appears to inevitably lead to the balancing approach rejected by *Crawford*.

The alternative is to accept both the text and the record of the adoption process at face value. The Framers provided no detailed information and knew they were not providing

³³⁰ *Id.* at 68.

³³¹ *Lilly v. Virginia*, 527 U.S. 116, 142-43 (Breyer, J., concurring).

complete instructions. Speakers such as Abraham Holmes provided no detail because they were not lawyers and lacked the experience to provide details. The absence of any evidence that the comments of the nonlawyers were corrected by judges or lawyers is itself evidence that those who might have thought about the actual application of the confrontation principle saw no need to speak. There is no evidence anyone discussed what the right of confrontation might mean if the hearsay rule withered away because the hearsay rule was not essential to the right of confrontation.

The ratification debates were about a political idea. The ratification debates explain why there is a Confrontation Clause. The discussion of confrontation in the ratification process and the inclusion of the right of confrontation in the Sixth Amendment provide some evidence that confrontation was a politically important idea. The political idea of confrontation was left undefined in its details. So were many political ideas such as religion, speech, search, seizure, jeopardy, counsel, and bail. If the Framers saw that the Sixth Amendment did not define confrontation, then using English common law to fill in the details of confrontation may not be using the meaning of the Framers. Suggesting that they meant something in-between inevitably becomes a search for hearsay the Framers would have permitted or excluded. That search cannot avoid the assumption that the evolution of the hearsay rule was part of the original meaning as well. Is it possible to ask what the Confrontation Clause might mean without a hearsay rule?

American hearsay law and the right of confrontation have been so intertwined for so long that it may seem impossible to think about confrontation by itself. It can be done, however. The European Court of Human Rights has been developing a right of confrontation that applies across the Continent to national court systems that do not recognize a hearsay rule.³³² The European confrontation right they are developing does not necessarily suggest how the Supreme Court should interpret the Sixth Amendment. It is important as an example that it is possible to consider confrontation and hearsay separately.

³³² See generally Roger W. Kirst, *Hearsay and the Right of Confrontation in the European Court of Human Rights*, 21 QUINNIPIAC L. REV. 777 (2003).

There is a source for possible roots for an alternative interpretation of the Confrontation Clause in the Supreme Court's decisions. Some Justices have employed a pro-confrontation approach to the Clause that has gotten too little notice for the way it differs from the more common anti-hearsay approach. The first time the Court mentioned the purpose of the Clause was in *Mattox v. United States*.³³³ In *Mattox* Justice Brown described the Clause's "primary object" as "to prevent depositions or ex parte affidavits."³³⁴ That anti-hearsay description was sufficient on the facts of *Mattox* because the hearsay was prior testimony from the defendant's first trial.³³⁵ The witnesses had died before the second trial,³³⁶ but the fact that the defendant had cross-examined them at the first trial meant that the evidence had not been taken *ex parte*.³³⁷

Four years later Justice Harlan did not use that anti-hearsay perspective in *Kirby v. United States*.³³⁸ *Kirby* was a prosecution for receiving stolen federal property. A federal statute provided that the judgment of conviction of the thief would be conclusive evidence in the trial of the alleged receiver that the property had been stolen.³³⁹ At trial, the prosecution had proved that the property was stolen by introducing the conviction record of the thieves and invoking the statute. In his opinion for the Court, the first Justice Harlan reviewed English precedent and state decisions before concluding that the statute violated the Confrontation Clause.³⁴⁰ He explained that the statute was unconstitutional because it allowed the prosecutor to prove an element of the crime with the record from a different trial, instead of by calling a witness to testify about the facts.³⁴¹ He also explained that the conviction record was not admissible for any purpose because the fact that the thief had been convicted was not an element of the crime of receiving stolen property.³⁴²

³³³ *Mattox v. United States*, 156 U.S. 237 (1895).

³³⁴ *Id.* at 242.

³³⁵ *Id.* at 240.

³³⁶ *Id.* at 238.

³³⁷ *Id.* at 240.

³³⁸ 174 U.S. 47 (1899).

³³⁹ *Id.* at 48 (citing An act to punish certain larcenies, and the receivers of stolen goods, ch. 144, 18 Stat. 479 (1875)).

³⁴⁰ *Id.* at 55-61.

³⁴¹ *Id.* at 55-56.

³⁴² *Id.* at 60.

In *Kirby*, Justice Harlan made no effort to fit the *Mattox* model by describing the use of the conviction by the prosecution as similar to trial by affidavit. Instead of using that anti-hearsay perspective, Justice Harlan described the purpose of the Confrontation Clause from a pro-confrontation perspective as intended to require the prosecution to call witnesses the defendant could confront at trial.³⁴³ He mentioned *Mattox* only in stating that the circumstances of a dying declaration are equivalent to testimony at trial.³⁴⁴

Both the anti-hearsay and pro-confrontation perspectives on the purpose of the Confrontation Clause reappeared when the modern era of confrontation doctrine began with *Pointer v. Texas* in 1965. In that case, Justice Black described the purpose from a pro-confrontation perspective when he wrote that a “major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him.”³⁴⁵ On the same day, Justice Brennan used a pro-confrontation perspective in *Douglas v. Alabama*, where he concluded that the Court’s confrontation cases “hold that a primary interest secured by it is the right of cross-examination.”³⁴⁶ In *Barber v. Page*, Justice Marshall used both perspectives without suggesting they might be different.³⁴⁷ When Justice Brennan wrote again in *Bruton v. United States*, he described the Confrontation Clause as directed against evidence that cannot be tested by cross-examination, but he cited only Justice Black’s opinion in *Pointer* and not his own opinion in *Douglas*.³⁴⁸

The last appearance of the pro-confrontation perspective was no more than implicit and easily overshadowed by the *Mattox* anti-hearsay perspective. In *Green*, Justice White stated that “it is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.”³⁴⁹ He followed that statement with

³⁴³ *Id.* at 55.

³⁴⁴ *Kirby*, 174 U.S. at 61.

³⁴⁵ *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

³⁴⁶ *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

³⁴⁷ *Barber v. Page*, 390 U.S. 719, 721 (1968).

³⁴⁸ *Bruton v. United States*, 391 U.S. 123, 136 (1968).

³⁴⁹ *California v. Green*, 399 U.S. 149, 157 (1970).

the quotation from *Mattox* that the object of the Clause was to prevent depositions or *ex parte* affidavits.³⁵⁰

Even as the pro-confrontation perspective was disappearing after *Green*, a related concept was first appearing in *Dutton*. In his lead opinion in *Dutton*, Justice Stewart described the hearsay statement as spontaneous and against penal interest.³⁵¹ He labeled those circumstances as “indicia of reliability” which allowed the prosecution to use the hearsay even though the defendant could not confront the declarant.³⁵² He cited no precedent for his statement that indicia of reliability were “widely viewed as determinative” of whether hearsay could be used without confrontation.³⁵³ Justice White had used “indicia of reliability” in *Green* in a reference to hearsay rules,³⁵⁴ but the Court had never before used that phrase in deciding whether there was a confrontation violation. *Dutton* has long been the hardest case to reconcile with any interpretation of the confrontation doctrine, but there is no need to do so here. *Dutton* is important for a different idea.

In *Dutton*, Justice Stewart also drew from Justice White’s opinion in *Green* in another way. Justice White had said that confrontation at trial about an earlier statement “will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”³⁵⁵ In *Dutton*, Justice Stewart used Justice White’s language in his own description that the “mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that ‘the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.’”³⁵⁶ Justice Stewart described how the defendant had exercised his right to examine the witness who reported the hearsay statement, an examination the jury had heard. He concluded that the possibility that cross-examination of the declarant “could conceivably have shown the jury that the statement, though made, might have been unreliable was wholly unreal.”³⁵⁷ One thing was different – Justice White had

³⁵⁰ *Id.* at 157-58.

³⁵¹ *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Green*, 399 U.S. at 161.

³⁵⁵ *Id.*

³⁵⁶ *Dutton*, 400 U.S. at 89.

³⁵⁷ *Id.*

described an effect of confrontation while Justice Stewart used the same language to describe its purpose. One thing was the same – both Justices focused on a basis for the factfinder to evaluate reliability without mentioning reliability as a test for the judge’s ruling on admissibility.

The last confrontation opinion from this era was written by then-Justice Rehnquist in *Mancusi v. Stubbs*.³⁵⁸ In *Mancusi*, the hearsay was testimony from a prior trial by a witness who was in Sweden and unavailable at the time of the second trial.³⁵⁹ Justice Rehnquist quoted both the “indicia of reliability” language from *Dutton*³⁶⁰ and the language about affording “the trier of fact a satisfactory basis for evaluating the truth of the prior statement” from *Green*.³⁶¹ Justice Rehnquist listed both items jointly in his summary of *Green* and *Dutton* and in his conclusion.³⁶²

Justice Blackmun relied on *Mancusi* twice in *Roberts*. In discussing the facts of *Roberts* in Part III, Justice Blackmun explained why examining the declarant at the pretrial hearing was sufficient. He said that both the opportunity and use of the opportunity to examine meant that the transcript had “sufficient indicia of reliability” and that it “afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”³⁶³ For that proposition Justice Blackmun cited Justice Rehnquist’s opinion in *Mancusi* for its quotation from *Dutton*, which in turn had quoted the language from *Green*.³⁶⁴

Justice Blackmun also relied on *Mancusi* when he set out his general approach in Part II of *Roberts*. He quoted the language from *Mancusi* that required both indicia of reliability and a satisfactory basis for the trier of fact to evaluate the truth of the statement. However, Justice Blackmun also framed reliability from another perspective when he described the “underlying purpose” of the Clause as “to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence.”³⁶⁵ Justice Blackmun described some hearsay exceptions as resting upon such a solid

³⁵⁸ 408 U.S. 204 (1972).

³⁵⁹ *Id.* at 209.

³⁶⁰ *Id.* at 213.

³⁶¹ *Id.*

³⁶² *Id.* at 213, 216.

³⁶³ *Ohio v. Roberts*, 448 U.S. 56, 73 (1980).

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 65.

foundation that virtually any evidence they allow would comport with the substance of the constitutional protection. He cited *Mattox* and added a footnote that described a dying declaration, cross-examined prior-trial testimony, and business and public records as illustrations.³⁶⁶ As always, more discussion in the opinion might resolve some ambiguities, but the context can be read as an argument by Justice Blackmun that the firmly rooted hearsay exceptions he listed were ones that would still ensure the defendant an effective means to test adverse evidence and afford the trier of fact a satisfactory basis for evaluating the truth of the statement.

The Court's best opportunity to develop the implications of the thinking behind Justice Blackmun's general theory was *Lee v. Illinois*.³⁶⁷ In the majority opinion in *Lee*, Justice Brennan quoted the language from *Roberts* about providing the defendant with an effective means to test adverse evidence.³⁶⁸ In his dissent in *Lee*, Justice Blackmun quoted the language from *Roberts* about affording the trier of fact a satisfactory basis for evaluating the truth of the statement.³⁶⁹ Neither Justice gave those quotations any further attention as they debated other issues in the case.

The idea that the trier of fact should have a basis for evaluating a statement did not completely disappear. For example, in *Inadi* Justice Powell explained why the prosecutor did not have to show the unavailability of the declarant of a co-conspirator statement.³⁷⁰ He emphasized that the evidentiary significance of the particular evidence could not be replicated by having the declarant repeat it as testimony at trial. His argument was strengthened by the fact that the specific co-conspirator statements in *Inadi* had been captured on tape by the police.³⁷¹ That meant the jury could actually listen to the defendants conspiring, possibly the closest practical equivalent to having the jury view the crime in progress. Justice Powell did not discuss how the defendant could test the evidence, but his emphasis on the evidentiary value and significance of co-conspirator statements appear to assume that the trier of fact will evaluate the statements they heard being made.

³⁶⁶ *Id.* at 66 & n.8.

³⁶⁷ 476 U.S. 530, 543 (1986).

³⁶⁸ *Id.* at 543.

³⁶⁹ *Id.* at 548 (Blackmun, J., dissenting).

³⁷⁰ *United States v. Inadi*, 475 U.S. 387, 395-96 (1986).

³⁷¹ *Id.* at 390.

The Supreme Court's recent precedent on courtroom confrontation has also emphasized that the purpose of confrontation is to allow the trier of fact to evaluate the evidence. In *Coy v. Iowa*, Justice Scalia described the Clause as a guarantee that the defendant would have "a face-to-face meeting with witnesses appearing before the trier of fact."³⁷² In *Maryland v. Craig*, Justice O'Connor described the purpose of the Confrontation Clause in similar terms as ensuring that evidence be subjected "to rigorous testing in the context of an adversary proceeding before the trier of fact."³⁷³ The Chief Justice quoted that same language from *Craig* in his concurring opinion in *Crawford*.³⁷⁴

Chief Justice Rehnquist relied on the *Inadi* analysis when he discussed excited utterances and statements for medical diagnosis in *White*.³⁷⁵ He described the contexts in which such statements are made as providing substantial guarantees of trustworthiness that support the hearsay exceptions. In addition to describing firmly rooted exceptions as satisfying the confrontation test, the Chief Justice made a second point. He described a statement made in a moment of excitement without an opportunity to reflect as possibly carrying more weight with a trier of fact than testimony.³⁷⁶ The Chief Justice described a statement for medical diagnosis where the declarant knows that a false statement may cause misdiagnosis or mistreatment as having guarantees of credibility "that a trier of fact may not think replicated by courtroom testimony."³⁷⁷ He did not discuss whether the defendant would have any way to test such evidence, but for both kinds of statements he explicitly stated that the trier of fact would evaluate each statement.

Various combinations of the pro-confrontation perspective have persisted in the Court's confrontation doctrine. That helps explain why Justice Scalia in *Crawford* could describe the results of the Court's decisions as not inconsistent with his interpretation that the original meaning

³⁷² 487 U.S. 1012, 1016 (1988).

³⁷³ 497 U.S. 836, 845 (1990).

³⁷⁴ *Crawford v. Washington*, 541 U.S. 36, 74 (2004) (Rehnquist, C.J., concurring).

³⁷⁵ *White v. Illinois*, 502 U.S. 346, 355-56 (1992).

³⁷⁶ *Id.* at 356.

³⁷⁷ *Id.*

did not include a reliability exception to the right of confrontation.

The pro-confrontation perspective is not inconsistent with the holding of *Crawford*, but Justice Scalia's emphasis on his anti-hearsay interpretation meant that the pro-confrontation perspective was only an implicit part of his declaration that there could be no substitute for confrontation for a testimonial statement. On the facts of *Crawford*, both perspectives lead to the same result.

V. REBUILDING CONFRONTATION DOCTRINE AFTER *CRAWFORD*

Confrontation doctrine can be rebuilt after *Crawford*, but a successful approach will avoid the obvious invitation to use historical research to produce a more precise definition of testimonial and nontestimonial hearsay. The reason other courts were reaching incorrect conclusions before *Crawford* was not just *Roberts* and not just the reliability test. Each played a role, but eliminating both did not get to the root of the problem. The problem began with the longstanding failure to question the assumption of both Justice Harlan and Justice Blackmun that the purpose of the Confrontation Clause was excluding certain kinds of hearsay. Without that assumption, the historical record does not compel using the testimonial interpretation as the foundation for confrontation doctrine.

An alternative interpretation would read the Confrontation Clause literally as requiring confrontation. That interpretation would not change the effect of the Clause as a limit on the use of hearsay evidence by the prosecution. It would describe a common purpose for the effect of the Clause on hearsay, as well as its effect on the ability of the prosecution to use testimony from a witness who refuses to answer questions on cross-examination. It would also set forth a common purpose for its effect on testimony from a witness hidden behind a screen, and its effect on taking testimony while the defendant is excluded from the courtroom. It would avoid the apparent discordance of describing the purpose of the Clause as only one of the several effects it has on criminal trials.

Interpreting the Confrontation Clause as requiring confrontation would not mean that a prosecutor could never present any evidence about out-of-court statements. The Supreme Court opinions that have identified two elements of

the right of confrontation would allow the prosecution to use an out-of-court statement if those two elements are met: the defendant must have an effective means to contest the evidence and the trier of fact must be able to assess the evidence.

There are two questions to ask about any interpretation of the Confrontation Clause or *Crawford*. The first is whether it is consistent with the Court's established confrontation doctrine. The second is how well it provides guidance for issues that have not yet been decided. Subpart A will describe how interpreting the Clause as requiring confrontation is more than just consistent with every Court opinion including *Crawford*; it can also be helpful in understanding the limits of some of the opinions. Subpart B will sketch how interpreting the Clause as requiring confrontation can provide guidance for addressing the issues left unanswered by *Crawford*.

A. *Understanding Established Confrontation Doctrine*

The rules the Supreme Court has applied in prior cases for several kinds of hearsay are consistent with the Court's two elements of confrontation. For example, the established rule that allows the prosecution to use the prior testimony of an unavailable witness requires showing that there had been actual cross-examination of the witness at the prior hearing. The Court explained that prior cross-examination is the feature that ensures that the defendant has an effective means to contest the evidence in both *Green*³⁷⁸ and *Roberts*.³⁷⁹ The transcript of the examination and cross-examination will provide the jury with a basis for evaluating the prior testimony.

The established rule that allows the prosecution to use any prior statements of a witness at trial requires that the defendant be able to cross-examine the witness at trial about the prior statement. In Part II of *Green*, the Court explained that cross-examination at trial gives the defendant an effective means to contest the evidence and provides the jury with a basis for evaluating the prior statement.³⁸⁰

The established rule that allows the prosecution to use a co-conspirator statement that was made in the course and scope of the conspiracy applies to statements that have the

³⁷⁸ *California v. Green*, 399 U.S. 149, 165-66 (1970).

³⁷⁹ *Ohio v. Roberts*, 448 U.S. 56, 68-71 (1980).

³⁸⁰ *Green*, 399 U.S. at 158-59.

evidentiary significance described in *Inadi*³⁸¹ and *Bourjaily*.³⁸² While both *Inadi* and *Bourjaily* involved recorded statements that could be played for the jury, neither opinion treated that fact as important. Both opinions described co-conspirator statements in general as having evidentiary significance the jury can evaluate.³⁸³

The established rule that allows the prosecution to use an excited utterance may apply only to truly immediately excited statements if the Court accepts Justice Scalia's footnote in *Crawford*³⁸⁴ as a refinement of *White*.³⁸⁵ Without the declarant as a witness, the prosecution would have to present the statement through the testimony of someone who was present to hear it. If the statement immediately follows the startling event, the witness will be present for the startling event to observe the context of the statement. That testimony would give the defendant an effective means to contest the evidence and the jury a basis for evaluating the statement. Requiring immediacy would prevent using the excited utterance exception to admit reports of past crimes; however, no Supreme Court decision supports that use of the exception. The inability of the defendant to ask the witness at trial about the context of a startling event they did not observe and the inability of the factfinder to evaluate that context explain why the Court might hold that immediacy is a condition for satisfying the right of confrontation.

The established rule that allows the prosecution to use a statement that was made for medical care could still be refined by the Court. The outer limits of the rule were not defined in *White* because the Court in that case did no more than assume the statements properly fit within the hearsay exception.³⁸⁶ Perhaps *White* would have been decided differently if it had been heard after the Court held in *Williamson* that a hearsay statement must be parsed to admit only the portion that is against the declarant's penal interest.³⁸⁷ Then the Court in *White* might have given more attention to parsing the medical care statements into those that were relevant to the need for

³⁸¹ United States v. Inadi, 475 U.S. 387 (1986).

³⁸² Bourjaily v. United States, 483 U.S. 171 (1987).

³⁸³ See *id.* at 183; *Inadi*, 475 U.S. at 394-96.

³⁸⁴ Crawford v. Washington, 541 U.S. 36, 58 n.8 (2004).

³⁸⁵ White v. Illinois, 502 U.S. 346, 355-56 (1992).

³⁸⁶ *Id.* at 351 n.4.

³⁸⁷ Williamson v. United States, 512 U.S. 594 (1994).

actual medical care and those that were relevant only to other purposes such as law enforcement. For a statement specifically relevant to medical care, the context, purpose, and significance of the statement could be reported by the medical personnel who heard it. That would mean there would be a factual basis that would give the defendant an effective means to contest the statement and would give the jury a basis for evaluating the statement.

Out-of-court statements offered for some purpose other than proving the truth of the assertion should generally not raise a confrontation issue.³⁸⁸ The Supreme Court has not held that the scope of the confrontation right is limited to the definition of hearsay in Federal Rule of Evidence 801(c), but the Court has suggested there is no confrontation issue if a statement is not used to prove the truth of the matter asserted.³⁸⁹ Testimony that provides background or explains the significance of an event can be attacked by the defendant and evaluated by the factfinder whether or not it involves a prior statement if the statement is not being used for a hearsay purpose. That does not mean that other courts could use the kind of strained misinterpretation of when evidence is being used for a hearsay purpose that had permitted the use of co-defendant plea allocutions that was criticized in *Crawford*.³⁹⁰

Interpreting the Clause as requiring confrontation would leave some incomplete areas of confrontation doctrine unchanged. For example, the current interpretation that the Clause allows the prosecution to introduce a dying declaration would remain undefined for the same reason this rule was not fully defined before *Crawford* – the Supreme Court has never decided a case involving a dying declaration. The forfeiture rule would remain partially defined because the Supreme Court's only application of the forfeiture principle in *United States v. Reynolds* considered only a single set of facts.³⁹¹

Interpreting the Clause as requiring confrontation would not change the conclusions in *Lee*,³⁹² *Lilly*,³⁹³ and

³⁸⁸ See, e.g., *Tennessee v. Street*, 471 U.S. 409, 414 (1985). See also *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987).

³⁸⁹ *Crawford*, 541 U.S. at 60 n.9.

³⁹⁰ *Id.* at 65. See generally *Kirst*, *supra* note 211, at 121-29.

³⁹¹ *Reynolds v. United States*, 98 U.S. 145 (1878).

³⁹² *Lee v. Illinois*, 476 U.S. 530, 546 (1986).

³⁹³ *Lilly v. Virginia*, 527 U.S. 116, 138-40 (1999).

*Crawford*³⁹⁴ that those custodial statements against penal interest were inadmissible because the accomplice did not testify. It would not change the holding in *Wright* that the victim's report was inadmissible.³⁹⁵ In all of these cases the defendant's inability to confront the declarant left the defendant with no effective means to contest the out-of-court statement and provided the factfinder without a sufficient basis to evaluate the truth of the out-of-court statement.

B. Addressing Future Issues

The categories the Supreme Court has found admissible and clearly inadmissible include a substantial percentage of the hearsay that typically is contested. Nevertheless, confrontation doctrine is still a work in progress. There are gaps in the established rules for hearsay such as business records and official records. The previously established rules may not provide clear answers for statements made possible by 911 calls or statements in developing areas of the law such as domestic abuse cases. There is no reason to expect that *Crawford* will directly answer every question about confrontation doctrine.

The importance of a precise distinction between testimonial and nontestimonial statements will not be apparent until the Court defines the rule for nontestimonial statements. The difficulty of defining a rule for nontestimonial statements will depend on whether the Court tries to announce a single comprehensive rule or decides that it can develop a set of rules in the common law manner by addressing the facts of one particular case at a time. *Crawford* did not endorse any rule the Supreme Court must follow when it eventually does address the right of confrontation for nontestimonial hearsay. When it does, *Crawford* suggests the Court may ask whether other courts have developed a coherent body of doctrine that is consistent with the purpose of the Confrontation Clause.

Other courts, prosecutors, and defense counsel have resources they can use to understand and apply *Crawford* while they must wait for the Supreme Court to provide further guidance. They can address the most important issues by recognizing that the Confrontation Clause was adopted to

³⁹⁴ *Crawford*, 541 U.S. 36, 68-69 (2004).

³⁹⁵ *Idaho v. Wright*, 497 U.S. 805, 826-27 (1990).

require confrontation and not just to exclude hearsay. They can consider whether admitting the particular kind of hearsay would be consistent with that purpose by focusing on the defendant's ability to contest the evidence and whether the factfinder has a sufficient basis for evaluating the truth of a prior statement. That interpretation does not lead to the judicial screening for reliability that was rejected in *Crawford*. The questions are not whether the trial judge thinks the defendant needs to contest the evidence or whether the trial judge can evaluate the truth of the hearsay.

The Supreme Court could best continue its development of confrontation doctrine by interpreting the Confrontation Clause to require confrontation and focusing on the two elements of confrontation to decide whether the prosecution can use a particular kind of hearsay. That interpretation would recognize that the adoption of the Confrontation Clause in the Sixth Amendment gave the courts both the duty to protect the right of confrontation and the responsibility to reevaluate confrontation doctrine as evidence law might change.

Justice Scalia declared in *Crawford* that the Court had to reject the reliability exception in order to make confrontation doctrine consistent with the historical record. Chief Justice Rehnquist argued that the Court did not have to freeze confrontation doctrine with a new categorical rule. Despite their apparent debate in *Crawford*, perhaps they were both right.