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DIALOGUE

Confrontation Under the Marian Statutes

A RESPONSE TO PROFESSOR DAVIES

Robert Kry[†]

In *Crawford v. Washington*, Justice Scalia wrote for a seven-Justice majority that the Confrontation Clause prohibits admission of an absent witness’s “testimonial” statements against a criminal defendant unless the witness is unavailable to testify in person and the accused had a prior opportunity for cross-examination.¹ That holding was based in part on a claim that, at the time of the framing, those two conditions governed admissibility of pretrial examinations taken under the Marian bail and committal statutes.² Those two statutes—passed during the reign of Queen Mary in the sixteenth century—required justices of the peace to examine felony suspects and their accusing witnesses before bailing the suspects or committing them to jail to await trial.³ Because those Marian examinations⁴ were a routine feature of felony prosecutions at

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¹ 541 U.S. 36, 68 (2004).

² *Id.* at 46-47.

³ 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 Phil. & M., c. 10 (1555).

⁴ Although the Marian bail statute also addressed depositions on coroners’ inquests, see *infra* notes 249-56 and accompanying text, I use the terms “Marian examination” and “Marian deposition” throughout to refer only to committal examinations by justices of the peace.

the time the Sixth Amendment was framed, their admissibility is relevant to any general theory of the Confrontation Clause.

If framing-era Marian examinations were conducted *ex parte*, were admissible despite being *ex parte*, and were nonetheless noncontroversial, that would be important evidence against *Crawford*'s holding. In his recent article, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*,⁵ Professor Thomas Davies makes those claims. He argues that *Crawford*'s historical analysis is flawed because the earliest reported English cases stating that the Marian statutes did not authorize admission of *ex parte* examinations were published no earlier than May 1789, too late to have been widely available to Americans when they drafted the Sixth Amendment later that year.⁶ Davies rejects all English sources published after or shortly before the framing and all American sources published more than a few years after the framing as invalid historical evidence; he finds many of those sources ambiguous in any event.⁷ From earlier sources, he concludes that a Marian examination was admissible if the witness was unavailable, whether or not there had been an opportunity for cross-examination.⁸ He relies on that conclusion as the basis for a series of broad critiques of *Crawford* and originalism generally.⁹

This Article responds. I argue that *Crawford* is well supported by the historical evidence, and that Davies reaches a contrary conclusion only because he ignores relevant evidence, treats highly ambiguous sources as clearly supporting his view, and understates the degree to which post-framing sources reject his position. Contrary to Davies' argument, there is a more than adequate historical basis to conclude that the Framers did not believe *ex parte* committal examinations were admissible under the Marian statutes or their state equivalents.¹⁰

⁵ Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

⁶ See *id.* at 159-61.

⁷ See *id.* at 155, 162-73, 180.

⁸ See *id.* at 108, 188-89.

⁹ See, e.g., *id.* at 206-17.

¹⁰ Although Professor Davies understands me to be making an argument substantially different from the one Justice Scalia made in *Crawford*, see Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule": A*

Part I of this Article examines Davies' evidence that Marian examinations were admissible without regard to whether the defendant had an opportunity to cross-examine. I conclude that *properly taken* Marian examinations were admissible, but that Davies' sources show no more than that. Part II turns to the affirmative case for the cross-examination rule, focusing first on the prisoner's right to be present. I conclude that prisoners would have been routinely present when witnesses were deposed at Marian committal hearings, and argue that presence was widely viewed as a procedural right by the time of the framing. Part III turns to cross-examination as such. I find that many believed a prisoner had a right to cross-examine witnesses at his committal hearing, but that the point was still disputed at the time of the framing. In Part IV, I explain why the Confrontation Clause would have been understood to resolve that dispute in favor of cross-examination.

I. ADMISSIBILITY

Whether the Marian statutes permitted *ex parte* depositions to be read against a criminal defendant is, at bottom, a question of timing. Even setting aside the 1787, 1789, and 1791 cases whose significance Professor Davies disputes, admissibility clearly became conditioned, at some point, on whether the defendant had an opportunity to cross-examine. Between 1795 and 1824, for example, at least seven English treatises¹¹ and four English case reports¹² expressly

Reply to Mr. Kry, 72 BROOK. L. REV. 557, 573-77 (2007), I believe he greatly overstates the extent of any difference. See *infra* note 287.

¹¹ See 4 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 423 (Thomas Leach ed., London 7th ed. 1795) (“[A]n examination of a person murderously wounded, taken by a justice of the peace . . . in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of *Philip and Mary* direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts alledged.”); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 40-41 (London, Rider 1801) (“[I]f in a case of felony one magistrate takes the deposition on oath of any person in the presence of the prisoner, whether the party wounded, or even an accomplice; and the deponent dies before the trial, the depositions may be read in evidence; but if the prisoner be not present at the time of the examination, it cannot.”); William David Evans, *On the Law of Evidence*, in 2 ROBERT JOSEPH POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS app. 16, at 141, 230 (William David Evans trans., London, Strahan 1806) (“[S]uch examinations, if taken in the presence of the party charged, shall be admitted as evidence, in case of the witness's death in the mean time.”); S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 277 & n.3 (London, Strahan 2d ed. 1815) (1814)

conditioned admissibility on either an opportunity to cross-examine or the prisoner's presence at the examination. Similarly, between 1794 and 1858, at least sixteen reported American cases conditioned admissibility on those criteria.¹³

(admissible if "taken in the presence of [the] prisoner"); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 79 (London, Valpy 1816) (examinations "must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses, and contradicting their testimony, or the examinations cannot be received in evidence"); JOHN FREDERICK ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES *85 (New York, Gould & Son 1st Am. ed. 1824) (1822) ("Depositions, to be thus given in evidence, must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness."); 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *96 (Boston, Wells & Lilly 1st Am. ed. 1826) (1824) ("[T]he depositions of witnesses before magistrates, under the statutes of Philip and Mary, are not evidence, unless the prisoner had an opportunity to cross-examine those witnesses . . ."); *see also* LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 296-301 (Dublin, Fitzpatrick 1802) (*semble*).

¹² *See* King v. Eriswell, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter's note 1797) ("Nor [are Marian depositions admissible] since that statute, unless the party accused be present . . ."); Rex v. Forbes, Holt 599 n.*, 599 n.*, 171 Eng. Rep. 354 n.*, 354 n.* (1814) (reported in 1818 in a note to Rex v. Wilson, Holt 597, 171 Eng. Rep. 353 (1817)) ("The intention of the statute of Philip and Mary is sufficiently plain. It is, that the prisoner shall be present whilst the witness actually delivers his testimony; so that he may know the precise words he uses, and observe throughout the manner and demeanour with which he gives his testimony."); Rex v. Smith, Holt 614, 615, 171 Eng. Rep. 357, 360 (1817) (reported 1818) ("Undoubtedly, . . . the decisions established the point, that the prisoner ought to be present, that he might cross-examine."); Rex v. Smith, 2 Stark. 208, 210-11 & n.(a), 171 Eng. Rep. 622, 623 & n.(a) (1817) (reported 1820) (similar); *see also* Rex v. Smith, Russ. & Ry. 339, 340 n.(c), 168 Eng. Rep. 834, 835 n.(c) (1817) (reported 1825) (endorsing "Mr. Starkie's excellent note" on the case).

¹³ *See* State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (Super. L. 1794) (state felony committal statute "clearly implies the depositions to be read, must be taken in [the prisoner's] presence," so that he has "liberty to cross examine"); State v. Moody, 3 N.C. (2 Hayw.) 31, 31-32 (Super. L. 1798) (Haywood, J.) (conditioning admissibility on whether the deposition was "regularly taken pursuant to the act . . . ; more especially [i.e., more specifically] if the party to be affected by that testimony were present at the examination"); Johnston v. State, 10 Tenn. (2 Yer.) 58, 59-60 (1821) (admitting deposition taken "under proper circumstances," i.e., "in the presence of the prisoner"); State v. Hill, 20 S.C.L. (2 Hill) 607, 608-11 (App. L. 1835) ("[I]f the accused is present and has an opportunity of cross examining the witness, the depositions, according to the rule, are admissible in evidence. . . . [N]o rule would be productive of more mischief than that which would allow the *ex parte* depositions of witnesses, and especially in criminal cases, to be admitted in evidence."); Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836) (deposition before committing magistrate admissible because "the defendant did meet the witness who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation"); People v. Restell, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842) ("The deposition [under the Marian statutes] must not only be taken in a judicial proceeding, but it must be taken when the defendant is present and has the opportunity to cross-examine the witness; otherwise it will not be received."); Bostick v. State, 22 Tenn. (3 Hum.) 344, 344-45 (1842) ("It is certain that such a deposition, taken in the absence of the prisoner, and where he had no opportunity to cross-examine the witness, could not be read in evidence against him . . ."); State v. Campbell, 30 S.C.L. (1 Rich.) 124, 130 (App. L. 1844) ("Neither the [Marian statutes nor their state equivalent] has any express provision, that the

Were these authorities representative of the public understanding of the confrontation right at the time the Sixth Amendment was adopted? Or do they represent post-framing developments? Professor Davies takes the latter view.¹⁴ He reaches that conclusion in large part because he refuses to consider English sources published after 1789 and American sources published more than a few years after the framing as evidence of original meaning—a limitation I consider in due course.¹⁵ But he also relies on pre-framing sources which, he contends, show that Marian examinations “were understood to be admissible in felony trials, without regard to whether there had been an opportunity for cross-examination, if a witness became unavailable prior to trial.”¹⁶ I evaluate that claim here.

Davies’ evidence falls into two categories. The first consists of statements in treatises and manuals, most notably Sir Matthew Hale’s, to the effect that a Marian examination was admissible if the witness was dead, too sick to travel, or kept away by the accused. The second consists of the 1696

depositions shall go to the jury in any case. But the Statute P. & M. has been so expounded:—Provided the accused was present, and had the opportunity of a cross-examination, and the witness be dead, &c.”); *State v. Hooker*, 17 Vt. 658, 669 (1845) (admitting magistrate’s testimony because proceedings were “adversary” (emphasis omitted)); *Tharp v. State*, 15 Ala. 749, 753 (1849) (“[D]epositions taken before the examining court, in the presence of, and on cross-examination by, the prisoner . . . are received as evidence, if the witnesses are dead.”); *Davis v. State*, 17 Ala. 354, 357 (1850) (committal examination admissible if “the witness was duly sworn by competent authority and the accused had the opportunity of cross-examining him”); *Kendrick v. State*, 29 Tenn. (10 Hum.) 479, 487 (1850) (committal examination admissible because “evidence of the deceased witness was given on oath before the committing court, in the presence of the accused, who had the right to cross-examine”); *United States v. Macomb*, 26 F. Cas. 1132, 1134 (C.C.D. Ill. 1851) (No. 15,702) (examination admissible “provided the defendant was present, had the liberty to cross-examine, and the witness was dead”); *Collier v. State*, 13 Ark. 676, 678 (1853) (examination inadmissible where the record “fail[s] to show that the prisoner was present at the examination”); *State v. McO’Blenis*, 24 Mo. 402, 414-15 (1857) (admitting “deposition of a witness regularly taken in a judicial proceeding against the accused in respect to the same transaction and in his presence”); *State v. Houser*, 26 Mo. 431, 438 (1858) (deposition admissible only if taken “in the presence of the accused, when an opportunity for cross-examination is afforded”); *cf. Dunwiddie v. Commonwealth*, 3 Ky. (Hard.) 290, 290 (1808) (“It appears to this court to be unnecessary to enter into any reasoning to show the impropriety of the decision of the inferior court. It is sufficient to say, that the principle decided by that court, viz. ‘That in the case of bastardy, the warrant before the justice ought to be received as evidence by the court, of the person charged being the father of the child,’ is a violation of the most fundamental rules of evidence; withholds from the person accused an advantage which was most unquestionably his right—the benefit of a cross examination; and, if admitted, it would also confine to a justice of the peace, the exclusive right of inquiring into the truth of the fact charged.”).

¹⁴ See Davies, *supra* note 5, at 118-19.

¹⁵ See *id.* at 155, 180.

¹⁶ *Id.* at 108.

Paine decision and subsequent interpretations of that case in treatises and manuals. I discuss each category in turn.

A. *Hale and the Unavailability Rule*

The Marian statutes required justices of the peace to examine felony suspects and witnesses at committal hearings,¹⁷ and also included similar provisions for coroners' inquests.¹⁸ The results were to be certified to the court, but the statutes said nothing about whether they were meant to take the place of trial testimony.¹⁹ That question fell to judicial construction when Lord Morly was tried for murder before the House of Lords in 1666 after killing his opponent in a duel.²⁰ The judges convened before trial to decide how to advise the House on evidentiary questions expected to arise, among them the admissibility of certain depositions taken by the coroner.²¹ They resolved that a deposition was admissible if the witness was dead, too sick to travel, or kept away by the accused, but not otherwise.²²

¹⁷ See 1 & 2 Phil. & M., c. 13 (1554) ("And that the said Justices or one of them being of the Quorum, when any such prisoner is brought before them for any Manslaughter or Felony, before any Bailment or Mainprise, shall take the examination of the said Prisoner and information of them that brings him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing before they make the same Bailment . . ."); 2 & 3 Phil. & M., c. 10 (1555) ("That from henceforth such Justices or Justice before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination . . ."). I have altered the spelling in all quotations from Statutes of the Realm.

¹⁸ See 1 & 2 Phil. & M., c. 13 (1554) ("And that every Coroner, upon any Inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessory or accessories to the same before the murder or manslaughter committed, shall put in writing the effect of the evidence given to the Jury before him being material . . .").

¹⁹ The statutes' intent in that regard has long been debated. See, e.g., *Rex v. Smith*, 2 Stark. 208, 211 n.(a), 171 Eng. Rep. 622, 623 n.(a) (1817) (reporter's note 1820) (observing that the statutes "seem to have been passed without any direct intention on the part of the legislature, to use the examinations and depositions as evidence upon the trials of felons"); JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE* 24-34 (1974) (contending that "the Marian draftsman did not intend to institute a system of written evidence").

²⁰ *Lord Morly's Case*, Kel. 53, 84 Eng. Rep. 1079 (1666) (also reported as *Lord Morley's Case*, 6 How. St. Tr. 769 (H.L. 1666)).

²¹ See *id.* at 53-55, 84 Eng. Rep. at 1079-80.

²² See *id.* at 55, 84 Eng. Rep. at 1080 ("[I]n case any of the witnesses which were examined before the coroner, were dead or unable to travel, and oath made thereof, . . . the examinations of such witnesses, so dead or unable to travel might be

Lord Morly's case involved coroners' depositions, but that "unavailability rule" was extended to committal examinations as well. Sir Matthew Hale, one of the judges who had presided at Lord Morly's case, wrote in his *History of the Pleas of the Crown* that "examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not."²³ As Davies notes, similar statements appear in treatises by William Hawkins and Francis Buller, and in colonial manuals for justices of the peace.²⁴

Professor Davies relies on those statements to argue that Marian depositions "were understood to be admissible in felony trials, without regard to whether there had been an opportunity for cross-examination, if a witness became unavailable prior to trial."²⁵ He concludes that absence of opportunity to cross-examine had no effect on the admissibility of depositions of unavailable witnesses in founding-era criminal trials.²⁶ Those conclusions, however, do not follow. Rather, they rest on implicit assumptions about Marian procedure.

If the right to confrontation prohibited *ex parte* depositions at trial, there are two ways in which Marian procedure could be consistent with that right. First, a trial court could condition the admissibility of a Marian examination on whether the accused had an opportunity to cross-examine at the committal hearing. In that case, even if Marian examinations were often taken *ex parte*, they would not contravene the cross-examination rule, because *ex parte* examinations would be excluded at trial. Second, an opportunity for cross-examination could be a natural or routine feature of a committal hearing. In that case, it would not matter whether a trial court conditioned admissibility on opportunity to cross-examine. That opportunity would be a

read, the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever."); see also Bromwich's Case, 1 Lev. 180, 180, 83 Eng. Rep. 358, 358 (K.B. 1666) ("[T]he depositions of two other witnesses taken before the coroner, which were now dead, were read to the same effect, as they were read before the lords on the trial of the Lord Morly, by the opinion of all the Judges of England.").

²³ 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 284 (Sollom Emlyn ed., London, Nutt & Gosling 1736).

²⁴ See Davies, *supra* note 5, at 146-52, 182-86.

²⁵ *Id.* at 108.

²⁶ *Id.*

consequence of the way an examination was normally conducted.

Professor Davies acknowledges the distinction between those two forms of consistency late in his article.²⁷ But he largely ignores its significance for the unavailability rule. That rule addressed the conditions under which a Marian examination was admissible, not the manner in which an examination was normally conducted. That a Marian examination was admissible if the witness was unavailable does not show that *ex parte* examinations would routinely be admitted. It would show that only if Marian examinations were routinely conducted *ex parte*.

Nor does the unavailability rule necessarily show that opportunity to cross-examine was not a condition of admissibility. The rule says nothing about cross-examination one way or the other; Davies must rely on a negative inference drawn from that omission. The strength of that inference, however, depends entirely on how Marian examinations were normally conducted. If they were often taken *ex parte*, the negative-inference argument has some force. If they were not, the argument is much weaker; opportunity to cross-examine could then simply be implicit in the fact that a deposition was properly taken under the Marian statutes.²⁸

²⁷ The distinction is reflected in his “strong” and “nuanced” interpretations of *Crawford*’s description of the 1787, 1789, and 1791 decisions. *See id.* at 162-78.

²⁸ Although many treatises and manuals state the unavailability rule in terms similar to Hale’s, some arguably provide more support for Professor Davies’ position. For example, Buller’s treatise states:

It is a general Rule, that Depositions taken in a Court not of Record shall not be allowed in Evidence elsewhere. So it has been holden in Regard to Depositions in the ecclesiastical Court, though the Witnesses were dead. So where there cannot be a Cross-Examination, as Depositions taken before Commissioners of Bankrupts, they shall not be read in Evidence; yet if the Witnesses examined on a Coroner’s Inquest be dead, or beyond Sea, their Depositions may be read; for the Coroner is an Officer appointed on Behalf of the Public, to make Enquiry about the Matters within his Jurisdiction; and therefore the Law will presume the Depositions before him to be fairly and impartially taken.—And by [the Marian statutes] Justices of the Peace shall examine of Persons brought before them for Felony, and of those who brought them, and certify such Examination to the next Gaol-Delivery; but the Examination of the Prisoner shall be without Oath, and the others upon Oath, and these Examinations shall be read against the Offender upon an Indictment, if the Witnesses be dead.

FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 342 (Dublin 1768). Burn’s manual includes a similar passage, although it combines the references to coroners’ depositions and committal examinations while omitting the rationale for admissibility of coroners’ depositions. *See* 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 336 (London, Woodfall & Strahan 1764). Davies

Authorities before and after the framing confirm that Hale and other proponents of the unavailability rule were widely understood *not* to have suggested that an unavailable witness's Marian deposition was admissible regardless of the circumstances under which it was taken. An early example comes from the 1696 debates over Sir John Fenwick's bill of attainder for treason in the House of Commons.²⁹ The prosecution sought to admit the examination of an unavailable witness taken in Fenwick's absence. Fenwick's counsel opposed admission because Fenwick was not "present or privy" and thus had "no opportunity . . . to cross-examine the person."³⁰ Counsel contended that such examinations were "never admitted" in "criminal cases" and that "it was never attempted in any court of justice, that the examination of witnesses behind a man's back, could be read in any place whatsoever."³¹

Debate ensued among Members of Parliament. One disputed counsel's broad claim that *ex parte* examinations were inadmissible in criminal cases by invoking Hale's discussion of the Marian statutes: "No less a man than my L. C. Justice Hales . . . in his Pleas of the Crown . . . says; First, by the [Marian statutes], the justice hath power to examine the offender and informer; and . . . these examinations, if the party

argues that the contrast these sources draw to bankruptcy depositions, which were inadmissible due to inability to cross-examine, implies that cross-examination was not a condition of admissibility for committal examinations. See Davies, *supra* note 5, at 151; Davies, *supra* note 10, at 591-93. But these sources offer Davies only ambiguous support. First, it is not clear that the words "yet" and "but" draw a comparison based on admissibility despite inability to cross-examine rather than admissibility generally—one could certainly say, for example, that "bankruptcy depositions are inadmissible because cross-examination is impossible 'yet' (or 'but') Marian examinations are admissible *precisely because* cross-examination is possible." (Buller's inclusion of a rationale for admissibility of coroners' depositions makes it unlikely he intended that meaning, but Burn's manual is more ambiguous.) Second, it is not clear that the "yet" in Buller's passage applies to the entire remainder of the paragraph, rather than just the remainder of the sentence addressing coroners' depositions. The final sentence addressing committal examinations could merely be a resumption of the paragraph's survey of the admissibility of various types of depositions.

²⁹ 13 How. St. Tr. 537 (H.C. 1696). Fenwick was charged with treason, not felony, so the Marian statutes did not apply. Nevertheless, the debates are relevant.

³⁰ *Id.* at 591 (Powys); see also *id.* at 592 ("[I]f that should be allowed for evidence, then what is sworn behind a man's back, in any case whatsoever, may as well be produced as evidence against him . . .").

³¹ *Id.* at 592 (Shower); see also *id.* ("[N]o deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination, and might have cross-examined him, or examined to his credit, if he thought fit; it was never pretended, depositions could be read upon other circumstances.").

be dead or absent, may be given in evidence.”³² Another Member responded, however, that Hale’s rule applied only when the examination was taken in the prisoner’s presence (and then only in felony cases): “I don’t think [counsel] were ignorant of the case quoted out of my L. C. J. Hales, but they thought it was not applicable to this business before the House; but only related to felonies, *and when depositions were taken in the presence of the party.*”³³

Davies relegates Fenwick’s case to a footnote because he “know[s] of no evidence [the Framers] were conversant with” it.³⁴ But the case was plainly available to them; *Crawford* cites Howell’s 1812 report, but the same report appears in earlier editions of the State Trials as far back as 1719.³⁵ Several colonial libraries had copies of the State Trials,³⁶ and scholars have assumed the Framers were familiar with their contents.³⁷ Fenwick’s case in particular is discussed and cited to the State Trials by both Blackstone and Hawkins.³⁸ The case shows that, even as early as 1696, there was disagreement over whether Hale’s rule implied that the Marian deposition of an unavailable witness was admissible regardless of the circumstances under which it was taken.

A 1794 North Carolina decision, *State v. Webb*, is also instructive.³⁹ There, the Attorney General invoked the state’s equivalent of the Marian statutes in seeking to admit an unavailable witness’s deposition taken *ex parte*. He cited the passages from Hale, Hawkins, and Buller on which Davies

³² *Id.* at 596 (Sloane). Hale’s *History of the Pleas of the Crown* was not published until 1736; Sloane is referring to Hale’s earlier *Summary*. See Davies, *supra* note 5, at 129-30 & n.80.

³³ *Id.* at 602 (Musgrave) (emphasis added).

³⁴ Davies, *supra* note 5, at 121-22 n.50.

³⁵ See 4 A COMPLETE COLLECTION OF STATE-TRYALS, AND PROCEEDINGS UPON IMPEACHMENTS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANOURS 232, 256-63 (Thomas Salmon ed., London 1719).

³⁶ See RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 87 n.160 (1973).

³⁷ See, e.g., *id.* (“[I]t is not to be presumed that [the Framers] were ignorant of the famous State Trials.”).

³⁸ See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 351 (Oxford, Clarendon Press 1769); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 428 & n.(a), 430 (London, Nutt & Gosling 1721).

³⁹ 2 N.C. (1 Hayw.) 103 (Super. L. 1794).

relies.⁴⁰ But the court rejected his interpretation of those authorities:

These authorities do not say that depositions taken in the absence of the prisoner shall be read, and our [committal statute] clearly implies the depositions to be read, must be taken in his presence: it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine; and though it be insisted that the act intended to make an exception in this instance, to the rule of the common law, yet the act has not expressly said so, and we will not by implication derogate from the salutary rule established by the common law.⁴¹

Webb thus expressly conditioned admissibility on an opportunity for cross-examination; and it viewed that condition, not as departing from the unavailability rule, but as consistent with that rule.⁴²

Subsequent cases and treatises that conditioned admissibility on presence or opportunity for cross-examination uniformly interpreted the earlier sources in that fashion—as stating that unavailability was a condition of admissibility but not implying that the deposition of an unavailable witness was admissible regardless of the manner in which it was taken. An 1818 case report, for example, cited Hale and Hawkins for the

⁴⁰ *Id.* at 103-04 (“and cited in support of this attempt, 2 H.H.P.C. 284 [Hale’s *History of the Pleas of the Crown*]. H.P.C. 429 [Hawkins’s *Pleas of the Crown*]. Bull. 252 [Buller’s *Nisi Prius*]. La. Evid. 140, 142. 3 Term Rep. 713 [*Eriswell*].”).

⁴¹ *Id.* at 104.

⁴² Despite having previously acknowledged that *Webb* supports *Crawford*’s cross-examination rule, *see* Davies, *supra* note 5, at 181-82, Davies now claims the case is inapposite because the witness was not “genuinely unavailable,” *see* Davies, *supra* note 10, at 627-28. His new interpretation, however, is implausible. Although the report never expressly states that the witness was unavailable, the case was obviously argued and decided on that premise. The Attorney General clearly thought the witness was unavailable because the authorities he relied on *expressly conditioned* admissibility on unavailability. *See supra* note 40. His argument makes no sense if the witness was available. And the court’s holding had nothing to do with availability; rather, the court held that the state’s equivalent of the Marian statutes “clearly implic[d]” that witnesses must be examined “in [the prisoner’s] presence” at the committal hearing (so that the prisoner had “liberty to cross examine”), and for *that* reason, “[t]hese authorities” on which the Attorney General relied—which, again, *relate only to unavailable witnesses*—“do not say that depositions taken in the absence of the prisoner shall be read.” *Webb*, 2 N.C. (1 Hayw.) at 104. Furthermore, the court’s rationale—that the committal statute itself “clearly implic[d]” a right to be present at the committal hearing—*necessarily* applied to witnesses who later became unavailable to testify at trial, since there is typically no way to predict which witnesses will become unavailable at the time the prisoner exercises his right to be present at the committal hearing. In short, Davies dismisses *Webb* only by attributing a nonsensical argument to the prosecutor and ignoring the court’s express holding in favor of a rationale the court said nothing about. I am certainly willing to admit that some of the sources I rely on are ambiguous, but this is not one of them.

point that “it seems now to be settled” that a Marian deposition was admissible if “the informant is dead, or not able to travel, or . . . kept away by the means and contrivance of the prisoner,” but also stated that it was “plain” under the Marian statutes that “the prisoner shall be present whilst the witness actually delivers his testimony.”⁴³ An 1814 treatise cited Hale, Hawkins, and Buller for the point that a Marian deposition was admissible if the witness was unavailable, but said the rule applied only to an examination taken “in the presence of [the] prisoner.”⁴⁴ An 1816 treatise cited Hale, Hawkins, and Buller for the unavailability rule, but also stated that examinations “must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses.”⁴⁵ And an 1822 treatise cited Hale’s unavailability rule but stated that “[d]epositions, to be thus given in evidence, must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness.”⁴⁶

The unavailability rule stated in Lord Morly’s case was construed the same way. An 1808 treatise, commenting on an earlier claim that Lord Morly’s case proved the admissibility of *ex parte* coroners’ depositions, stated: “Mr. J. Buller is reported to have said that it was so settled in [Lord Morly’s case and a companion case]; certainly nothing of the kind appears in those books.”⁴⁷ And an 1844 decision characterized Lord Morly’s case as “quite uncertain, as to the precise point of the absence of the accused at the taking of the depositions,” and stated that it could not “conceive how judges could have resolved, that the depositions of deceased witnesses, when examined by the coroner, should be received as competent evidence . . . but by assuming that the written testimony had been taken under all the guards and tests of the common law, and especially those of the cross-examination.”⁴⁸

⁴³ Rex v. Forbes, Holt 599 n.*, 599-600 n.*, 171 Eng. Rep. 354 n.*, 354-55 n.* (1814) (reported 1818).

⁴⁴ PHILLIPPS, *supra* note 11, at 277 & nn.1-7.

⁴⁵ 1 CHITTY, *supra* note 11, at 79-81 & nn.(w)-(y).

⁴⁶ ARCHBOLD, *supra* note 11, at *85.

⁴⁷ THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 n.(m) (London, Hanford & Sons 3d ed. 1808); *see also* 2 STARKIE, *supra* note 11, at *490 (similar). Peake was commenting on Buller’s opinion in *Eriswell*, as to which see *infra* notes 128-44 and accompanying text.

⁴⁸ State v. Campbell, 30 S.C.L. (1 Rich.) 124, 127, 131-32 (App. L. 1844).

Of course, these post-framing interpretations were not available to the Framers in 1789 or 1791. But that does not make them irrelevant. The way that Hale, Hawkins, and Buller were understood in 1794 or even 1822 is some evidence of how they were understood at the time of the framing—not conclusive evidence, but better evidence (temporally speaking) than the way Professor Davies (or even Justice Scalia) might interpret them today. Those later sources show that the unavailability rule was widely understood *not* to imply that the Marian deposition of an unavailable witness was admissible regardless of the circumstances under which it was taken.

B. Paine and the Felony/Misdemeanor Distinction

Professor Davies' other line of authority consists of the 1696 decision in *King v. Paine*⁴⁹ and later commentaries on that case by Hawkins, Geoffrey Gilbert, and American manuals quoting Hawkins. Paine was charged with criminal libel, a misdemeanor. He was represented by Sir Bartholomew Shower, who (perhaps not coincidentally) was also defense counsel in Fenwick's case.⁵⁰ The Crown sought to admit the *ex parte* examination of a dead witness who had implicated Paine. The court rejected the evidence, but the rationale for its decision differs across the five reports of the case.

In the Modern Reports, defense counsel argued that the examination was inadmissible because “the defendant had lost all opportunity of cross-examining” and “this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for *felony*, because they have power by a particular statute to take such examinations both of the fact and circumstances, and to put it in writing and certify it at the next general gaol

⁴⁹ There are five reports of the evidentiary decision in the case: *King v. Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696); *Rex v. Pain*, Comb. 358, 90 Eng. Rep. 527 (K.B. 1697); *Rex v. Pain*, Holt 294, 90 Eng. Rep. 1062 (K.B. 1697); *Rex v. Paine*, 1 Salk. 281, 91 Eng. Rep. 246 (K.B. 1696); and *Rex v. Payne*, Ld. Raym. 729, 91 Eng. Rep. 1387 (K.B. n.d.). *Paine* is customarily dated to January 1696 (i.e., Hilary Term, 7 Will. 3), as reported by Modern and Salkeld, see, e.g., 3 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 22 & n.53 (2d ed. 1923), but there is reason to believe that Comberbach and Holt's date of 1697 is the correct one. If *Paine* had been decided in January 1696, it surely would have been mentioned in the debates in Fenwick's case later that year, especially since the same lawyer represented both defendants. See *infra* note 50 and accompanying text; cf. 3 WIGMORE, *supra*, § 1364, at 22 n.53.

⁵⁰ *Compare Pain*, Comb. at 359, 90 Eng. Rep. at 527, with Fenwick's Case, 13 How. St. Tr. 537, 592-93 (H.C. 1696).

delivery.”⁵¹ The prosecutor responded that “the statute makes no difference in this case, for the power of a justice of peace to take examinations is not grounded upon it; for he might examine a criminal by virtue of his office.”⁵² The court held simply that “these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.”⁵³

According to the Comberbach and Holt reports, the examination was inadmissible “for two reasons”: “1. It appears, that the defendant was not present when the examination was taken, so that he could not cross-examine him. 2. There is a difference between capital offences and cases of misdemeanour, for in case of felony the justices are by the [Marian statutes] to take the examinations in writing, and certify them to the gaol-delivery, &c. and if the party be dead or absent, they may be given in evidence.”⁵⁴ Finally, the Salkeld and Lord Raymond reports rely on the Marian statutory limitation to felonies without mentioning cross-examination.⁵⁵

Read together, the five reports suggest that two factors—the absence of opportunity to cross-examine and the Marian statutory limitation to felonies—were both relevant to the outcome. But the reports leave unclear how those two strands of analysis relate to each other. One reading—Professor Davies’—is that they were *interrelated* grounds for decision: The examination was inadmissible because it was taken outside the authority of the Marian statutes, and non-Marian examinations were admissible (if at all) only upon a prior opportunity for cross-examination.⁵⁶ On that reading, *Paine’s* distinction between felonies and misdemeanors arguably does support the claim that Marian examinations were admissible without regard to opportunity for cross-examination.

⁵¹ 5 Mod. at 164, 87 Eng. Rep. at 585.

⁵² *Id.*

⁵³ *Id.* at 165, 87 Eng. Rep. at 585.

⁵⁴ Comb. at 359, 90 Eng. Rep. at 527; Holt at 294, 90 Eng. Rep. at 1062.

⁵⁵ 1 Salk. at 281, 91 Eng. Rep. at 246 (“[I]n cases of felony such depositions before a justice, if the deponent die, may be used in evidence by the [Marian statutes]. But this cannot be extended farther than the particular case of felony [*sic*], and therefore not to this case.”); Ld. Raym. at 730, 91 Eng. Rep. at 1387 (“[I]n indictments for felony, by [the Marian statutes] such informations may be read, the deponent being dead. But in indictments or informations for misdemeanors, or in civil actions, or appeals of murder, no such information can be given in evidence . . .”).

⁵⁶ See Davies, *supra* note 5, at 140-43.

Another interpretation, however, is that the two grounds for decision were *independent*: The examination was excluded *both* because there was no opportunity for cross-examination *and* because there was no statutory authority to take examinations in misdemeanor cases, either ground alone being sufficient to exclude. In other words, misdemeanor examinations were *never* admissible, regardless of how they were taken; felony examinations were admissible, but only if there was an opportunity for cross-examination. The “difference” between felony and misdemeanor examinations was not that felony examinations were admissible even if *ex parte*, but simply that they were admissible *at all*.

Comberbach and Holt do speak of “two reasons” why the examination was excluded, suggesting those reasons were alternative grounds for decision.⁵⁷ And every report that addresses the felony/misdemeanor distinction does so in connection with the authority-to-examine issue, not the cross-examination issue.⁵⁸ Davies himself interprets *Paine* to hold that examinations were never admissible in misdemeanor cases.⁵⁹ But he thereby undermines his other argument that

⁵⁷ Comb. at 359, 90 Eng. Rep. at 527; Holt at 294, 90 Eng. Rep. at 1062.

⁵⁸ Comberbach and Holt address the “difference” between Marian and misdemeanor examinations in their discussions of authority to examine, not their separate references to opportunity to cross-examine. Comb. at 359, 90 Eng. Rep. at 527; Holt at 294, 90 Eng. Rep. at 1062. Salkeld and Lord Raymond (who stake the decision solely on authority grounds) report the court’s distinction between Marian and misdemeanor examinations; Modern (which stakes the decision solely on cross-examination) does not. Compare 1 Salk. at 281, 91 Eng. Rep. at 246, and Ld. Raym. at 730, 91 Eng. Rep. at 1387, with 5 Mod. at 165, 87 Eng. Rep. at 585. The only passage in any report that even arguably connects the Marian/misdemeanor difference to the cross-examination rule is defense counsel’s argument in Modern. See 5 Mod. at 164, 87 Eng. Rep. at 585 (examination inadmissible because “the defendant had lost all opportunity of cross-examining him; that this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for *felony*, because they have power by a particular statute to take such examinations both of the fact and circumstances, and to put it in writing and certify it at the next general gaol delivery”). Even that passage is ambiguous, however, and since Paine’s counsel was the same lawyer who argued in Fenwick’s case that *ex parte* examinations were “never admitted” in “criminal cases” and that it was “never attempted in any court of justice, that the examination of witnesses behind a man’s back, could be read in any place whatsoever,” 13 How. St. Tr. 537, 592 (H.C. 1696), it seems unlikely he meant to concede the admissibility of *ex parte* Marian examinations in *Paine*. More probably, he was arguing that the examination was inadmissible *both* because “the defendant had lost all opportunity of cross-examining” *and* because “this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for *felony*.” 5 Mod. at 164, 87 Eng. Rep. at 585.

⁵⁹ Davies, *supra* note 5, at 137-40. Davies attributes the contrary view to Justice Scalia, *id.* at 137, apparently because *Crawford* states that “admissibility . . .

Paine shows Marian examinations were admissible even absent opportunity to cross-examine: If misdemeanor examinations were never admissible, they were “differen[t]” from felony examinations, whether or not the cross-examination rule applied to the latter. Furthermore, if misdemeanor examinations were never admissible and felony examinations were always admissible, it is hard to see why *Paine* bothered to say anything about cross-examination at all.

Several English authorities read *Paine* in precisely the fashion suggested here. An 1814 treatise, for example, cited the Modern version of *Paine* for the point that a Marian examination had to be taken “in the presence of [the] prisoner.”⁶⁰ It then cited the Lord Raymond version for the point that an examination “cannot be given in evidence on an indictment for a misdemeanor” at all.⁶¹ Similarly, an 1816 treatise cited Modern for the point that Marian examinations “must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses,”⁶² while citing Modern, Salkeld, Comberbach, and Lord Raymond for the point that “the depositions cannot, in any case, be given in evidence on an indictment for a misdemeanour.”⁶³

depended on whether the defendant had had an opportunity to cross-examine.” Crawford v. Washington, 541 U.S. 36, 45 (2004).

⁶⁰ PHILLIPPS, *supra* note 11, at 277 & n.3.

⁶¹ *Id.* at 278 & n.2.

⁶² 1 CHITTY, *supra* note 11, at 79 & n.(l).

⁶³ *Id.* at 81 & n.(a); *see also* Cox v. Coleridge, 1 B. & C. 37, 48 & n.(a), 107 Eng. Rep. 15, 19 & n.(a) (K.B. 1822) (reporter’s note to counsel’s argument) (citing Salkeld and Modern for the point that a Marian deposition may “be read in evidence against the prisoner, on the ground that he has had the opportunity for [a] cross-examination”); ARCHBOLD, *supra* note 11, at *85 (citing Modern, Salkeld, and Lord Raymond for the point that a Marian examination, “to be thus given in evidence, must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness,” while citing Salkeld for the point that an examination cannot “be read in the case of misdemeanors, at all; the statute extending only to manslaughter and felony”). Other English authorities read *Paine* as holding that misdemeanor examinations were never admissible, and also stated that *ex parte* felony examinations were inadmissible, without attributing that latter point to *Paine*. An 1820 reporter’s note cited *Paine* for the point that “examinations and depositions taken in a case of misdemeanour, cannot be read in evidence, because the statutes apply to cases of felony only.” Rex v. Smith, 2 Stark. 208, 211 n.(a), 171 Eng. Rep. 622, 623-24 n.(a) (1817). But even Marian examinations, the author added, became admissible only “upon the rules and principles of evidence already established,” and admissibility at common law depended on “an opportunity to cross-examine.” *Id.* Likewise, an 1801 treatise cited *Paine* for the point that examinations were never admissible in misdemeanor cases, but stated in the preceding sentence that a felony examination was inadmissible “if the prisoner be not present at the time of the examination.” PEAKE (1801), *supra* note 11, at 41.

American authorities read *Paine* the same way. An 1835 South Carolina case relied on it to conclude that the Marian statutes did not permit admission of *ex parte* depositions: “The case of the King v. Paine is authority at least for the general position that the *ex parte* examination of a witness, although taken in the course of a judicial proceeding, is not admissible in evidence, although the witness be dead, and I have before remarked that the [Marian committal] statute does not prescribe any new rule of evidence.”⁶⁴ The same court cited *Paine* in 1844 for the point that the Marian statutes authorized admission “[p]rovided the accused was present, and had the opportunity of a cross-examination, and the witness be dead.”⁶⁵

An 1842 New York case is especially instructive.⁶⁶ The witness there had been examined first by the committing magistrate and then pursuant to a court order.⁶⁷ The court held the second examination inadmissible for lack of authority, citing the Salkeld, Lord Raymond, and Comberbach reports of *Paine* for the point that “there is no authority at the common law [i.e., absent statute] for taking depositions out of court in criminal cases.”⁶⁸ The court then held the first examination inadmissible because, even though the magistrate had authority to examine under the state’s equivalent of the Marian statutes, the witness had not been sworn for the cross-examination.⁶⁹ The court said: “It is settled upon the construction of the statutes of *Phil. & Mary*, that the defendant must be present at the examination of the witnesses against him [T]he defendant shall have the opportunity to cross-examine, and if that right is not enjoyed, the deposition cannot be read in evidence against him on the trial”—and as to *that* point, the court cited the Modern and Comberbach versions of *Paine*.⁷⁰

Davies’ contrary authorities are not all supportive of his position. For example, Hawkins (and the American manuals that quoted him) wrote only that “it is said to have been adjudged . . . , upon an Indictment for a Libel, that Depositions

⁶⁴ State v. Hill, 20 S.C.L. (2 Hill) 607, 610 (App. L. 1835) (citation omitted).

⁶⁵ State v. Campbell, 30 S.C.L. (1 Rich.) 124, 130 (App. L. 1844).

⁶⁶ People v. Restell, 3 Hill 289 (N.Y. Sup. Ct. 1842).

⁶⁷ *Id.* at 291-94.

⁶⁸ *Id.* at 298.

⁶⁹ *Id.* at 303-04.

⁷⁰ *Id.* at 300.

taken before a Justice of Peace relating to the Fact could not be given in Evidence, tho' the Deponent were dead; and that the Reason why such Depositions may be given in Evidence in Felony depends upon the [Marian statutes]. And that this cannot be extended farther than the particular Case of Felony."⁷¹ This entails the same ambiguity as *Paine* itself. Is the rule that "cannot be extended farther than the particular Case of Felony" that examinations are admissible even if taken *ex parte*, or merely that properly taken examinations are admissible *at all*?⁷² Notably, when Thomas Leach revised Hawkins's treatise in 1795 to state that the Marian statutes required an "opportunity of contradicting or cross-examining,"⁷³ he made no change to this discussion of *Paine*.⁷⁴ Davies relies on that fact as if it somehow supported his position,⁷⁵ but it proves the opposite: Leach evidently thought Hawkins's discussion was consistent with applying the cross-examination rule to the Marian statutes.

Some English sources arguably support Davies' interpretation. Gilbert, for example, wrote that *Paine* "would not allow the Examinations . . . to be given in Evidence, because *Paine* was not present to cross-examine, and tho' tis Evidence in Indictments for Felony in such case by Force [of the Marian statutes] yet 'tis not so in Informations for Misdemeanors"⁷⁶—a description that, while ambiguous,⁷⁷ is

⁷¹ 2 HAWKINS (1721), *supra* note 38, at 430. For the American manuals, see Davies, *supra* note 5, at 183 n.246, 184 n.250, 184 n.253, and accompanying text.

⁷² Hawkins adds: "But in the Report of this Case in 5 *Mod.* it is said that the Reason why such Depositions could not be read was, because the Defendant was not present, when they were taken, and therefore had not the Benefit of a Cross Examination." 2 HAWKINS (1721), *supra* note 38, at 430 (footnote omitted). This sentence could merely be making the point that, although some reports of *Paine* held misdemeanor examinations never admissible, Modern relied *only* on the absence of cross-examination and thus left open the possibility that a misdemeanor examination might be admissible if an opportunity for cross-examination were provided.

⁷³ 4 HAWKINS (1795), *supra* note 11, at 423.

⁷⁴ *Id.*

⁷⁵ Davies, *supra* note 5, at 149.

⁷⁶ GEOFFREY GILBERT, THE LAW OF EVIDENCE 100 (Dublin 1754). The passage was written before Gilbert's death in 1726, three generations before the framing; "it is generally agreed that Gilbert's work reflects an understanding of evidence formed no later than the opening decade of the eighteenth century." Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 592 (1990). Nevertheless, the passage was not substantively revised even as late as Lofft's 1791 edition. See 1 GEOFFREY GILBERT, THE LAW OF EVIDENCE 215 (Capel Lofft ed., London, Strahan & Woodfall 1791).

⁷⁷ The passage could be saying either that (1) the examination was inadmissible for two independent reasons: *Paine* was not present to cross-examine

perhaps more naturally read as Davies suggests. Two eighteenth-century English cases also seem to interpret *Paine* in that fashion.⁷⁸

Nevertheless, the fact remains that *Paine* was widely interpreted as not only *consistent with* a Marian cross-examination requirement, but as *affirmatively supporting* such a requirement. Indeed, so far as I can tell, reported American cases *uniformly* interpreted *Paine* that way. That those sources were post-framing does not make them irrelevant. *Paine* itself was available to the Framers, the decision is ambiguous on its face, and the fact that it was widely interpreted over the ensuing decades as establishing a cross-examination rule applicable even to Marian examinations is relevant evidence of how the case was understood in 1789 or 1791. An interpretation cannot be dismissed as “fictional” when that same interpretation was ultimately adopted as settled law.

C. Conclusion

Neither Hale’s rule that a Marian examination was admissible if the witness was unavailable nor the decision in *King v. Paine* shows that Marian examinations were admissible even absent an opportunity to cross-examine. Rather, Hale and his successors were widely read as simply not addressing that issue, and *Paine* was widely read as taking the exact opposite view.

II. PRESENCE

I now turn to the affirmative case in support of the cross-examination rule. There are two ways in which a

“and” the force of the Marian statutes authorizes admission of depositions *at all* only in felony cases; or (2) the examination was inadmissible because *Paine* was not present to cross-examine, and the force of the Marian statutes authorizes admission of *ex parte* depositions only in felony cases. In other words, the “tis” could mean either *ex parte* examinations or examinations generally, and “such case” could mean either *ex parte* examinations or unavailable witnesses generally.

⁷⁸ See *King v. Westbeer*, 1 Leach 12, 12, 168 Eng. Rep. 108, 109 (1739) (citing Salkeld as authority for admitting a Marian deposition over the objection that it would deprive the prisoner of “the benefit which might otherwise have arisen from a cross-examination”), discussed *infra* text accompanying notes 158-62; *King v. Eriswell*, 3 T.R. 707, 722-23, 100 Eng. Rep. 815, 823-24 (K.B. 1790) (Kenyon, C.J.), quoted and discussed *infra* text accompanying notes 128-44. *But see* 2 STARKIE, *supra* note 11, at *488 n.(c), *491-92 (reading Kenyon’s citation to *Paine* in *Eriswell* as adopting the interpretation suggested here), quoted *infra* note 136.

prisoner could be denied the opportunity to cross-examine at a committal hearing. First, the magistrate could depose witnesses in the prisoner's absence—a prisoner who was not present necessarily would have no opportunity to cross-examine. Second, the magistrate could depose witnesses in the prisoner's presence but refuse to permit any questions. This section considers the former possibility. I first argue that, as a factual matter, eighteenth-century Marian examinations were routinely conducted in the prisoner's presence. I then argue that, by the framing, there was an emerging consensus that presence was also a procedural right, so that depositions taken in the prisoner's absence could not be read against him at trial under the authority of the Marian statutes.

A. *Presence as a Routine Feature of Marian Procedure*

The Marian committal statute provided that a justice of the peace “before whom any person shall be brought” must “before . . . commit[ting] or send[ing] such Prisoner to Ward . . . take the examination of such Prisoner, and information of those that bring him.”⁷⁹ The statute therefore contemplated depositions in very particular circumstances. Witnesses who believed someone had committed a felony would “br[ing]” him before a justice of the peace. When the witnesses and prisoner appeared before the justice, the prisoner would be in the witnesses' custody, and thus their presence. The statute directed the justice to examine the prisoner and witnesses “before” committing the prisoner to jail; there is no suggestion that the prisoner be sequestered while witnesses are deposed. A reasonable inference is that the prisoner would typically remain in the custody (and therefore presence) of the witnesses who brought him.

That inference follows not only from the statutory text, but from the simple fact that Marian examinations are *committal* examinations. The function of a committal hearing is to decide whether to commit the prisoner, and a magistrate cannot commit a prisoner who is not there. Committal hearings are thus distinguishable from non-Marian pretrial proceedings such as warrant applications, where there is no particular reason to expect the prisoner's presence. Chief Justice Marshall made that distinction in 1807 during a

⁷⁹ 2 & 3 Phil. & M., c. 10 (1555). The language of the bail statute is similar. 1 & 2 Phil. & M., c. 13 (1554).

colloquy in *Ex parte Bollman*: “If a person makes an affidavit before a magistrate to obtain a warrant of arrest, such affidavit must necessarily be *ex parte*. But how is it on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in presence of the prisoner?”⁸⁰ Marshall’s point here seems to be not so much that there is a legal requirement that committal proceedings be conducted in the prisoner’s presence, but that it would be strange to conduct them any other way.⁸¹

Other evidence corroborates this theory. A 1747 print by William Hogarth depicts a committal examination in the Guildhall magistrates’ court; the accused is clearly shown to be present while his accuser is sworn to testify against him.⁸² Other prints from the same era show “[p]eople waiting their turn—prosecutors, accused, constables, the curious—simply st[anding] about.”⁸³ Committal examinations were often conducted in the relatively informal setting of the justice’s residence parlor,⁸⁴ so it is not even clear where the prisoner would have been kept if sequestered while the witnesses who brought him were deposed.

The most compelling evidence of Marian procedure, however, is in the depositions themselves. I obtained from the

⁸⁰ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 124 (1807) (Marshall, C.J.).

⁸¹ As Professor Davies notes, see Davies, *supra* note 10, at 631-32, the Court in *Bollman* ultimately held that an *ex parte* affidavit was admissible at a committal hearing, over counsel’s objection that “[t]he party arrested and brought before the magistrate for commitment, has a right to be confronted with his accuser, and to cross-examine the witnesses produced against him.” 8 U.S. (4 Cranch) at 120, 129. But the Attorney General in that case had conceded that such evidence would be inadmissible at trial. See *id.* at 115 (“It is true that none of the evidence now offered would be competent on the trial . . .”). That the Court was willing to allow an affidavit at a committal hearing does not prove the Court would treat it the same as a live Marian examination if the witness became unavailable before trial. Marshall’s question suggests that the committal procedure followed in *Bollman* was not typical.

⁸² WILLIAM HOGARTH, *INDUSTRY AND IDLENESS NO. 10: THE INDUSTRIOUS PRENTICE ALDERMAN OF LONDON, THE IDLE ONE BROUGHT BEFORE HIM & IMPEACH’D BY HIS ACCOMPLICE* (1747), available at <http://www.victorianweb.org/painting/18c/hogarth/17.html> (last visited Nov. 27, 2006); see also J.M. BEATTIE, *POLICING AND PUNISHMENT IN LONDON, 1660-1750*, at 109 (2001) [hereinafter BEATTIE, *POLICING AND PUNISHMENT*] (describing this picture); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 78-79 (1983) (reproducing the picture).

⁸³ J.M. Beattie, *Sir John Fielding and Public Justice: The Bow Street Magistrates’ Court, 1754-1780*, 25 LAW & HIST. REV. (forthcoming 2007) (manuscript at 15) [hereinafter Beattie, *Public Justice*] (citing prints from 1742 and 1750).

⁸⁴ See J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800*, at 278-79 (1986) [hereinafter BEATTIE, *CRIME AND THE COURTS*]; BEATTIE, *POLICING AND PUNISHMENT*, *supra* note 82, at 419; PETER KING, *CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740-1820*, at 85 (2000).

London Metropolitan Archives a sample of committal depositions in twenty-seven cases from 1789.⁸⁵ In twenty-two of the cases—more than 80%—the prisoner is expressly identified as being present in accusing witnesses' testimony. In one case, for example, the deposition states that the witness "particularly remembers that on the night of the robbery and a very short time before this Informant left his Shop *the person now present who calls himself Joseph Pocock* came into his Shop."⁸⁶ Another states that the witness "looked up and saw *the Prisoner Present who says his name is James Netherhood* take some Copper out of said Barge and give it to *the other prisoner present*."⁸⁷ Twenty other cases contain similar references.⁸⁸ Two of those cases are particularly striking in

⁸⁵ I located these materials by using the Old Bailey Proceedings Online database. See *The Proceedings of the Old Bailey*, <http://www.oldbaileyonline.org> (last visited Nov. 27, 2006). The depositions are not available online (unlike the trial proceedings), but the creators of the site did add archive citations for depositions and other "associated records" where those records survived. To construct my sample, I searched for trials from 1789 with associated records likely to be committal depositions. Because I constructed the sample from the trial proceedings, it necessarily excludes cases where the prisoner was discharged before trial. I also excluded cases where the associated records were located somewhere other than the London Metropolitan Archives. Finally, because I was most interested in finding cases where the prisoner might have been represented by counsel at the committal hearing (which seemed more likely to yield evidence of cross-examination), I excluded cases where the prisoner appeared *pro se* at trial. I located 13 cases with associated records coded as "information" and "examination," and 54 cases with associated records coded only as "information." I chose a sample consisting of all 13 cases in the former category and an essentially random subset of 14 cases from the latter; I then obtained the records from the London Metropolitan Archives. For purposes of whether the prisoner was present at the committal hearing or not, I would expect this sample to be reasonably representative.

⁸⁶ *Informations of George Bemfleet (Benfield) et al. against Joseph Pocock et al.*, OBSP 1789 Feb/53-57, 87 (Jan. 31 & Feb. 3, 1789) (emphasis added) (also includes three other similar references).

⁸⁷ *Information of Corbin Sangley against James Netherhood & Timothy Hopkins*, OBSP 1789 Sept/92 (Aug. 14, 1789) (emphasis added) (also includes one other similar reference).

⁸⁸ See *Information of James Park against James Walton (Wharton)*, OBSP 1789 Jan/20 (Dec. 15, 1788) ("the person present who saith his name is James Walton"); *Examination of Robert Hutton against William Street & John Maidwell*, OBSP 1789 Jan/19, 30 (Jan. 3 & 5, 1789) ("the two men present who say their names are William Street and John Maidwell"); *Informations of William Morris et al. against Jacob Canter*, OBSP 1789 Feb/16-23, 84 (Jan. 7 & 26, 1789) ("a person now present who calls himself Jacob Canter"; nine other similar references); *Information of John Grimes against Cuthbert Rutledge et al.*, OBSP 1789 Jan/18, 53 (Jan. 8, 1789) ("he saw the persons present who say their names are Cuthbert Rutledge John Butler and John Freeman"); *Information of George Forester against Christopher Daley (Daley)*, OBSP 1789 Feb/41 (Feb. 14, 1789) ("he saw the person present who saith his name is Christopher Daley"); *Information of Chaffon Edgell against William Cook*, OBSP 1789 Ap/69-70 (Mar. 25, 1789) ("the Person now present who calls himself William Cook"); *Information of John Clarke against Thomas Denton et al.*, OBSP 1789 Ap/10 (Mar. 27,

that the prisoners were examined on one day and the witnesses deposed on another, yet the witnesses still identified the prisoners as present—evidently the prisoners were brought back for those depositions.⁸⁹ Of the remaining five cases, two contain ambiguous indications that the prisoner was present,⁹⁰

1789) (“two persons now present who call themselves Thomas Denton and John Jones”); Information of Edward Smith against James Henley, OBSP 1789 Ap/73 (Apr. 3, 1789) (“he did suspect the man present who says his name is James Henley”); Information of Joseph Barrett against Edward Lary, OBSP 1789 Ap/27 (Apr. 11, 1789) (“a person now present who calls himself Edward Lary”); Information of Thomas Lancaster against Edward Castledine, OBSP 1789 Ap/47, 76 (Apr. 22, 1789) (“[t]he person present who says his name is Edward Castledine”); Information of Thomas Beszant against David Coleman, OBSP 1789 Ju/35 (May 6, 1789) (“said Draft was presented for payment by a person now present who calls himself David Coleman”; one other similar reference); Information of James McManus against John Bannister, OBSP 1789 Ju/47 (May 7, 1789) (“he apprehended John Bannister the prisoner now present”); Information of Robert Tate against Edward Tapp, OBSP 1789 Ju/38 (May 9, 1789) (“a person now present who calls himself Edward Tapp”); Information of Simon Wood against Joseph Lucas & James Rock, OBSP 1789 Jy/22 (June 26, 1789) (“saw the persons present who say their names are Joseph Lucas and James Rock”); Information of David Mackintosh against Francis Burrows, OBSP 1789 Sept/87 (Aug. 16, 1789) (“one of the men now present that calls himself Francis Burrows”); Information of John Fletcher against George Dawson & Deborah Dawson, OBSP 1789 Sept/90a-b (Aug. 18, 1789) (“he met the person now present who calls herself Deborah Dawson”); Informations of John Roberts & John Clark against Thomas Girling, OBSP 1789 Sept/81a-c, 82 (Aug. 18 & Sept. 11, 1789) (“Thomas Girling the Letter Carrier now present”; one other similar reference); Information of Mary Tollin against Edward Studsbury & Charles Burton, OBSP 1789 Sept/74 (Sept. 1, 1789) (“the person now present, who calls himself Edward Studsbury”; “the other person also now present, who calls himself Charles Burton”); Information of Catherine Baker against William Cunningham, OBSP 1789 Oct/59 (Oct. 10, 1789) (“has no doubt but that the person now present who calls himself William Cunningham is the man she saw lying down in the Passage as aforesaid”); Information of Mary Smith against Joseph Webb, OBSP 1789 Oct/73 (Oct. 14, 1789) (“the prisoner now present, who calls himself Joseph Webb”). Qualifications should be noted with respect to two of these cases. First, in the Thomas Girling case, although multiple witnesses identified the prisoner as present, the archive file includes a second set of depositions taken about a month later that refer to the prisoner as being then in custody at Newgate. *See* Informations of John Roberts et al. against Thomas Girling, OBSP 1789 Sept/81a-c, 82 (Aug. 18 & Sept. 11, 1789). Apparently the prisoner was committed upon the first set of depositions; it is unclear whether this second set (seemingly *ex parte*) were Marian committal depositions or not. Second, in the Street and Maidwell case, although one person clearly identified both prisoners as present, another stated that “neither of the persons are present who was present at the loading of the said last mentioned Waggon”; it is unclear from context whether the persons referred to include either of the prisoners. Information of Robert Bygrave against William Street & John Maidwell, OBSP 1789 Jan/30 (Jan. 5, 1789).

⁸⁹ *See* Examination of Robert Hutton against William Street & John Maidwell, OBSP 1789 Jan/19, 30 (Jan. 3 & 5, 1789); Informations of William Morris et al. against Jacob Canter, OBSP 1789 Feb/16-23, 84 (Jan. 7 & 26, 1789).

⁹⁰ In one case, the deposition refers to the prisoner as “William Ward now under Examination.” Information of John Peacock against William Ward, OBSP 1789 Ju/17 (May 6, 1789). In the other, the deposition states that the witness “met the Prisoner who says her name is Eleanor Hays”; the prisoner’s own examination appears on the same document immediately after the witness’s deposition; and the prisoner begins by exclaiming that the witness has “Perjured himself,” suggesting she was

and three contain no indication either way.⁹¹ Overall, this evidence suggests that presence was not merely a routine feature of Marian procedure, but a near-universal one.

The notion that Marian examinations were conducted in the prisoner's absence seems to have originated in a late nineteenth-century treatise by English historian James Stephen. In contrasting the Marian statutes with the 1848 legislation explicitly requiring opportunity for cross-examination, Stephen wrote that under the former "[t]he prisoner had no right to be, and probably never was, present."⁹² He cited no source for that claim, however; it was not carefully researched the way much of Stephen's work was. We can only speculate about his rationale. If Stephen was inferring that the prisoner probably never was present merely because he had no express statutory right to be present, his conclusion is a non sequitur. Whatever the rationale, Stephen's claim seems impossible to reconcile with the evidence above, which shows that the prisoner was almost invariably present when his accusers testified against him at a committal hearing.⁹³

B. Presence as a Procedural Right

Was presence more than a natural feature of Marian practice—was it also a procedural right? The general rule that evidence must be given in the presence of the accused was settled long before the framing. Hawkins, for example, had written that it was “a settled Rule, That in Cases of Life no Evidence is to be given against a Prisoner but in his Presence.”⁹⁴ The exchange in Fenwick's case suggested that

present for his testimony. Information of Fredreck Seabeck against Eleanor Hays, OBSP 1789 Dec/54 (Nov. 28, 1789).

⁹¹ Informations of Joseph Athinson et al. against William Patmore, OBSP 1789 Feb/72a-b (Jan. 20 & 31, 1789); Informations of James Kerton et al. against Francis Fleming et al., OBSP 1789 Feb/60, 86 (Jan. 28, 1789); Informations of Nunn Ilston & Edward Vaughan Williams against Thomas Taylor, OBSP 1789 Dec/79 (Dec. 9, 1789).

⁹² 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (London, MacMillan 1883).

⁹³ Beattie writes in his *Crime and the Courts in England* that “[t]he Marian legislation gave the prisoner few rights at this stage of the investigation. He was not to be told precisely what the evidence was against him, nor to be present when the deposition of his accuser was taken.” BEATTIE, *CRIME AND THE COURTS*, *supra* note 84, at 271. I am informed by the author, however, that the intent of this passage was merely to convey that the prisoner had no *right* to be present, and that normally he would have been present nonetheless. E-mail from John Beattie to Robert Kry (Apr. 22, 2006) (on file with author).

⁹⁴ 2 HAWKINS (1721), *supra* note 38, at 428 (footnote omitted).

this general rule might also apply in the specific context of Marian examinations.⁹⁵ And the pervasive references to “presence” in the Marian depositions themselves raise a strong suspicion that presence was more than just a natural feature of Marian procedure.⁹⁶ The strongest evidence, however, comes from three cases decided almost contemporaneously with the adoption of the Bill of Rights: *King v. Radbourne*,⁹⁷ *King v. Woodcock*,⁹⁸ and *King v. Dingler*.⁹⁹

Radbourne was a murder and petty treason trial of a maid accused of killing her mistress. William Garrow, the most celebrated criminal defense lawyer of his day,¹⁰⁰ represented the prosecution. The victim had been examined before she died by a justice of the peace; the case report specifically mentions that the examination was taken “in the presence of the prisoner,” “heard by the prisoner,” and “distinctly read over to her in the presence of” the victim.¹⁰¹ Garrow argued that the deposition was admissible under the Marian statutes:

Garrow, for the Crown, . . . contended that Mrs. Morgan’s deposition was admissible in evidence . . . as an information taken by a regular magistrate, under the statutes of Philip & Mary; *for it had been given in the presence and hearing of the prisoner*, upon an oath lawfully administered to Mrs. Morgan, who had thereby called God to witness that what she said was true, and who had *in the presence of the prisoner*, made an additional attestation of its truth, by putting her signature thereto . . .¹⁰²

The deposition was admitted, and the defendant convicted of murder.¹⁰³

⁹⁵ See *supra* notes 32-33 and accompanying text.

⁹⁶ See *supra* notes 85-91 and accompanying text.

⁹⁷ 1 Leach 457, 168 Eng. Rep. 330 (1787) (reported 1789/1800).

⁹⁸ 1 Leach 500, 168 Eng. Rep. 352 (1789) (reported 1789).

⁹⁹ 2 Leach 561, 168 Eng. Rep. 383 (1791) (reported 1800). The quotations that follow in the text are taken from the 1815 fourth edition of Leach’s *Crown Cases* that appears in the English Reports. I note below instances in which Leach’s fourth edition differs materially from his earlier editions. I am indebted to Professor Davies for drawing my attention to those differences. In an attempt to verify the accuracy of Leach’s reporting, I also compared his reports to the earlier accounts in the Old Bailey Sessions Papers. Although the reports are similar in many respects, there are material discrepancies, which I likewise note below.

¹⁰⁰ See *infra* note 178.

¹⁰¹ *Radbourne*, 1 Leach at 459, 168 Eng. Rep. at 331-32.

¹⁰² *Id.* at 460-61, 168 Eng. Rep. at 332 (emphasis added).

¹⁰³ *Id.* at 461-62, 168 Eng. Rep. at 332-33. The decision was referred to the Twelve Judges—essentially, England’s *en banc* process for criminal cases—and affirmed. *Id.* at 462, 168 Eng. Rep. at 333. The version of *Radbourne* in the English

In *Woodcock*, the prisoner was charged with murdering his wife. The victim was found injured in a ditch and taken to a poor-house, where a magistrate examined her before she died. The court refused to admit the examination under the Marian statutes:

[A Marian] deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact. In the present case a doubt has arisen with the Court, to which doubt I entirely subscribe, Whether the examination of the deceased, taken in writing at the poor-house by Mr. Read, the Magistrate, is an examination of the nature I have last described? *It was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of contradicting the facts it contains.* It was not in the discharge of that part of Mr. Read's duty by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a voluntary and extrajudicial act, performed at the request of the Overseer; and although it was a very proper and prudent act, yet being voluntary, and under circumstances where the Justice was not authorized to administer an oath, it cannot be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken.¹⁰⁴

Reports is substantially the same as the version in Leach's 1800 third edition. See 2 THOMAS LEACH, CASES IN CROWN LAW 512-20 (London 3d ed. 1800). The version in Leach's 1789 first edition is shorter; it states that the victim "gave an information upon oath, before a Justice of the Peace, which was read deliberately over to her in the presence and hearing of the prisoner," but does not include arguments of counsel and therefore omits Garrow's express tying of presence to admissibility under the Marian statutes. See THOMAS LEACH, CASES IN CROWN LAW 399-401 (London 1st ed. 1789). Leach's 1792 second edition italicizes the words "to her in the presence and hearing of the prisoner," but otherwise is similar to the first edition. See THOMAS LEACH, CASES IN CROWN LAW 363-64 (London 2d ed. 1792). In the version in the Old Bailey Sessions Papers, Garrow argues that the information is admissible because it was "given in the presence of the prisoner," but he makes that point as a general principle of evidence law without specific reference to the Marian statutes:

[O]ne of the grounds of receiving such declarations, when made in the presence and hearing of the prisoner, is this; that when an innocent man is accused in a solemn manner, his innocent mind instantly revolts at the accusation; and he asserts his innocence, and denies his guilt; and therefore if he does not do so, when he hears the accusation, that is evidence at least to go to a Jury, that he did not object to it when he heard it.

Trial of Henrietta Radbourne, Old Bailey Sessions Papers, July 11, 1787, at 750, 752.

¹⁰⁴ King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789) (citation omitted; emphasis added).

The court nevertheless told the jury it could consider the testimony as a dying declaration if given under apprehension of death; the jury convicted.¹⁰⁵

Dingler was another case in which the prisoner was accused of murdering his wife. Abingdon, the magistrate, had examined the victim at the infirmary before she died, after the husband was in custody but outside his presence. The defendant was represented at trial by William Garrow, the same lawyer who had represented the Crown in *Radbourne* four years earlier. Garrow argued that the examination was inadmissible:

[The Marian committal statute] enacts, "That such Justice or Justices, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstances thereof, and the same, or so much thereof as shall be material to prove the felony, shall put in writing," &c. The Magistrate, therefore, is only authorized to take an examination of the person brought before him, and of those who bring him: this is the course which the law has prescribed to the Magistrate on these occasions; and when this course is pursued, the prisoner may have, as he is entitled to have, the benefit of cross-examination; but in the course which has been pursued by Mr. Abingdon, as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination. . . . The authority of the Magistrate in such cases grows out of the statute; it is commensurate with the terms of it; and therefore it is utterly impossible, unless the prisoner had been present, that depositions thus taken can be read; and he cited the case of *Rex v. Woodcock*.¹⁰⁶

The court sustained the objection "on the authority of the case cited."¹⁰⁷

¹⁰⁵ *Id.* at 504, 168 Eng. Rep. at 354. The version of *Woodcock* in the English Reports is the same in relevant respects as the versions in all of Leach's prior editions. See 2 LEACH (1800), *supra* note 103, at 563-68; LEACH (1792), *supra* note 103, at 397-401; LEACH (1789), *supra* note 103, at 437-42. The version in the Old Bailey Sessions Papers differs somewhat; among other things, where Leach reports the judge as stating that the deposition "was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of contradicting the facts it contains," the Old Bailey Sessions Papers reports him as stating more ambiguously that Marian examinations are "taken where persons are in custody, and when the justice hears the examination of witnesses against persons in custody." Trial of William Woodcock, Old Bailey Sessions Papers, Jan. 14, 1789, at 95, 111.

¹⁰⁶ *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 384 (1791) (citation omitted; emphasis added).

¹⁰⁷ *Id.* at 563, 168 Eng. Rep. at 384. The version of *Dingler* in the English Reports is substantially the same as the version in Leach's 1800 third edition. See 2

Radbourne, *Woodcock*, and *Dingler* confirm that, by the framing era, Marian examinations were normally conducted in the prisoner's presence. The deposition in *Radbourne* was taken "in the presence of the prisoner."¹⁰⁸ Although Davies thinks that merely reflects the fact that the petty treason charge independently entitled the prisoner to be present,¹⁰⁹ Garrow expressly argued that presence was relevant *under the Marian statutes*—the deposition was properly taken "*under the statutes of Philip & Mary*; for it had been given in the presence and hearing of the prisoner."¹¹⁰ Likewise, in *Woodcock*, the court distinguished the deposition at hand from one taken "as the statute directs, in a case where the prisoner was brought before [the magistrate] in custody," affording an "opportunity of contradicting the facts it contains."¹¹¹ And in *Dingler*, Garrow distinguished the deposition at issue from a committal examination on the ground that it was not taken in the prisoner's presence.¹¹² All three cases thus confirm that Marian examinations were normally conducted in the prisoner's presence.

The three cases do more than reveal how Marian examinations were normally conducted—they also speak to admissibility. In *Radbourne*, the deposition was "*admissible in*

LEACH (1800), *supra* note 103, at 638-41. Professor Davies supposes that *Dingler* first appeared in Leach's 1792 second edition, *see* Davies, *supra* note 5, at 157 n.164, but that edition in fact only reports cases through the July Session of 1791 and therefore does not include *Dingler*'s September trial, although the case is mentioned in a marginal note to *Woodcock*. *See* LEACH (1792), *supra* note 103, at 401 n.(a). In the Old Bailey Sessions Papers, Garrow's argument is more discursive, but he makes similar points. *See* Trial of George Dingler, Old Bailey Sessions Papers, Sept. 14, 1791, at 468, 473-77. That report is discussed *infra* notes 166-76 and accompanying text.

¹⁰⁸ *King v. Radbourne*, 1 Leach 457, 459, 168 Eng. Rep. 330, 331 (1787). Professor Davies observes that Leach's first edition reported that the deposition was "read" rather than "taken" in the prisoner's presence. *See* Davies, *supra* note 10, at 607-09. But the report states that the deposition was "read deliberately over to her"—i.e., the witness—"in the presence and hearing of the prisoner." LEACH (1789), *supra* note 103, at 400 (emphasis added). In other words, the witness and the prisoner were both present when the prisoner was apprised of the witness's testimony. That arrangement is no more or less conducive to cross-examination than taking the deposition in the prisoner's presence in the first instance; in either case the prisoner can question the witness about her testimony unless the magistrate affirmatively prevents her from doing so.

¹⁰⁹ Davies, *supra* note 5, at 165.

¹¹⁰ *Radbourne*, 1 Leach at 461, 168 Eng. Rep. at 332 (emphasis added). As noted *supra* note 103, this quotation appears in Leach's 1800 third edition but not in his prior editions. Nevertheless, Leach's third edition, together with the Old Bailey Sessions Papers report, *see supra* note 103, strongly suggest that Garrow argued presence was relevant for reasons unrelated to the treason statute.

¹¹¹ *King v. Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789).

¹¹² *Dingler*, 2 Leach at 562-63, 168 Eng. Rep. at 384.

evidence . . . for it had been given in the presence and hearing of the prisoner.”¹¹³ In *Woodcock*, the deposition was not *admissible* under the Marian statutes because the prisoner was not “brought before [the magistrate] in custody.”¹¹⁴ And in *Dingler*, Garrow argued that it was “utterly impossible, unless the prisoner had been present, that depositions thus taken can be read.”¹¹⁵ Presence was thus not only a natural consequence of Marian procedure, but a procedural right—unless the prisoner was present, the deposition could not be read at trial. Later sources confirm that interpretation, routinely citing these cases as holding that depositions taken in the prisoner’s absence were inadmissible.¹¹⁶

Davies makes much of a distinction between what he terms the “strong” and “nuanced” versions of Justice Scalia’s claim that these cases “rejected” the “statutory derogation view.”¹¹⁷ As he notes, *Woodcock* and *Dingler* did not hold that depositions taken in conformity with the Marian statutes were inadmissible if taken *ex parte*; rather, they held that the depositions at issue were not taken in conformity with the Marian statutes.¹¹⁸ But that distinction is academic because the *reason* the depositions were held not to have conformed to the Marian statutes was that they were taken *ex parte*. There is no practical difference between excluding Marian depositions taken *ex parte* and holding that depositions taken *ex parte* are not Marian depositions and for *that* reason inadmissible. In either case, presence is a condition of admissibility.

Davies also objects to the timing of the decisions: Leach’s reports of *Radbourne* and *Woodcock* were not published until 1789, at most a few months before Congress proposed the

¹¹³ *Radbourne*, 1 Leach at 460-61, 168 Eng. Rep. at 332 (emphasis added).

¹¹⁴ *Woodcock*, 1 Leach at 502, 168 Eng. Rep. at 353. The deposition was excluded because it was taken “under circumstances where the Justice was not authorized to administer an oath.” *Id.* One of those “circumstances,” however, was that the prisoner was not “brought before [the magistrate] in custody.” *Id.*

¹¹⁵ *Dingler*, 2 Leach at 563, 168 Eng. Rep. at 384.

¹¹⁶ See *People v. Restell*, 3 Hill 289, 300 (N.Y. Sup. Ct. 1842) (citing *Woodcock* and *Dingler*); *Rex v. Smith*, Holt 614, 614-16, 171 Eng. Rep. 357, 357-60 (1817) (apparently citing *Radbourne*); ARCHBOLD, *supra* note 11, at *85 (citing *Radbourne*); 1 CHITTY, *supra* note 11, at 79 & n.(l) (citing *Woodcock* and *Dingler*); 4 HAWKINS (1795), *supra* note 11, at 423 (citing *Woodcock* and *Dingler*); PEAKE (1801), *supra* note 11, at 40-41 (citing *Radbourne* and *Dingler*); PHILLIPPS, *supra* note 11, at 277 & n.3 (citing *Woodcock*); 2 STARKIE, *supra* note 11, at *487-89 (citing *Woodcock* and *Dingler*).

¹¹⁷ Davies, *supra* note 5, at 162-64; see *Crawford v. Washington*, 541 U.S. 36, 54 n.5 (2004) (“[T]o the extent [*ex parte*] Marian examinations were admissible, it was only because the statutes *derogated* from the common law.”).

¹¹⁸ See Davies, *supra* note 5, at 166-69.

Sixth Amendment for ratification; his report of *Dingler* was not published until after the Sixth Amendment was ratified. Davies argues that these decisions are not valid evidence of original meaning because the reports would not have been widely available in the United States when the Sixth Amendment was framed.¹¹⁹

That argument assumes, incorrectly, that English evidence is relevant only if published in a treatise or case report shipped to America before the framing. That is too narrow a view of the sources of information on which American legal thinkers relied. Many colonial lawyers, for example, trained in London and thus were directly exposed to English practices and ideas. One historian writes that “[a] far greater number [of colonial lawyers] than is generally known, received their legal education in London in the Inns of Court; and the influence, on the American Bar, of these English-bred lawyers, especially in the more southerly Colonies, was most potent.”¹²⁰ Another historian counts more than 115 American lawyers who trained between 1760 and 1775 in London, where they could “come into personal contact with some of England’s leading lawyers and judges.”¹²¹ He finds that “[t]he professional influence which these English-trained lawyers had on the colonial bar is beyond imagination.”¹²² At least nine of the thirty-one lawyers at the Constitutional Convention trained in England.¹²³ Because colonial lawyers were directly exposed to English practices and ideas, English evidence is relevant whether or not it appeared in a published treatise or case report shipped to the colonies.

Furthermore, the way Marian examinations were conducted in England in 1787, 1789, or 1791 is relevant to how they were conducted during the preceding decades. *Radbourne*, *Woodcock*, and *Dingler* do not purport to *change* Marian committal procedure in any way; they simply confirm what that procedure already was. None of the cases excluded a

¹¹⁹ *Id.* at 153-62. I take no position on whether 1789 or 1791 is the more relevant date for assessing original meaning because I do not view that two-year difference as having much practical significance.

¹²⁰ CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 188 (1911).

¹²¹ 1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 33 (1965).

¹²² *Id.* at 36.

¹²³ See BERGER, *supra* note 36, at 87 n.160 (noting that four had studied in the Inner Temple and five in the Middle Temple); WARREN, *supra* note 120, at 211 (“four had studied in the Inner Temple, and one at Oxford, under Blackstone”).

committal deposition taken *ex parte*—*Radbourne* admitted a properly taken deposition, and *Woodcock* and *Dingler* rejected attempts to use the Marian statutes to admit non-committal depositions. The cases suggest that magistrates in the late eighteenth century were becoming more assertive in investigating crime by taking voluntary depositions unrelated to their statutory committal function,¹²⁴ and that courts were unwilling to expand the statutes to reach those depositions. But they do not suggest any novelty in how *committal* examinations were conducted.

Radbourne, *Woodcock*, and *Dingler* are also evidence of the *conditions of admissibility* that were understood to exist during the preceding decades. They are relevant, not as a source of new legal rights, but as a reflection of existing understandings of legal rights. Significantly, the rule they acknowledged was not invented from scratch, but was a straightforward reading of the statutory text: The statutes authorized a justice of the peace to examine only a suspect and the witnesses who brought him; the prisoner in such a case would necessarily be present; and an examination not taken “as the statute directs” was not admissible under its authority.¹²⁵ Several other English authorities followed that same line of textual reasoning.¹²⁶ And the way English authorities interpreted statutory text is a reasonable proxy for how Americans would have interpreted similar text in their own committal statutes. As indeed they did: When the North

¹²⁴ This is consistent with other evidence that magistrates were taking a more aggressive role in investigating and prosecuting crime during this era. See, e.g., Beattie, *Public Justice*, *supra* note 83, at 9 (describing the “Bow Street runners,” the “first quasi-official detective policemen” directed by magistrates in the mid-eighteenth century); *id.* at 23-35 (describing the “re-examination” procedure first used by Bow Street magistrates in the mid-eighteenth century).

¹²⁵ *King v. Woodcock*, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789); see also *King v. Dingler*, 2 Leach 561, 562-63, 168 Eng. Rep. 383, 384 (1791).

¹²⁶ See *King v. Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter’s note 1797) (“Nor [are committal examinations admissible] since that statute, unless the party accused be present, . . . see the words of the [Marian statutes].”); *Rex v. Forbes*, Holt 599 n.*, 599 n.*, 171 Eng. Rep. 354 n.*, 354 n.* (1814) (“[T]he intention of the statute of Philip and Mary is sufficiently plain. It is, that the prisoner shall be present whilst the witness actually delivers his testimony”); 2 STARKIE, *supra* note 11, at *487-88 (“[W]here the informations are taken before a magistrate, the words of the statute strongly imply that the prisoner is supposed to be present, for the Justice is to take the examination of the prisoner, and the informations of those who bring the prisoner; and if they were to be taken in the prisoner’s absence he would lose the benefit of cross-examination”). But see *Rex v. Smith*, Holt 614, 615, 171 Eng. Rep. 357, 360 (1817) (“[T]he statute did not mention the prisoner’s presence at all. Undoubtedly, however, the decisions established the point, that the prisoner ought to be present, that he might cross-examine.”).

Carolina court held in *Webb* in 1794 that “our [committal statute] clearly implies the depositions to be read, must be taken in [the prisoner’s] presence,”¹²⁷ it was drawing the same textual inference that *Woodcock* and *Dingler* had drawn just a few years earlier.

Nevertheless, the rule articulated by *Radbourne*, *Woodcock*, and *Dingler* was not universally accepted. In the 1790 case of *King v. Eriswell*, the King’s Bench divided over whether the *ex parte* examination of a pauper who had become insane could be admitted in a suit to charge a town with his care.¹²⁸ In defending admissibility, Justice Buller relied by analogy on his construction of the Marian statutes: “Where an act is judicially done, it is not necessary that the person to be affected by it should be present in order to make it evidence against him, and therefore depositions taken by a justice of a person who afterwards died, though taken in the absence of the prisoner, must be read. So it was determined by all the Judges in *Radburn’s case*.”¹²⁹ Two other judges, Grose and Kenyon, disagreed with Buller as to pauper examinations but did not dispute his premise that *ex parte* Marian depositions were admissible, instead dismissing it as a statutory exception to the common-law rule. Grose wrote:

Evidence, though upon oath, to affect an absent person, is incompetent, because he cannot cross examine; as nothing can be more unjust than that a person should be bound by evidence which he is not permitted to hear. Before the Statute of Philip & Mary, a deposition taken before the justice of the county where the murder was committed was not evidence, even though the party died or was unable to travel. Why? Because although the justice had jurisdiction to enquire into the fact, the common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross examine; and therefore that statute was made.¹³⁰

Chief Justice Kenyon added:

Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them, and where each has an opportunity of cross-examining the witness . . . It has been said that there are cases where examinations are admitted, namely, before the coroner, and before magistrates in cases of felony. . . . Those

¹²⁷ *State v. Webb*, 2 N.C. (1 Hayw.) 103, 104 (Super. L. 1794).

¹²⁸ *King v. Eriswell*, 3 T.R. 707, 100 Eng. Rep. 815 (K.B. 1790) (reported 1790).

¹²⁹ *Id.* at 713-14, 100 Eng. Rep. at 819 (Buller, J.) (citation omitted).

¹³⁰ *Id.* at 710, 100 Eng. Rep. at 817 (Grose, J.) (reporter’s notes omitted).

exceptions alluded to are founded on the Statutes of Philip & Mary; and that they go no further is abundantly proved. . . . [W]ithout stating the cases which occur on this head, I will do little more than refer to the case of *The King v. Paine*. That was not loosely decided, but was the opinion of this Court assisted by the Court of Common Pleas. In *Salkeld* it is expressly said that the rule cannot be extended further than the particular case of felony; and in the other book the Chief Justice declared that the depositions were not evidence; and a weighty reason is given, namely, "The defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination."¹³¹

The fourth judge, Ashhurst, thought Buller's position on pauper examinations compelled by precedent, though "[i]f this were a new case, I should be strongly of opinion that the evidence given ought not to have been received, as being hearsay evidence."¹³² He stated no view on *ex parte* Marian depositions, but since he was on the court that decided *Woodcock* a year earlier,¹³³ it is doubtful he agreed with Buller on that specific point.¹³⁴

Eriswell admittedly provides evidence that the admissibility of *ex parte* Marian depositions was still disputed at the time of the framing. Buller specifically states that Marian depositions were admissible even if "taken in the absence of the prisoner,"¹³⁵ and Grose and Kenyon never clearly dispute that premise.¹³⁶ While Buller says nothing about whether committal depositions were *normally* taken in the

¹³¹ *Id.* at 722-23, 100 Eng. Rep. at 823-24 (Kenyon, C.J.) (citation, reporter's note omitted).

¹³² *Id.* at 720, 100 Eng. Rep. at 822 (Ashhurst, J.).

¹³³ See *King v. Woodcock*, 1 Leach 500, 500, 168 Eng. Rep. 352, 352 (1789) (identifying Ashhurst as "present"). The presiding judge's statement that "a doubt has arisen with the Court, to which doubt I entirely subscribe," seems to indicate that the other judges present shared his concerns. See *id.* at 502, 168 Eng. Rep. at 353.

¹³⁴ In 1801, the year after Buller died, *ex parte* pauper examinations were ruled inadmissible. See *King v. Ferry Frystone*, 2 East 54, 102 Eng. Rep. 289 (K.B. 1801).

¹³⁵ *Eriswell*, 3 T.R. at 713-14, 100 Eng. Rep. at 819 (Buller, J.).

¹³⁶ Starkie, however, did interpret Kenyon's reference to *Paine* as disputing Buller's premise. See 2 STARKIE, *supra* note 11, at *488 n.(c) ("It seems to have been the opinion of Ld. Kenyon . . . that depositions so taken [*ex parte*] were not admissible; and he refers to *Payne's* case (as reported 5 Mod. 163), and terms the objection there taken to admitting the deposition in evidence, namely, the loss of cross-examination, a *weighty objection.*"); *id.* at *491-92 ("[H]e immediately afterwards laid great stress upon the case of *The King v. Paine* . . . It cannot therefore be inferred that Lord Kenyon fully acceded to the admissibility of such evidence, although in the course of his argument, assuming them to be exceptions, he denied the consequences attempted to be deduced from them.").

prisoner's absence, he at least contemplates the possibility that they might be taken that way.¹³⁷

It is remarkable, however, that the only authority Buller relies on—*Radbourne*—squarely refutes his position. The deposition there was “given in the presence and hearing of the prisoner,” and the prosecution counsel expressly stated that the Marian statutes required as much.¹³⁸ That discrepancy was not lost on commentators. When Thomas Peake reprinted *Eriswell* in 1801, he inserted a footnote in Buller's opinion recounting that Leach's report of *Radbourne* “expressly stated that the deposition was taken in the presence of the prisoner”; that Peake had reviewed the magistrate's statement in the sessions papers and found it “agreeable to this report”; and that he had reviewed a manuscript copy of the case and found that it did not “appear that the point, whether a deposition taken in the absence of the prisoner was evidence or not, was at all submitted to the consideration of the judges.”¹³⁹ Leonard MacNally wrote in 1802 that Leach's account “varies materially” from Buller's; that in the former the deposition was “*deliberately read over to [the witness] in the presence and hearing of the prisoner*”; and that “[t]he words in italics are omitted by the learned judge.”¹⁴⁰ Thomas Starkie wrote in 1824 that “[Buller] refers to *Radbourne's* case . . . ; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise”;¹⁴¹ he described Kenyon as

¹³⁷ Three years after *Eriswell*, a court in a (noncriminal) paternity case also cited the Marian statutes in passing for the point that an “examination . . . taken before a magistrate in the course of a judicial proceeding . . . is certainly admissible evidence,” even though the putative father there had argued that the paternity examination was “not taken in the presence of the party to be affected by it.” *King v. Ravenstone*, 5 T.R. 373, 374, 101 Eng. Rep. 209, 209 (K.B. 1793). For contrary American authority, see *Dunwiddie v. Commonwealth*, 3 Ky. (Hard.) 290, 290 (1808).

¹³⁸ *King v. Radbourne*, 1 Leach 457, 459-61, 168 Eng. Rep. 330, 331-32 (1787). As noted *supra* note 103, all the reports of *Radbourne* are clear that the deposition was taken in the prisoner's presence (or at least read back to the witness in the prisoner's presence), although only some include counsel's argument making presence a condition of admissibility. Leach in his 1792 second edition italicized the words “to her in the presence and hearing of the prisoner” that had appeared in his 1789 first edition before *Eriswell* was decided, see LEACH (1792), *supra* note 103, at 363; that revision was evidently a direct response to Buller's argument.

¹³⁹ PEAKE (1801), *supra* note 11, app. 1, at 144 n.*. The last reference is apparently to the statement of the case by the presiding judge on submission to the Twelve Judges. See *supra* note 103.

¹⁴⁰ MACNALLY, *supra* note 11, at 307 n.*.

¹⁴¹ 2 STARKIE, *supra* note 11, at *488 n.(c) (citation omitted); see also *id.* at *491 (“It is however remarkable, that in *Radbourne's* case the information was taken in the *presence* of the prisoner.” (footnote omitted)).

merely having assumed the admissibility of such evidence for the sake of argument.¹⁴² Most striking is a footnote that the case reporters, Durnford and East, inserted in their 1797 edition. Where Grose had written “Before the statute of *Philip & Mary*, a deposition taken before the justice of the county where the murder was committed was not evidence, even though the party died or was unable to travel,” they added: “Nor since that statute, unless the party accused be present . . . ; see the words of the [Marian statutes].”¹⁴³

This highly negative reception suggests that, even around the time *Eriswell* was decided, the prevailing view in the legal community was that Buller’s dictum had misstated the law. As a judge, Buller was respected for his legal abilities but was fairly reactionary on criminal procedure matters.¹⁴⁴ *Eriswell* may well be an instance of that.

C. Conclusion

Marian depositions were routinely conducted in the prisoner’s presence, a natural consequence of the statutory text and the function of a committal hearing. At some point before the framing, that practice hardened into a procedural right. The timing is difficult to pinpoint because, so long as Marian depositions were conducted the way they were normally conducted, the question did not arise. The catalysts for the principle’s express recognition in reported cases were not *ex parte* committal hearings, but attempts to stretch the statutes to non-committal contexts where presence was *not* routine. Courts then had to decide what features of committal examinations rendered their admission acceptable. One such

¹⁴² See *supra* note 136.

¹⁴³ 3 CHARLES DURNFORD & EDWARD HYDE EAST, TERM REPORTS IN THE COURT OF KING’S BENCH 710 n.(c) (London, Strahan new ed. 1797). The note does not appear in Durnford and East’s original 1790 report, see 3 CHARLES DURNFORD & EDWARD HYDE EAST, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF KING’S BENCH 710 (London, Strahan & Woodfall 1790), or in Peake’s 1801 reprint, see PEAKE (1801), *supra* note 11, app. 1, at 140-41, but it appears in later editions of the Term Reports, including the 1817 edition in the English Reports, see *King v. Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790).

¹⁴⁴ See, e.g., JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 212-16 (2003) (describing Buller’s role in dismantling the accomplice-corroboration rule). I leave to the reader the relevance of Buller’s ascribed views on family discipline. See JAMES GILLRAY, JUDGE THUMB, OR—PATENT STICKS FOR FAMILY CORRECTION: WARRANTED LAWFUL! (1782), available at http://en.wikipedia.org/wiki/Image:Judge_Thumb.jpg (last visited Nov. 27, 2006).

feature, they determined, was the prisoner's presence; and thus a confrontation right was read into the Marian statutes.

III. CROSS-EXAMINATION

Crawford did not require mere presence as a condition of admissibility, but also opportunity for cross-examination. This section examines that further requirement.

A. Background

While the statutory text invites the inference that prisoners were routinely present for committal depositions, it contains no express indication whether cross-examination was contemplated. That does not mean, however, that one should assume no opportunity for cross-examination existed.

The admissibility of a Marian deposition has only ever depended on whether the prisoner had an *opportunity* for cross-examination—not on whether cross-examination actually occurred.¹⁴⁵ The mere fact that cross-examination was unusual, therefore, would not disprove the cross-examination rule; all that matters is the opportunity. Furthermore, cross-examination need not have been affirmatively invited by the magistrate (although that was apparently done by the early nineteenth century).¹⁴⁶ So long as the prisoner was present, opportunity for cross-examination would require only that the magistrate not interfere if the prisoner sought to ask questions. Viewed in that light, statutory silence should not be taken to indicate that no opportunity for cross-examination existed. The statutes did not mention cross-examination, but nor did they affirmatively direct the magistrate to prohibit it.

If cross-examination *never* took place, one could argue that the opportunity was so theoretical that the Framers would not have attached any significance to it. It therefore makes sense to inquire whether cross-examination at committal hearings likely ever occurred. Two considerations suggest it was probably very rare before the second half of the eighteenth century, although developments over that period may have made it less anomalous.

¹⁴⁵ See, e.g., various sources cited *supra* notes 11-13.

¹⁴⁶ In *Smith*, the prisoner was expressly offered the opportunity to cross-examine. See *Rex v. Smith*, Holt 614, 614, 171 Eng. Rep. 357, 357 (1817) ("The prisoner was asked whether he would chuse to put any questions to him, but declined to do so.").

The first concerns the prisoner's incentive to cross-examine. The Marian statutes did not give justices of the peace any express authority to discharge prisoners; their only options were to commit for trial or release on bail, according to the seriousness of the offense charged.¹⁴⁷ Because the statutes did not contemplate discharge, the prisoner had little incentive to challenge adverse testimony at the committal hearing. As legal historians have documented, however, during the eighteenth century magistrates began exercising an extra-statutory power of discharge, releasing a felony suspect if the evidence was insufficient.¹⁴⁸ As a result, the prisoner had a much greater incentive to test the sufficiency of the prosecutor's case.

The second development concerns the involvement of lawyers. At the start of the eighteenth century, counsel could appear for a criminal defendant at trial only in cases of treason or misdemeanor, not felony.¹⁴⁹ The rule against felony counsel receded during the eighteenth century, starting in the 1730s.¹⁵⁰ Nevertheless, for many decades, counsel could perform only limited functions at trial—a lawyer could examine and cross-examine witnesses but could not argue his client's case to the jury.¹⁵¹ Because of those restrictions, cross-examination was an utterly central component of a criminal defense lawyer's skill set—Langbein calls it “nearly the only tool in defense counsel's kit.”¹⁵²

The rule against felony counsel was a rule of appearance in the trial court; it did not extend to pretrial assistance.¹⁵³ Nonetheless, if lawyers were not involved at trial,

¹⁴⁷ See BEATTIE, CRIME AND THE COURTS, *supra* note 84, at 272; BEATTIE, POLICING AND PUNISHMENT, *supra* note 82, at 95-97; LANGBEIN, *supra* note 19, at 7.

¹⁴⁸ See BEATTIE, CRIME AND THE COURTS, *supra* note 84, at 274-76; BEATTIE, POLICING AND PUNISHMENT, *supra* note 82, at 104-07; KING, *supra* note 84, at 88; LANGBEIN, *supra* note 144, at 47, 273-74.

¹⁴⁹ See J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 221 (1991) [hereinafter Beattie, *Scales of Justice*].

¹⁵⁰ See BEATTIE, CRIME AND THE COURTS, *supra* note 84, at 356-57; LANGBEIN, *supra* note 144, at 167-77; Beattie, *Scales of Justice*, *supra* note 149, at 226-30; Landsman, *supra* note 76, at 533-48.

¹⁵¹ See LANGBEIN, *supra* note 144, at 171, 254-55. The right to full assistance of counsel developed earlier in the American colonies than in England. See 1 CHROUST, *supra* note 121, at 42-44.

¹⁵² LANGBEIN, *supra* note 144, at 283; see also *id.* at 291-96; BEATTIE, CRIME AND THE COURTS, *supra* note 84, at 361-62; Beattie, *Scales of Justice*, *supra* note 149, at 234-35; Landsman, *supra* note 76, at 535-37, 539-42, 548-57.

¹⁵³ See LANGBEIN, *supra* note 144, at 129. Moreover, even after lawyers were permitted at trial, only barristers (counsel) could represent a defendant at trial, but either barristers or solicitors (attorneys) might participate in pretrial hearings. See

their involvement in pretrial hearings was probably rare at best. By the mid-eighteenth century, however, lawyers began to appear at some committal hearings.¹⁵⁴ A lawyer's involvement would increase the likelihood of cross-examination at such a proceeding. A lawyer would not have any greater right to cross-examine than the client he represented; and if a prisoner had a right to cross-examine, involvement of a lawyer was by no means necessary to his exercise of that right;¹⁵⁵ but as a practical matter, the assistance of counsel would make it more likely that any opportunity to cross-examine would be exploited.¹⁵⁶ Cross-examination at trial was already the most important component of defense counsel's work; a lawyer seeking to justify his fee for assisting at a committal hearing would likely take advantage of any opportunity to cross-examine the forum presented.¹⁵⁷

As one might predict from those two developments, sources from this period do indeed reveal the advent of cross-examination at some committal hearings, as well as the first clear articulations of the view that opportunity to cross-examine—like presence—was a procedural right critical to the admissibility of a Marian deposition. I examine those sources in the following two sections, first considering reported cases and treatises and then turning to other sources.

B. *Reported Cases and Treatises*

Marian procedure collided with cross-examination rights in the 1739 case of *King v. Westbeer*.¹⁵⁸ The defendant

ALLYSON N. MAY, *THE BAR AND THE OLD BAILEY, 1750-1850*, at 89-90 (2003); *infra* notes 194-204, 215-23 and accompanying text.

¹⁵⁴ See BEATTIE, *CRIME AND THE COURTS*, *supra* note 84, at 278-79 (citing a magistrate's complaint from the 1740s about "Newgate Solicitors" at committal hearings); BEATTIE, *POLICING AND PUNISHMENT*, *supra* note 82, at 112; MAY, *supra* note 153, at 89-90; Beattie, *Public Justice*, *supra* note 83, at 33-35, 43-44; *infra* notes 194-223 and accompanying text. As these sources make clear, there is no substance to Davies' claim that it "goes without saying that, even if the arrestee had been present for the taking of a witness's Marian deposition, he would not have been represented by counsel at that time." Davies, *supra* note 5, at 170.

¹⁵⁵ See *Cox v. Coleridge*, 1 B. & C. 37, 54, 107 Eng. Rep. 15, 21 (K.B. 1822) (Best, J.) (noting that "opportunity for cross-examination" need not include "cross-examining by counsel or attorney").

¹⁵⁶ See LANGBEIN, *supra* note 144, at 34-35 (noting that most prisoners probably could not cross-examine effectively (quoting BEATTIE, *CRIME AND THE COURTS*, *supra* note 84, at 350-51)); Beattie, *Scales of Justice*, *supra* note 149, at 234 (same).

¹⁵⁷ In addition, increasing lawyer involvement at trial would tend to crystallize evidentiary rules. See LANGBEIN, *supra* note 144, at 243.

¹⁵⁸ 1 Leach 12, 168 Eng. Rep. 108 (1739) (reported 1789).

there was charged with theft; an accomplice, Lulham, had implicated him in a committal examination but died before trial. Defense counsel argued that “admitting his deposition to be read in evidence would injure the prisoner, inasmuch as he would lose the benefit which might otherwise have arisen from a cross-examination.”¹⁵⁹ The report continues: “The [prosecution counsel] replied, and the point was very much debated. But the Court over-ruled the objection, and admitted Lulham’s information to be read; though they said it would not be conclusive unless it were strongly corroborated by other testimony.”¹⁶⁰

Although *Westbeer* admitted an examination over the objection that it denied the prisoner his right to cross-examine, the case does not necessarily show that magistrates refused to permit questioning by prisoners at committal hearings, or that depositions were routinely taken in the prisoner’s absence. The case is unusual in that the deposition was taken from an accomplice at what appears to have been the accomplice’s *own* committal hearing.¹⁶¹ The examination was thus conducted in the *prisoner’s* (Lulham’s) presence but became *ex parte* when read against a *different* defendant (*Westbeer*). Those circumstances suggest why the case was “very much debated” and the court’s ruling so qualified. Courts in 1739 were not yet willing to condition admissibility on presence or opportunity for cross-examination, but in unusual cases where the normal features of committal depositions were absent, their admission was controversial.¹⁶²

Contrast *Westbeer* with *Woodcock* and *Dingler*. In *Woodcock*, the deposition was excluded because “[i]t was not taken, as the statute directs, in a case where the prisoner was brought before [the magistrate] in custody; the prisoner

¹⁵⁹ *Id.* at 12, 168 Eng. Rep. at 109.

¹⁶⁰ *Id.*; see also BEATTIE, CRIME AND THE COURTS, *supra* note 84, at 273 & n.15 (mentioning a similar unreported case from 1749).

¹⁶¹ The accomplice “made a full confession in writing” before giving his sworn statement, *Westbeer*, 1 Leach at 12, 168 Eng. Rep. at 109; the unsworn confession suggests the accomplice himself was being committed. Leach and Peake, however, both apparently assumed the defendant was present. See 4 HAWKINS (1795), *supra* note 11, at 423 (citing *Westbeer* for the point that an accomplice’s Marian deposition was admissible if taken “in the presence of the prisoner”); PEAKE (1801), *supra* note 11, at 40-41 (same).

¹⁶² Alternatively, the court’s corroboration requirement could reflect the more general accomplice-corroboration rule rather than the *ex parte* character of the testimony, although Langbein states that the accomplice-corroboration rule did not emerge until the 1740s. LANGBEIN, *supra* note 144, at 203.

therefore had no opportunity of contradicting the facts it contains.”¹⁶³ The court thus treated presence as relevant not for its own sake, but because it would afford the prisoner an “opportunity of contradicting” the witness’s testimony. The use of the word “contradict” rather than “cross-examine” presents an ambiguity. But the defendant was not literally denied an opportunity to “contradict” the witness; he could have given a contradictory account at trial after the deposition was read. Implicit in the court’s holding is that the defendant was denied an opportunity to contradict the witness *at a time when the witness could be required to respond to the contradictions*—which is, in substance, an opportunity to cross-examine.¹⁶⁴

Garrow’s argument in *Dingler*, as reported by Leach, is unambiguous: “[W]hen [the statutory] course is pursued, the prisoner may have, as he is entitled to have, the benefit of cross-examination; but in the course which has been pursued by Mr. Abingdon, as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination.”¹⁶⁵ Garrow thus saw opportunity to cross-examine as both a justification for the right to be present and as a free-standing right to which the prisoner was “entitled.”

Another account of *Dingler* published in the Old Bailey Sessions Papers in 1791 confirms the significance of cross-examination.¹⁶⁶ In that report, Garrow sought to show what mischief would ensue from *ex parte* depositions by posing a hypothetical in which a witness testified *ex parte* that the defendant had killed the victim but omitted that he had done so in self-defense.¹⁶⁷ Surely, Garrow argued, such a deposition, “not taken in my presence, and without the advantage of cross-

¹⁶³ King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789); *see also supra* note 114. As noted *supra* note 105, the reference to “contradicting” does not appear in the Old Bailey Sessions Papers report of the case.

¹⁶⁴ It is true that presence would be advantageous to the prisoner even if he could not ask questions. *See* Davies, *supra* note 5, at 172-73. But the advantages Davies identifies seem unlikely to have been the ones the judge in *Woodcock* had in mind. Absence might hamper a prisoner in preparing to contradict the witness at trial, but it would be strange to describe that as a *denial* of the opportunity to contradict. And while absence might also hamper a prisoner in defending himself at his committal examination, the deposition in *Woodcock* was not taken in connection with any committal hearing. The judge’s use of the word “contradict” rather than “cross-examine” might reflect an assumption that the prisoner at a committal hearing would not question the witness directly, but would “contradict” his account and rely on the magistrate to demand responses. *Cf. infra* note 224.

¹⁶⁵ King v. Dingler, 2 Leach 561, 562, 168 Eng. Rep. 383, 384 (1791).

¹⁶⁶ Trial of George Dingler, Old Bailey Sessions Papers, Sept. 14, 1791, at 468.

¹⁶⁷ *Id.* at 474.

examination, taken behind my back, not containing all the circumstances that he knows, but containing just so much as shall justify my commitment,” could not be admitted.¹⁶⁸ Garrow then argued from the statutory text, as in Leach: “The language of the statute is, that the Justice has nothing to do but with a man coming before him to be committed. . . . [This] was not in the course of a judicial examination; the prisoner was not present; the prisoner was not on his defence”¹⁶⁹ He then quoted at length from *Woodcock*.¹⁷⁰

A colloquy ensued. The prosecution counsel inquired what had happened to the prisoner after his committal examination.¹⁷¹ The magistrate replied: “After I had committed him once, I sent for him again, that he might have all the advantage he could make of it.”¹⁷² Garrow interjected: “*Had he the advantage of suggesting the questions to the woman?*”¹⁷³ The magistrate conceded he had not.¹⁷⁴ The prosecution counsel then argued that, whether or not the statute applied, the examination should be admitted as the best evidence available.¹⁷⁵ But “[t]he examination [was] not allowed to be read.”¹⁷⁶

In Leach’s report, the court sustained Garrow’s objection “on the authority of the case cited” (*Woodcock*); we cannot be sure how much of Garrow’s argument the court accepted, although presumably it agreed with whatever was implicit in *Woodcock* itself.¹⁷⁷ The Old Bailey Sessions Papers report suggests more strongly that inability to cross-examine was relevant to the decision, though it too is ambiguous. Whatever the basis for the court’s holding, however, the fact that Garrow believed there was a right to cross-examine at a committal hearing is significant in itself. Garrow was the most

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 475.

¹⁷⁰ *Id.* at 475-76.

¹⁷¹ *Id.* at 476.

¹⁷² Trial of George Dingler, Old Bailey Sessions Papers, Sept. 14, 1791, at 468, 476.

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 476-77.

¹⁷⁶ *Id.* at 477.

¹⁷⁷ King v. Dingler, 2 Leach 561, 563, 168 Eng. Rep. 383, 384 (1791).

famous criminal defense lawyer of his time.¹⁷⁸ That he thought the right existed meant others probably did as well.

In 1794, *Webb* essentially replicated the reasoning of *Woodcock* and *Dingler* without citing either decision. The court held that the state's committal statute "clearly implies the depositions to be read, must be taken in [the prisoner's] presence"¹⁷⁹—tracking the logic of *Woodcock* and *Dingler* that a committal statute authorizes testimony only where the prisoner is brought before the magistrate in custody. And, just like Garrow in *Dingler*, the court then justified that presence requirement on the ground that it would afford an opportunity to cross-examine: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine"¹⁸⁰

Treatises also endorsed the cross-examination rule to varying degrees. A 1789 treatise cited Hawkins for the point that "[t]he examination of an informer, taken on oath in pursuance of the statutes of *Philip & Mary*, and subscribed by him, may be given in evidence" if the witness becomes unavailable.¹⁸¹ It then added: "This shews the propriety and justice of permitting a prisoner by himself, or counsel to cross-examine any witness produced against him, before the magistrate, though some justices have strenuously contended against the right."¹⁸²

In 1795, Leach cited *Woodcock* and *Dingler* in his seventh edition of Hawkins for the point that "an examination of a person murderously wounded, taken by a justice of the peace . . . in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of *Philip and Mary* direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts alledged."¹⁸³ In other words, the Marian statutes "direct[ed]" that the prisoner have the

¹⁷⁸ See LANGBEIN, *supra* note 144, at 243 ("the dominant Old Bailey barrister of the day"); Landsman, *supra* note 76, at 551 ("one of the foremost counsel of the era"). See generally Beattie, *Scales of Justice*, *supra* note 149, at 236-47.

¹⁷⁹ *State v. Webb*, 2 N.C. (1 Hayw.) 103, 104 (Super. L. 1794); see also *supra* notes 39-42 and accompanying text.

¹⁸⁰ *Webb*, 2 N.C. (1 Hayw.) at 104.

¹⁸¹ 1 JOHN MORGAN, *ESSAYS UPON THE LAW OF EVIDENCE, NEW TRIALS, SPECIAL VERDICTS, TRIALS AT BAR, AND REPLEADERS* 431 (London 1789).

¹⁸² *Id.* I am indebted to Professor Davies for this reference.

¹⁸³ 4 HAWKINS (1795), *supra* note 11, at 423.

“opportunity of contradicting or cross-examining” adverse witnesses. Later treatises and cases that conditioned admissibility on opportunity for cross-examination often similarly traced that requirement to *Woodcock* and *Dingler*.¹⁸⁴

Marian examinations remained a source of controversy. Importantly, however, the typical complaint was that the opportunity for cross-examination at a committal hearing was *inadequate*, not that there was no opportunity at all. An 1806 treatise, for example, criticized the rule of admissibility as “very unsatisfactory” because Marian depositions were “taken under circumstances, in which the adverse party had not a *fair* opportunity of cross examination, or in which such an examination, being unusual, could not reasonably be expected to have taken place.”¹⁸⁵ Among other things, the hearing was limited to the issue of cause to commit rather than guilt, and “the combating of the evidence by professional assistance, or by adverse testimony, is frequently disallowed.”¹⁸⁶ An 1824 treatise advocated a strict unavailability rule because “[i]t is true that the prisoner has had the power to cross-examine the witness, but this was at a time and under circumstances very disadvantageous to the prisoner.”¹⁸⁷ And a 1795 Virginia manual decried the rule of admissibility on the ground that “the accused party has not the *same* advantage of cross examination, which he would possess before a court, with the assistance of counsel.”¹⁸⁸ These critiques are directed at the *adequacy* of the opportunity to cross-examine afforded by a committal hearing. None claims the accused might be denied that opportunity altogether.

C. Other Sources

Marian depositions themselves provide little evidence of cross-examination. That may be due in large part to the format: The depositions merely recount witnesses’ testimony;

¹⁸⁴ See *People v. Restell*, 3 Hill 289, 300 (N.Y. Sup. Ct. 1842) (citing *Woodcock* and *Dingler*); 1 CHITTY, *supra* note 11, at 79 & n.(l) (citing *Woodcock* and *Dingler*); 2 STARKIE, *supra* note 11, at *487-89 (citing *Woodcock* and *Dingler*); cf. *Rex v. Smith*, Holt 614, 615-16, 171 Eng. Rep. 357, 360 (1817) (apparently citing *Radbourne*); ARCHBOLD, *supra* note 11, at *85 (citing *Radbourne*).

¹⁸⁵ Evans, *supra* note 11, at 232 (emphasis added).

¹⁸⁶ *Id.*

¹⁸⁷ 2 STARKIE, *supra* note 11, at *487.

¹⁸⁸ WILLIAM HENING, THE NEW VIRGINIA JUSTICE 148 (Richmond, Nicolson 1795) (emphasis added).

they do not transcribe questions and answers verbatim, nor do they report procedural colloquies between the magistrate and prisoner (or counsel). There are a few instances of testimony that might conceivably be a product of cross-examination. In one case, for example, an accomplice initially implicates the prisoners but then, in a passage of testimony apparently added afterward, minimizes their involvement.¹⁸⁹ In other cases, witnesses admit not knowing particular facts in a manner arguably consistent with adverse questioning.¹⁹⁰ Overall, however, the infrequency of such instances suggests that cross-examination was still rarely attempted; that it was attempted but rarely permitted; or that it was conducted but the answers rarely transcribed.¹⁹¹ The deposition format provides no means

¹⁸⁹ See Examination of Robert Hutton against William Street & John Maidwell, OBSP 1789 Jan/19 (Jan. 5, 1789) (first claiming that “William Street and John Maidwell came to his said Master, with two Waggon loaded with Sacks” (some of which were stolen), but later stating that “William Street was with his horses, and two men not present brought the said sacks to him, not Maidwell which last declaration is the Truth”). The latter passage appears in compressed writing, as if it were inserted after the magistrate had already recorded the following witness’s testimony.

¹⁹⁰ See Information of John Higgs against William Street & John Maidwell, OBSP 1789 Jan/30 (Jan. 5, 1789) (stating that he “saw him [a prisoner] go forward where Roots Waggon was but cannot say if he went there or not”); Information of Phillip Jones against Francis Fleming et al., OBSP 1789 Feb/60 (Jan. 28, 1789) (admitting he “does not know what became of the said Tire” that was stolen); Information of John Thompson against Francis Fleming et al., OBSP 1789 Feb/60 (Jan. 28, 1789) (“[T]his Informant is not acquainted with the person of John Cumberledge [a prisoner] says he might have been in Company—Knows Holmes alias Shock [a prisoner] & thinks he was in his House does not recollect seeing Samuel Young alias Leggy [an accomplice] but says he might have been there as there was many persons”); Information of Daniel Adams against David Coleman, OBSP 1789 Ju/35 (May 6, 1789) (stating that an allegedly forged draft “was presented for payment but by whom this Informant cannot say”); Information of Fredreck Seabeck against Eleanor Hays, OBSP 1789 Dec/54 (Nov. 28, 1789) (stating that “a Man and four Women came into the Room (but does not know who they were)”).

¹⁹¹ The third possibility cannot be discounted. Although authorities generally advised the magistrate to record all testimony, exculpatory as well as inculpatory, *see, e.g.*, 1 CHITTY, *supra* note 11, at 79; MICHAEL DALTON, THE COUNTRY JUSTICE 265 (London 1618), the Marian statutes by their terms required the magistrate to take down only so much testimony “as shall be material to prove the Felony,” 2 & 3 Phil. & M., c. 10 (1555). Selective transcription remained a source of controversy into the nineteenth century. *See People v. Restell*, 3 Hill 289, 293, 304-05 (N.Y. Sup. Ct. 1842) (holding that a magistrate erred where “neither the questions nor answers [during cross-examination] were put down, because [he] did not think it material to put them down”); *Tharp v. State*, 15 Ala. 749, 755 (1849) (chastising a magistrate for writing down only “so much [testimony] as he considered material”); *cf. Evans, supra* note 11, at 232 (“[I]t is a very hard measure, that an authentic record may be taken of the evidence which tends to criminate, while there is not an equal opportunity of preserving the materials of defence.”). It may be that some magistrates would not record a witness’s responses to cross-examination unless they substantially undermined his other testimony.

of distinguishing among those possibilities.¹⁹²

Fortunately, other sources shed more light.¹⁹³ Particularly significant is an unreported case from 1780, *Ayrton v. Addington*.¹⁹⁴ The case was a civil suit by Thomas Ayrton, an attorney, against William Addington, a magistrate presiding at Bow Street in London.¹⁹⁵ The dispute arose from a felony robbery charge brought by a third man, Webb, against a fourth, Wilson.¹⁹⁶ Wilson's master had hired Ayrton to assist Wilson in his Marian committal hearing before Addington.¹⁹⁷ According to witnesses in the civil case, when Webb testified at the hearing, Ayrton sought to ask him "cross-questions" concerning the crime.¹⁹⁸ Addington informed the attorney that this was "not a trial but an examination of prisoners" and that "he would not suffer him to examine," although the attorney could suggest questions for the magistrate to ask.¹⁹⁹ Ayrton replied that this was "very odd," and "insisted he had a right to ask the [witness] any questions"—"the right as an Attorney to put any question for the benefit of his client."²⁰⁰ Ayrton persisted in his cross-examination, interrupting Addington's own questioning, and Addington ordered him removed.²⁰¹

Ayrton then sued Addington for assault and false imprisonment.²⁰² In defense, Addington pled justification, claiming that Ayrton had interfered with his official duties.²⁰³ The jury, however, returned a verdict for Ayrton, who

¹⁹² As explained *supra* note 85, I excluded from my deposition sample cases where the prisoner appeared *pro se* at trial, in an effort to find cases where the prisoner might also have been represented by counsel at the committal hearing (which seemed more likely to yield evidence of cross-examination). Nevertheless, the depositions did not yield any evidence of lawyer involvement. It is unclear whether that is because lawyers were rarely involved or because magistrates saw no need to note their involvement.

¹⁹³ I owe many of the following references to John Beattie.

¹⁹⁴ *Ayrton v. Addington* (Dec. 7, 1780), in 2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 1023 (1992).

¹⁹⁵ *Id.* at 1023-24.

¹⁹⁶ *Id.* at 1024.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1025-26 ("[I]f he would put any question to him, & if he thought it proper, he would put it.").

²⁰⁰ 2 OLDHAM, *supra* note 194, at 1024-26.

²⁰¹ *Id.* at 1026.

²⁰² *Id.* at 1023.

²⁰³ *Id.* at 1024.

recovered one shilling in damages and £50 in court costs.²⁰⁴ Implicit in the verdict, evidently, is the jury's approval of Ayrton's conduct at the hearing. The case shows that, even in 1780, a right to cross-examine witnesses at committal hearings was thought to exist not only by a member of the legal profession but by the public at large.

Ayrton v. Addington is not the only instance of attempted cross-examination at a committal hearing. Early press accounts reveal at least two others, though with mixed results. In a 1774 case reported in the *General Evening Post*, John Matchem was charged with the robbery of two men, Lincon and Fidel.²⁰⁵ At the Bow Street committal hearing, Matchem was assisted by counsel who, "from the improbability of the prisoner being the offender, moved to cross-examine Lincon and Fidel."²⁰⁶ According to the press account, however, "the Bench seemed unwilling to admit of such a proceeding."²⁰⁷ Lincon and Fidel testified at trial, so Matchem was not ultimately denied the opportunity to cross-examine.²⁰⁸ Nevertheless, the case suggests that the right to cross-examine at a committal hearing was not firmly established at that time.

By contrast, in a 1786 examination for arson reported in the *Daily Universal Register*, cross-examination not only was permitted, but resulted in the exoneration of the prisoners.²⁰⁹ The principal witness at the hearing was the prisoners' maid, who claimed they had directed her to set the fire.²¹⁰ But "on her cross-examination by Mr. MacNally, who was counsel for the prisoners, she acknowledged that she had not accused her master and mistress, till after she was informed of her own danger [of being charged with the offense], and that to save herself she became evidence [for the prosecution]."²¹¹ The magistrates then discharged the prisoners for want of evidence.²¹²

²⁰⁴ *Id.* at 1026. The trial was significant enough to be reported in the *British Mercury*, although without any relevant details. See BRIT. MERCURY & EVENING ADVERTISER, Dec. 9, 1780, at 4; BRIT. MERCURY & EVENING ADVERTISER, Dec. 11, 1780, at 3.

²⁰⁵ GEN. EVENING POST, June 14-16, 1774, at 3.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See Trial of John Mattsham, Old Bailey Sessions Papers, July 6, 1774, at 243, 243-53.

²⁰⁹ DAILY UNIVERSAL REG., June 5, 1786, at 3.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

Cross-examination at committal hearings was also a point of controversy in the colonies. In 1766, colonists in New York complained to the authorities that “During the Course of the Examination of the Witnesses [a particular justice] would not admit any of the prisoners to ask or propose one Single Question to the Witnesses nor suffer anyone to do it in their Ste[a]d.”²¹³ According to the complainants, this was one of “several violent and arbitrary steps . . . manifestly tending to the subversion of the invaluable privilege of English Subjects they conceive [o]ught not to pass unnoticed.”²¹⁴

By 1801, lawyer participation in committal hearings had become sufficiently common that a group of Lancaster magistrates sought legal advice on their rights. Complaining that “[i]t frequently occurs upon the Examination of Persons charged with Felony, that Attornies are employed on their behalf to attend at their Examinations,” they posed a series of questions to five members of the bar, which were published that year with the answers in a pamphlet.²¹⁵ The principal questions were whether attorney attendance at a committal hearing was by right or by discretion, and whether the attorney was entitled to copies of the examinations.²¹⁶ Most respondents thought that attorney attendance was a matter of discretion and that copies of the examinations should not be given out.²¹⁷ As relevant here, however, the magistrates also inquired whether an attorney had a right “to cross examine the Witnesses as if on Trial.”²¹⁸

²¹³ JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664-1776*, at 635 (1944) (internal quotation marks omitted).

²¹⁴ *Id.* Davies cites the same page of this source for the point that “[t]he royal officials in New York do not seem to have admitted any right to cross-examination at a preliminary hearing,” Davies, *supra* note 5, at 188 n.269 (quoting GOEBEL & NAUGHTON, *supra* note 213, at 635), but omits the fact that this refusal was the subject of colonial protest.

²¹⁵ COPY OF CASE [SUBMITTED TO COUNSEL BY THE MAGISTRATES OF THE COUNTY OF LANCASTER] AND OPINIONS 3 (Manchester, Shelmerdine & Co. 1801) (British Library shelfmark T.1177.(1.); copy on file with author).

²¹⁶ *Id.* at 5-7.

²¹⁷ *Id.* at 5-18. In 1822, the King’s Bench definitively held that there was no right to counsel at a committal hearing, *see Cox v. Coleridge*, 1 B. & C. 37, 107 Eng. Rep. 15 (K.B. 1822), although one judge noted that, “in practice, magistrates do permit, on many occasions, the presence of advocates for the parties accused,” *id.* at 49, 107 Eng. Rep. at 19 (Abbott, C.J.), and another opined that “it may be very useful for a magistrate to grant [counsel] in many cases, and it is to be presumed that he will do so on all proper occasions,” *id.* at 51, 107 Eng. Rep. at 20 (Bayley, J.).

²¹⁸ COPY OF CASE AND OPINIONS, *supra* note 215, at 5.

Three respondents addressed that issue. The most expansive view was taken by a Mr. Topping, who stated:

I conceive . . . that a Prisoner has a Right to have the Benefit of legal Advice upon his Examination if he chooses it [A]nd if a Prisoner has a Right to the Assistance of a professional Man upon his Examination before a Magistrate, it seems to me that such professional Person may examine the Witnesses produced against him, in doing this, if he conducts himself contemptuously or indecently towards the Magistrate in the Execution of his Duty, he is liable to Punishment.²¹⁹

At the other extreme was Mr. Serjeant Shepherd, who stated that a lawyer did *not* have “any right to cross examine the Witnesses.”²²⁰ Nevertheless, Shepherd explained:

The best Advice I can give to the Magistrates, is the Rule I should lay down myself were I in the Commission; if an Attorney of Character and proper Demeanor, or a Counsel of Integrity, attended in order to give a Prisoner fair Advice, I should always permit it, and having heard him state the Question he wished to put on Cross-examination, if it tended fairly to elucidate the Truth and protect the Prisoner, I should permit it; but I would not permit a general and desultory Cross-examination²²¹

Third was the ubiquitous William Garrow, whose response was ambiguous but seemed to assume that a lawyer permitted to attend should be allowed to cross-examine:

There cannot exist a Right in any professional or other Person to interrupt the Magistrate, but I think it is incident to his Attendance that such Person should be permitted to advise the Prisoner as to his Conduct, nor do I think it would be proper to prevent such professional Persons making Minutes of what may pass, with respect to Cross-examination, I think the Magistrate may easily prevent this being extended to an inconvenient Degree, by observing that the Person is not now upon his Trial, that it is the Duty of the Magistrate to commit, that the Prisoner will have an Opportunity of making a full Defence upon his Trial, for which Occasion it will be for his Advantage to reserve himself.²²²

²¹⁹ *Id.* at 16-17.

²²⁰ *Id.* at 10; *cf. id.* at 5-6 (Edward Law) (stating that the magistrate “may prescribe the Terms upon which alone he will allow” attorney attendance).

²²¹ *Id.* at 11.

²²² *Id.* at 15.

In sum, while the respondents differed over whether cross-examination was by right or by discretion, all three agreed it should normally be allowed to some degree.²²³

D. Conclusion

The evidence in the preceding two sections suggests that, at the time of the framing, the right to cross-examine at a committal hearing was not firmly established, but nor was the absence of such a right firmly established. Rather, there was disagreement over the point. Most criminal lawyers probably thought the right existed; most magistrates probably thought it did not; other opinion was divided. Cross-examination was probably still uncommon, so even those who thought the right existed likely expected only that the prisoner should be permitted to cross-examine, not that cross-examination would often actually occur. Some thought the prisoner could not question witnesses directly, but could suggest questions for the magistrate to ask.²²⁴ Opinion was clearly shifting in favor of the right to cross-examine over time. And some who thought there was no such right nevertheless thought an opportunity to cross-examine should be afforded as a matter of discretion.²²⁵

²²³ Furthermore, it is unclear to what extent the disagreement over counsel's right to cross-examine reflected disagreement over the right to *cross-examine* or merely disagreement over the right to *counsel*. When the King's Bench held in 1822 that there was no right to counsel at a committal hearing, one judge clearly implied that the prisoner himself could still cross-examine. See *Cox v. Coleridge*, 1 B. & C. 37, 54, 107 Eng. Rep. 15, 21 (K.B. 1822) (Best, J.) ("It has been argued that a prisoner under examination should have the assistance of an attorney, to cross-examine the witnesses for the Crown, the depositions taken being, in certain cases, evidence against him, on account of his having had an opportunity for cross-examination. But this does not mean cross-examining by counsel or attorney, for that formerly was not allowed to a prisoner, even on his trial."); *cf. id.* at 51, 107 Eng. Rep. at 20 (Bayley, J.) ("[I]f the party be really innocent, he will himself be able to suggest to the magistrate all such matters as may tend to elucidate the truth.").

²²⁴ Even at trial, cross-examination was sometimes intermediated by the judge. See LANGBEIN, *supra* note 144, at 16. Permitting the prisoner to suggest questions for the magistrate to ask therefore probably would have been viewed by many as substantially respecting any right to cross-examine.

²²⁵ These conclusions are largely consistent with other observations about pretrial practice in this era. See BEATTIE, CRIME AND THE COURTS, *supra* note 84, at 273-74 (stating that the cross-examination rule's applicability to Marian depositions was "plainly at issue by 1750" and "accepted in its most general terms" by 1790 or soon thereafter); *id.* at 277 ("[B]y the end of the eighteenth century . . . [the] cross-examination of the prosecution witnesses . . . had produced a new kind of magistrates' hearing."); *id.* at 280-81 ("The public pretrial enquiry [in the eighteenth century] also enlarged the possibility that a suspected offender, aided by a lawyer, might challenge the evidence upon which his commitment to trial would be based . . ."); KING, *supra* note 84, at 97 ("[T]he eighteenth century witnessed a gradual growth in concern about

IV. CROSS-EXAMINATION – THE BROADER PICTURE

Conflicting historical evidence poses problems for constitutional interpretation. It transforms an effort to discover a single, universally accepted original meaning into an effort to determine which of two plausible meanings predominated. In those circumstances, it makes sense to consider a broader range of historical evidence and the inferences reasonably drawn from that evidence.

A. *Consistency*

The Confrontation Clause is phrased in categorical terms and was designed to secure a procedure the Framers thought fundamental over a broad range of circumstances.²²⁶ In the face of conflicting direct evidence, therefore, it seems reasonable to assume that an interpretation that results in consistent and rational application over a range of circumstances is more likely to reflect original meaning than one that results in arbitrary distinctions. Evidence concerning other forms of testimony beyond felony committal examinations is therefore relevant. That evidence shows two things. First, in a wide variety of circumstances, English law required that testimony be given in the presence of the accused. Second, the principal justification for that requirement was that it would afford the accused an opportunity for cross-examination.

Testimony *at trial* has long conformed to those principles. Blackstone and Hale waxed eloquent about the English tradition of live oral testimony and identified the opportunity to propound “occasional questions” upon witnesses

the rights of the accused at preliminary hearings . . . linked to, and perhaps caused by, the fact that lawyers began to appear at some summary hearings in this period.”); LANGBEIN, *supra* note 144, at 274-75 (noting that in the late eighteenth century, “[a]t least in London, the magistrate’s pretrial inquiry increasingly took on the trappings of a public hearing” and “became an occasion at which a defense lawyer could challenge the prosecution case”); Beattie, *Scales of Justice*, *supra* note 149, at 250 (noting the practice “by the end of the eighteenth century” of “allowing the accused to be represented at the preliminary hearing by counsel, who might cross-examine the evidence upon which a committal to trial might be based”). Davies dismisses London as an “aberration,” Davies, *supra* note 5, at 201 n.306, but practices in London are uniquely relevant because they are the ones to which Americans studying in England would have been exposed. See *supra* notes 120-23 and accompanying text.

²²⁶ See U.S. CONST. amend. VI (“In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” (emphasis added)).

as a primary benefit of that tradition.²²⁷ Hawkins wrote broadly that “in Cases of Life no Evidence is to be given against a Prisoner but in his Presence,”²²⁸ and he justified the hearsay rule in part on the ground that hearsay denied the accused an “Opportunity of a cross Examination.”²²⁹ Finally, I noted above the centrality of cross-examination to a criminal defense lawyer’s work in the eighteenth century.²³⁰

Opportunity for cross-examination was also a settled requirement in various pretrial contexts. On the civil side, for example, it was clear that depositions could not otherwise be read. According to Gilbert, it would be “against natural Justice” to admit a deposition against someone who “had not Liberty to cross-examine the Witnesses.”²³¹

A comparable rule applied to non-felony criminal cases. Whatever else *Paine* stands for, it clearly holds that opportunity to cross-examine is a necessary condition to the admissibility of a deposition in a misdemeanor case, even if the witness is dead. The sole ground for decision in *Modern*, and the first of two alternative grounds in *Comberbach* and *Holt*, was that the prisoner was not present and so had lost the

²²⁷ See 3 BLACKSTONE, *supra* note 38, at 373 (1768) (“[T]he occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled”); MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, Nutt 1713) (“[B]y this Course of personal and open Examination, there is Opportunity for all Persons concern’d, *viz.* The Judge, or any of the Jury, or Parties, or their Council or Attornies, to propound occasional Questions, which beats and bolts out the Truth much better than when the Witness only delivers a formal Series of his Knowledge without being interrogated”).

²²⁸ 2 HAWKINS (1721), *supra* note 38, at 428 (footnote omitted).

²²⁹ *Id.* at 431 (“As to the second Particular, *viz.* How far Hearsay is Evidence: It seems agreed, That what a Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side hath no Opportunity of a cross Examination” (footnotes omitted)). Throughout the eighteenth century, the principal justification for the hearsay rule remained absence of oath. See LANGBEIN, *supra* note 144, at 245. *But cf.* Thomas Y. Davies, *Not “the Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL’Y (forthcoming 2007). The admissibility of Marian depositions, however, was not typically analyzed as a hearsay issue. Depositions were testimony, not hearsay; the question was how testimony must be given, not whether hearsay should be allowed. *Cf.* Davies, *supra* note 5, at 194.

²³⁰ See *supra* notes 151-52 and accompanying text.

²³¹ GILBERT (1754), *supra* note 76, at 47 (“A Deposition can’t be given in Evidence against any Person that was not Party to the Suit, and the Reason is, because he had not Liberty to cross-examine the Witnesses, and ’tis against natural Justice that a Man should be concluded in a Cause to which he never was a Party.”).

opportunity to cross-examine.²³² The case has been cited throughout the centuries as standing for *some* cross-examination rule.²³³ Cross-examination was not a *sufficient* condition to admissibility,²³⁴ and there is room for debate over *Paine's* applicability to felonies,²³⁵ but neither qualification diminishes the case's core holding.

In treason cases, confrontation was secured by statute. A series of enactments dating back to the sixteenth century granted the defendant the right to confront witnesses "face to face" at his arraignment.²³⁶ The statutes did not mention a right to cross-examine. But when Hale discussed them in his treatise, he justified the presence requirement on the ground that it would afford an opportunity for cross-examination.²³⁷

Justices of the peace had summary jurisdiction to try certain minor criminal offenses, and a 1745 case seemed to allow depositions in such cases even if taken in the prisoner's absence.²³⁸ In 1761, however, the King's Bench effectively overruled that decision in *Rex v. Vipont* and held unanimously

²³² King v. Paine, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K.B. 1696) ("the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination"); Rex v. Pain, Comb. 358, 359, 90 Eng. Rep. 527, 527 (K.B. 1697) ("the defendant was not present when the examination was taken, so that he could not cross-examine him"); Rex v. Pain, Holt 294, 294, 90 Eng. Rep. 1062, 1062 (K.B. 1697) (same).

²³³ See, e.g., 2 HAWKINS (1721), *supra* note 38, at 430; GILBERT (1754), *supra* note 76, at 100; King v. Eriswell, 3 T.R. 707, 722-23, 100 Eng. Rep. 815, 824 (K.B. 1790) (Kenyon, C.J.); ARCHBOLD, *supra* note 11, at *85; State v. Hill, 20 S.C.L. (2 Hill) 607, 610 (App. L. 1835); People v. Restell, 3 Hill 289, 300 (N.Y. Sup. Ct. 1842); 3 WIGMORE, *supra* note 49, § 1364, at 22 & n.52.

²³⁴ Authority to examine was also required. See *supra* Part I.B.

²³⁵ See *supra* Part I.B.

²³⁶ See, e.g., 13 Car. 2, c. 1, § 5 (1661) ("[N]o person or persons shall be indicted arraigned condemned convicted or attainted for any of the Treasons or Offences aforesaid unless the same Offender or Offenders be thereof accused by the Testimony and deposition of two lawful and credible Witnesses upon Oath which Witnesses at the time of the said Offender or Offenders' arraignment shall be brought in person before him or them face to face and shall openly avow and maintain upon Oath what they have to say against him or them concerning the Treason or Offences contained in the said Indictment unless the party or parties arraigned shall willingly without violence confess the same."). Earlier treason statutes included an exception for dead witnesses (but not unavailable witnesses generally); that exception was deleted from later statutes. Compare 5 & 6 Edw. 6, c. 11, § 9 (1552) ("if they be then living"), 1 & 2 Phil. & M., c. 10, § 11 (1554) ("if they be then living and within the Realm"), 1 Eliz., c. 1, § 21 (1559) ("so many of them as shall be living and within this Realm"), and 1 Eliz., c. 5, § 10 (1559) ("if they be then living"), with 13 Eliz., c. 1, § 9 (1571) (no death exception), and 13 Car. 2, c. 1, § 5 (1661) (no death exception).

²³⁷ 1 HALE, *supra* note 23, at 306 ("[T]he statute requires, that [the witnesses] be produced upon the arraignment in the presence of the prisoner to the end that he may cross examine them.").

²³⁸ See Rex v. Baker, 2 Strange 1240, 93 Eng. Rep. 1156 (K.B. 1745).

that testimony must be given in the prisoner's presence.²³⁹ Each of the judges justified that requirement on the ground that presence would ensure the defendant an opportunity to cross-examine.²⁴⁰ The court reaffirmed that rule in 1786.²⁴¹ This line of cases is particularly significant because the justices of the peace whom *Vipont* required to allow cross-examination in summary proceedings were the same justices who administered committal hearings under the Marian statutes. Langbein reports that examination techniques did not vary across those two contexts.²⁴² In some cases, it might not even be clear at the outset whether an examination would terminate in summary conviction or felony committal.²⁴³ A right to cross-examine in summary proceedings would not necessarily imply a right to cross-examine in committal hearings (only the former involves a determination of guilt).²⁴⁴ Nonetheless, cross-examination would have seemed more natural in a committal hearing once magistrates had to allow cross-examination in their other proceedings.

Even in felony cases, the Marian statutes applied only to committal examinations and coroners' depositions²⁴⁵—not to other forms of testimony that might be generated, such as prior trial testimony,²⁴⁶ warrant applications,²⁴⁷ or preservation

²³⁹ 2 Burr. 1163, 97 Eng. Rep. 767 (K.B. 1761).

²⁴⁰ *Id.* at 1165, 97 Eng. Rep. at 768 (Mansfield, J.) (“[E]vidence . . . must be given in the presence of the defendant, that he may have an opportunity of cross-examining.”); *id.* at 1165, 97 Eng. Rep. at 769 (Denison, J.) (“The evidence must be given in the presence of the defendant, that he may have an opportunity to cross-examine.”); *id.* at 1166, 97 Eng. Rep. at 769 (Wilmot, J.) (“The witnesses ought to be examined in the presence of the party accused; that he may have the benefit of cross-examination.”). The court did not expressly address unavailable witnesses.

²⁴¹ See *King v. Crowther*, 1 T.R. 125, 127, 99 Eng. Rep. 1009, 1011 (K.B. 1786); see also *id.* at 126, 99 Eng. Rep. at 1010 (counsel's argument) (“It was a principle in our law that the evidence must be given in the presence of the defendant, that he might have an opportunity of cross-examining the witness.”).

²⁴² LANGBEIN, *supra* note 19, at 76-77, 93-95.

²⁴³ See KING, *supra* note 84, at 89 (noting that magistrates faced with felony accusations would sometimes summarily convict for minor offenses such as vagrancy rather than commit for trial).

²⁴⁴ See *Cox v. Coleridge*, 1 B. & C. 37, 50, 107 Eng. Rep. 15, 20 (K.B. 1822) (Bayley, J.) (making the same distinction as to the right to counsel); COPY OF CASE AND OPINIONS, *supra* note 215, at 10-14 (Shepherd) (same).

²⁴⁵ See *supra* notes 17-18; see also Davies, *supra* note 5, at 142 (acknowledging that “later treatise writers seem to have read *Paine* to also prohibit the use of a deposition of an unavailable witness in a felony trial if the deposition were improperly taken outside of Marian procedure”).

²⁴⁶ See, e.g., *Mattox v. United States*, 156 U.S. 237, 244 (1895); *United States v. Wood*, 28 F. Cas. 754 (C.C.E.D. Pa. 1818) (No. 16,756); *Summons v. State*, 5 Ohio St. 325, 342-43 (1856); *State v. Atkins*, 1 Tenn. (1 Overt.) 229 (1807); *Finn v. Commonwealth*, 26 Va. (5 Rand.) 701, 708 (Gen. Ct. 1827); 2 HAWKINS (1721), *supra*

depositions.²⁴⁸ But what about coroners' depositions? Their admissibility had been settled since Lord Morly's case in 1666.²⁴⁹ And, as Professor Davies notes, the coroner's inquest could occur before anyone was accused or arrested, so there is no obvious reason to assume the eventual defendant would be present.²⁵⁰

Nevertheless, there is evidence that those who *did* attend the inquest could cross-examine witnesses. In a 1742 London trial, the defendant's attorney testified: "[O]n the 4th of May, I went to *Staines* to attend the Coroner's Jury; though, as I had not Time to enquire into the Fact, and prepare for Mr. *Annesley's* Defence, I could do him but little Service more, than by cross examining the Witnesses for the Crown, and making Observations on their Evidence . . ." ²⁵¹ Furthermore, in 1790, Chief Justice Kenyon in *Eriswell* explained the admissibility of coroners' depositions on the ground that "the examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access."²⁵² It

note 38, at 430. Davies criticizes *Crawford's* reliance on *Atkins* and *Finn*, see Davies, *supra* note 5, at 180 & n.235; Davies, *supra* note 10, at 626, but those cases do support the only proposition for which *Crawford* cited them—that some courts excluded prior testimony on confrontation grounds *even though* the defendant had an earlier opportunity to cross-examine. See *Crawford v. Washington*, 541 U.S. 36, 50 (2004); *Atkins*, 1 Tenn. (1 Overt.) at 229 (prior trial testimony would "go a great length in overthrowing this wise provision of the Constitution"); *id.* (counsel's argument) (relying on "the Constitution, which provided that the witnesses should be confronted with the accused"); *Finn*, 26 Va. (5 Rand.) at 708 ("In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial, may be given in evidence, for the evidence was given on oath; and the party had an opportunity of cross-examining him. But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise." (citations omitted)). I agree the cases are not directly relevant *here*, because they involved prior trial testimony, not Marian depositions.

²⁴⁷ See, e.g., *Collier v. State*, 13 Ark. 676, 677 (1853); *State v. Hill*, 20 S.C.L. (2 Hill) 607, 608 (App. L. 1835).

²⁴⁸ See, e.g., *People v. Restell*, 3 Hill 289, 293 (N.Y. Sup. Ct. 1842); *King v. Dingle*, 2 Leach 561, 168 Eng. Rep. 383 (1791); *King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (1789); *Case of Thatcher & Waller, T. Jones* 53, 84 Eng. Rep. 1143 (K.B. 1676).

²⁴⁹ See *supra* notes 20-22 and accompanying text.

²⁵⁰ Davies, *supra* note 5, at 171-72. At most, of course, Davies' argument suggests only that there was no cross-examination rule for *coroners' depositions*. It has no bearing on the cross-examination rule applicable to *committal examinations*, which derived from the particular statutory text governing committal procedure. See *supra* notes 125-27 and accompanying text.

²⁵¹ Trial of James Annesley, Old Bailey Sessions Papers, July 15, 1742, at 1, 25.

²⁵² *King v. Eriswell*, 3 T.R. 707, 722, 100 Eng. Rep. 815, 824 (K.B. 1790) (Kenyon, C.J.); see also 2 STARKIE, *supra* note 11, at *492 ("The only plausible ground upon which such a distinction [between coroners' depositions and committal

thus appears that coroners' depositions were admissible on the theory that, since inquests were notorious proceedings of which everyone was presumed to be aware, those who failed to show up to cross-examine had simply neglected their rights.

American cases refused to admit coroners' depositions, declining to follow English precedents or making only half-hearted attempts to reconcile them.²⁵³ One stated that, whatever the English rule, the use of such *ex parte* depositions had "never been permitted in this country."²⁵⁴ The leading case asked of defendants rhetorically: "[S]hall they all be assumed *per leges* [i.e., by operation of law], to have neglected, though absent, the time of cross-examination? Because our Act is general for all inquests, the examination public, and of high respectability? On the contrary, is there not too much of mere formula, if not fiction, in such a notion?"²⁵⁵ The perceived English rule these cases rejected thus did not condone *ex parte* testimony. Rather, it *presumed* opportunity to cross-examine from the notoriety of the proceeding. That presumption was not very realistic, so the practical effect was to admit *ex parte* depositions.²⁵⁶ But the very fact that English authorities rationalized that result speaks volumes about the legal landscape.

In a wide variety of contexts, therefore, admissibility depended on presence, and presence was relevant because it afforded an opportunity to cross-examine. Principles of consistency therefore favor a cross-examination requirement for Marian depositions. Furthermore, the fact that opportunity to cross-examine was routinely identified as the reason presence was important—even when the governing statute said nothing about cross-examination—is instructive. Some sources conditioned the admissibility of a Marian examination on the

examinations] can be supported, seems to be this, that a proceeding before the coroner is a matter so notorious, that every one may be presumed to have notice of it, and consequently to have had an opportunity of cross-examining the witness. This however is a reason far from satisfactory.")

²⁵³ See *State v. Campbell*, 30 S.C.L. (1 Rich.) 124, 131-32 (App. L. 1844); *State v. Houser*, 26 Mo. 431, 436 (1858); *People v. Restell*, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842); *State v. Hill*, 20 S.C.L. (2 Hill) 607, 610 (App. L. 1835).

²⁵⁴ *Houser*, 26 Mo. at 436.

²⁵⁵ *Campbell*, 30 S.C.L. (1 Rich.) at 129.

²⁵⁶ See, e.g., PEAKE (1808), *supra* note 47, at 64 n.(m) ("[T]he practice has been to admit [coroners' depositions] after the death of the witness, without inquiry whether the party was present or not . . ."); cf. *King v. Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter's note 1797) ("Nor [are committal depositions admissible] since that statute, unless the party accused be present, though an examination before a coroner is . . .").

prisoner's presence without mentioning cross-examination.²⁵⁷ This background suggests that opportunity to cross-examine may nevertheless have been an implicit justification for the presence requirement stated in those sources.²⁵⁸

B. *Subsequent History*

For the most part, the preceding sections have examined only sources roughly contemporaneous with the framing or older, referring to later materials only to shed light on specific earlier ones. As noted at the outset, however, the more general subsequent history is quite one-sided. Between 1795 and 1824, at least eleven English treatises or case reports conditioned admissibility on presence or opportunity for cross-examination; between 1794 and 1858, at least sixteen reported American cases did so.²⁵⁹ By contrast, I am not aware of any English source from later than the early 1790s suggesting that a Marian committal examination would be admissible even if taken *ex parte*. And I have not found a single reported case from any American jurisdiction—not one—that has ever made that claim. That subsequent history is relevant to original meaning. Subsequent conduct in conformity with a particular interpretation of a contract is evidence of the parties' intent; no less is true of the Constitution.

Professor Davies deems later sources irrelevant because “conditions changed rapidly during the early decades of the Republic.”²⁶⁰ Clearly, however, that goes to weight rather than admissibility. How committal examinations were conducted in, say, 1821—and what conditions attached to their admissibility—is plainly *some* evidence of practices and legal rules a few decades earlier. Later evidence might reflect new developments instead, but that sort of uncertainty is inherent in any source not precisely contemporaneous with the framing: Post-framing evidence might reflect post-framing

²⁵⁷ See various authorities cited *supra* notes 11-13.

²⁵⁸ In contexts not involving formal depositions, it may be less likely that presence was relevant in order to afford an opportunity to cross-examine. For example, courts sometimes conditioned admissibility of relatively informal hearsay statements on the prisoner's presence. See, e.g., Trial of John Ilford, Old Bailey Sessions Papers, Dec. 8, 1757, at 10, 10 (accusatory statement to private party); Trial of Thomas Fitzroy, Old Bailey Sessions Papers, Sept. 16, 1801, at 525, 526 (statements to constable). Cross-examination may have been very difficult in those circumstances. I owe these two references to Richard Friedman.

²⁵⁹ See sources cited *supra* notes 11-13.

²⁶⁰ Davies, *supra* note 5, at 179.

developments, but pre-framing evidence might be obsolete. The historical record should be evaluated as a whole, giving most weight to sources closest to the framing—not by ignoring subsequent authorities entirely because of the mere possibility that they might reflect subsequent developments.²⁶¹

As to post-framing English sources, little needs to be added to what I have already said with respect to *Radbourne*, *Woodcock*, and *Dingler*.²⁶² If an 1821 American source is relevant to American meaning in 1789, then Ayrton's 1780 civil suit is relevant to English meaning in 1748; Garrow's 1791 argument is relevant to English meaning in 1759; and the 1801 responses to the Lancaster magistrates' queries are relevant to English meaning in 1769. More than a hundred American lawyers trained in London over that period, observing English practices and absorbing English conceptions of legal rights.

Crawford's reliance on post-framing authorities is hardly novel. Justices Scalia and Thomas routinely rely on comparable or later American authorities to interpret the Constitution. In *Apprendi v. New Jersey*, for example, Justice Thomas derived the original meaning of the jury-trial right by examining state cases from "the founding to roughly the end of the Civil War, . . . particularly from the 1840's on," and continued his review through the end of the nineteenth century.²⁶³ Other opinions relying heavily on state cases from that era include Justice Thomas's opinion for the Court in *Wilson v. Arkansas* (knock and announce),²⁶⁴ Justice Scalia's plurality in *Harmelin v. Michigan* (cruel and unusual punishment),²⁶⁵ and Justice Scalia's dissents in *County of Riverside v. McLaughlin* (pretrial detention)²⁶⁶ and *Grady v. Corbin* (double jeopardy).²⁶⁷ Still further examples abound.²⁶⁸

²⁶¹ Davies also argues that later American decisions might reflect post-framing English developments. *See id.* at 180 n.234. Even if so, American courts *chose* to follow those developments as consistent with their own understanding of the law.

²⁶² *See supra* notes 119-27 and accompanying text.

²⁶³ 530 U.S. 466, 501-18 (2000) (Thomas, J., concurring).

²⁶⁴ 514 U.S. 927, 933 (1995) (Thomas, J.).

²⁶⁵ 501 U.S. 957, 982-85 (1991) (Scalia, J., plurality opinion).

²⁶⁶ 500 U.S. 44, 61-62 (1991) (Scalia, J., dissenting).

²⁶⁷ 495 U.S. 508, 533-35 (1990) (Scalia, J., dissenting).

²⁶⁸ *See, e.g.,* *Blakely v. Washington*, 542 U.S. 296, 301-02 (2004) (Scalia, J.) (citing 1872 treatise to construe jury-trial right); *Thornton v. United States*, 541 U.S. 615, 629-31 & n.2 (2004) (Scalia, J., concurring in judgment) (citing late nineteenth-century cases to construe search-incident-to-arrest authority under Fourth Amendment); *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (citing late nineteenth-century treatise to interpret Fourth Amendment); *United States v. Gaudin*, 515 U.S. 506, 516-19 (1995) (Scalia, J.) (citing late nineteenth-century cases

Justices Scalia and Thomas also routinely rely on post-framing English authorities.²⁶⁹ Leach's *Crown Cases* has been cited as constitutional authority throughout the Court's history.²⁷⁰ *Mattox*, the Court's seminal 1895 Confrontation Clause decision, relied on *Radbourne* itself.²⁷¹ While Davies would presumably dismiss every one of these citations as an invalid use of historical evidence, the more reasonable

to establish absence of exception to jury-trial right); *Austin v. United States*, 509 U.S. 602, 626 (1993) (Scalia, J., concurring in part) (citing 1882 treatise to interpret Eighth Amendment); *Burson v. Freeman*, 504 U.S. 191, 215 & nn.1-2 (1992) (Scalia, J., concurring in judgment) (citing late nineteenth-century statutes to interpret First Amendment); *Riggins v. Nevada*, 504 U.S. 127, 154 n.4 (1992) (Thomas, J., dissenting) (citing late nineteenth-century case on shackling); *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (Scalia, J.) (citing 1862 case to interpret Fourth Amendment); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 724 (1988) (Scalia, J.) (citing cases through 1831 to interpret Full Faith and Credit Clause); *cf. United States v. Bajakajian*, 524 U.S. 321, 345 (1998) (Kennedy, J., dissenting, joined by Scalia, J., et al.) (citing late nineteenth-century cases to interpret Excessive Fines Clause).

²⁶⁹ See, e.g., *Thornton*, 541 U.S. at 629-31 & n.2 (Scalia, J., concurring in judgment) (citing nineteenth-century English cases to interpret search-incident-to-arrest authority under Fourth Amendment); *INS v. St. Cyr*, 533 U.S. 289, 338, 342 (2001) (Scalia, J., dissenting) (citing 1794 English statute to interpret Suspension Clause; disputing significance of 1811 English case but not questioning timeliness); *United States v. Hubbell*, 530 U.S. 27, 50 n.1 (2000) (Thomas, J., concurring) (citing 1808 English case to interpret Self-Incrimination Clause); *Carter*, 525 U.S. at 94 (Scalia, J., concurring) (citing 1815 English case to interpret Fourth Amendment); *Gaudin*, 515 U.S. at 515-16 (Scalia, J.) (citing nineteenth-century English cases to establish absence of exception to jury-trial right); *Wilson*, 514 U.S. at 935-36 (Thomas, J.) (citing early nineteenth-century English cases to interpret Fourth Amendment knock-and-announce rule); *McLaughlin*, 500 U.S. at 61 (Scalia, J., dissenting) (citing 1825 English case to interpret pretrial detention authority under Fourth Amendment); *Grady*, 495 U.S. at 532-33 (Scalia, J., dissenting) (citing 1796 English case to interpret Double Jeopardy Clause); *cf. Rasul v. Bush*, 542 U.S. 466, 504-05 (2004) (Scalia, J., dissenting) (citing twentieth-century English case on common-law territorial scope of the writ); *Stogner v. California*, 539 U.S. 607, 644-45 (2003) (Kennedy, J., dissenting, joined by Scalia and Thomas, JJ.) (citing 1829 English statute to interpret Ex Post Facto Clause); *Dickerson v. United States*, 530 U.S. 428, 433 (2000) (Rehnquist, C.J.) (citing nineteenth-century English cases to interpret Self-Incrimination Clause); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 327-29 & n.10 (1999) (Scalia, J.) (citing nineteenth- and twentieth-century English cases on common-law equity jurisdiction). Not included are countless citations to nineteenth-century editions of earlier English works.

²⁷⁰ See *Deck v. Missouri*, 544 U.S. 622, 626 (2005); *id.* at 639 n.2 (Thomas, J., dissenting); *Dickerson*, 530 U.S. at 433; *Lilly v. Virginia*, 527 U.S. 116, 127 (1999) (plurality); *Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996); *United States v. Dixon*, 509 U.S. 688, 710 (1993); *Medina v. California*, 505 U.S. 437, 446-47 (1992); *Grady*, 495 U.S. at 532 (Scalia, J., dissenting); *New York v. Quarles*, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part); *Ashe v. Swenson*, 397 U.S. 436, 463 n.1 (1970) (Burger, J., dissenting); *Kirby v. United States*, 174 U.S. 47, 59 (1899); *Bram v. United States*, 168 U.S. 532, 547, 551 (1897); *Mattox v. United States*, 156 U.S. 237, 240 (1895); *Holden v. Minnesota*, 137 U.S. 483, 496 (1890); *In re Palliser*, 136 U.S. 257, 265-66 (1890); *Ex parte Wilson*, 114 U.S. 417, 422-23 (1885); *Coleman v. Tennessee*, 97 U.S. 509, 530 (1878) (Clifford, J., dissenting); *Ex parte Wells*, 59 U.S. 307, 312-13 (1855); *cf. Sparf v. United States*, 156 U.S. 51, 55 (1895); *Hopt v. People*, 110 U.S. 574, 584 (1884).

²⁷¹ *Mattox*, 156 U.S. at 240.

inference is that his definition of relevant evidence is too narrow.

While the pre-framing evidence is ambiguous in this case, the post-framing evidence is devastating. Every reported American decision to address the issue conditioned the admissibility of a committal examination on presence, and in most cases expressly on opportunity to cross-examine.²⁷² None of those cases contains the slightest hint that it is departing from past practice or creating new law; indeed, with one exception,²⁷³ none even shows any awareness that the point was ever debatable in England. Furthermore, none of the cases actually excluded a committal examination taken *ex parte*. Rather, they all involved either (1) an attempt by a defendant to exclude a committal examination *even though* he was present and had an opportunity to cross-examine,²⁷⁴ or (2) an attempt by a prosecutor to admit an *ex parte* deposition that was *not* a committal examination.²⁷⁵ If framing-era criminal defendants were routinely sequestered or prohibited to ask questions at their own committal hearings, surely there would be *some* reported case either excluding a committal deposition or admitting it over the objection that it was taken *ex parte*. That there is neither is compelling evidence that committal examinations were routinely taken in a manner that respected the prisoner's right to confrontation. Only when a prosecutor sought to invoke a committal statute in a non-committal context, or when a prisoner sought to exclude even a properly taken committal deposition, did it become necessary to confirm the cross-examination rule.

²⁷² See cases cited *supra* note 13.

²⁷³ *State v. Hill*, 20 S.C.L. (2 Hill) 607, 609 (App. L. 1835) (noting a "great diversity of opinion on the question" and citing *Eriswell*).

²⁷⁴ See *United States v. Macomb*, 26 F. Cas. 1132, 1132 (C.C.D. Ill. 1851) (No. 15,702); *Davis v. State*, 17 Ala. 354, 356 (1850); *Tharp v. State*, 15 Ala. 749, 750 (1849); *Commonwealth v. Richards*, 35 Mass. (18 Pick.) 434, 437 (1836); *State v. Houser*, 26 Mo. 431, 438 (1858); *State v. McO'Blenis*, 24 Mo. 402, 402-03 (1857); *People v. Restell*, 3 Hill 289, 292-93 (N.Y. Sup. Ct. 1842); *State v. Moody*, 3 N.C. (2 Hayw.) 31, 31-32 (Super. L. 1798); *Kendrick v. State*, 29 Tenn. (10 Hum.) 479, 484, 487 (1850); *Bostick v. State*, 22 Tenn. (3 Hum.) 344, 344 (1842); *Johnston v. State*, 10 Tenn. (2 Yer.) 58, 58 (1821); *State v. Hooker*, 17 Vt. 658, 662 (1845).

²⁷⁵ See *Collier v. State*, 13 Ark. 676, 677 (1853) (warrant application); *State v. Webb*, 2 N.C. (1 Hayw.) 103 (Super. L. 1794) (unclear, but apparently not a committal examination, see *Davies*, *supra* note 5, at 181 & n.237); *State v. Campbell*, 30 S.C.L. (1 Rich.) 124, 124-25 (App. L. 1844) (coroner's deposition); *Hill*, 20 S.C.L. (2 Hill) at 608 (warrant application).

C. *Text*

Finally, we should not lose sight of what the Sixth Amendment actually says: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”²⁷⁶ As Professor Davies observes, the Framers clearly would have understood those who gave sworn testimony against a prisoner at his committal hearing to be “witnesses against him” within the meaning of that clause.²⁷⁷ Indeed, the full phrase “accusers and witnesses” that appeared in some state confrontation clauses²⁷⁸ and in Madison’s original draft of the federal clause²⁷⁹ was the same phrase Hale used to describe Marian deponents.²⁸⁰

Taking a Marian deposition outside the presence of the prisoner and then using that *ex parte* deposition to convict him at trial deprives the defendant of the opportunity “to be confronted with the witnesses against him” under any conceivable literal interpretation of those words. And denying the prisoner the opportunity to question the witness deprives him of the principal benefit that the English confrontational manner of giving testimony was thought to secure. By contrast, if admissibility is subject to the appropriate conditions, “[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.”²⁸¹ Those are not irrelevant considerations.

Professor Davies declines to undertake any textual parsing of the Confrontation Clause because it “drew upon settled understandings of legal rights.”²⁸² The “right . . . to be

²⁷⁶ U.S. CONST. amend. VI.

²⁷⁷ Davies, *supra* note 5, at 193.

²⁷⁸ See Virginia Declaration of Rights § 8 (1776) (“[I]n all capital or criminal prosecutions a man hath a right . . . to be confronted with the accusers and witnesses”), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 234, 235 (1971); Delaware Declaration of Rights § 14 (1776) (“[I]n all prosecutions for criminal offences, every man hath a right . . . to be confronted with the accusers or witnesses”), reprinted in 1 SCHWARTZ, *supra*, at 276, 278.

²⁷⁹ See SOURCES OF OUR LIBERTIES 423 (Richard Perry & John Cooper eds., rev. ed. 1978) (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with his accusers, and the witnesses against him”).

²⁸⁰ See 2 HALE, *supra* note 23, at 284 (directing magistrates to take “informations of the accusers and witnesses”); *id.* at 52 (similar).

²⁸¹ *Mattox v. United States*, 156 U.S. 237, 244 (1895).

²⁸² Davies, *supra* note 5, at 105 n.1.

confronted with the witnesses against him,” in other words, secures only whatever content that “right” had at common law. That interpretive method is sound so far as it goes, but it presumes the existence of a “settled understanding” on which to operate. If nothing else, this Article has shown that the admissibility of *ex parte* committal examinations was far from settled.

The Framers were invoking what they understood to be pre-existing legal rights, but they were also using the English language to describe those rights; and when the content of the right invoked is unclear or was disputed, we should not ignore their description of it. It is one thing to read a common-law exception into the text where that exception was noncontroversial in England and consistently followed in America after the framing (as, for example, with dying declarations²⁸³). But it is quite another where the exception was disputed in England and consistently rejected here.

V. CONCLUSION

Throughout the eighteenth century, it was settled law that a Marian deposition was admissible at trial if the witness was dead, too sick to travel, or kept away by the accused. Nevertheless, Marian procedure was evolving. The development was not that courts began excluding depositions where they once admitted them, but that Marian procedure came to be (or be seen as) consistent with the cross-examination rule. It would have been strange, at the outset of the century, to say that “[t]he substance of the constitutional protection is preserved to the prisoner”²⁸⁴ in the advantages he enjoyed at Marian pretrial. Not so at the end.

The presence of the prisoner was clearly a routine feature of Marian committal practice. Presence was a natural consequence of the procedure the statutes contemplated—indeed, of *any* committal procedure. That routine feature hardened into a procedural right, so that an examination conducted in the prisoner’s absence was deemed outside the statutes and so not admissible. How long before the framing that occurred is hard to say, since there was little occasion to consider the matter until prosecutors tried to invoke the

²⁸³ See *Crawford v. Washington*, 541 U.S. 36, 56 n.6 (2004); 3 WIGMORE, *supra* note 49, §§ 1430-1452, at 160-87.

²⁸⁴ *Mattox*, 156 U.S. at 244.

statutes to admit depositions unrelated to magistrates' statutory committal function.

Whether a prisoner could cross-examine witnesses at his committal hearing was probably an almost entirely theoretical question until the second half of the eighteenth century. It was put into relief once magistrates began exercising an extra-statutory power of discharge (increasing the incentive to test the prosecutor's case) and lawyers began participating (increasing the likelihood that any opportunity to cross-examine would be exploited). The idea that a prisoner had the right to cross-examine witnesses at his committal hearing gained currency before the framing, but some magistrates resisted, and the point was still disputed when the Confrontation Clause was framed.²⁸⁵

That said, there are compelling reasons to think the framing generation's views on this point coincided more with Garrow's than with Buller's.²⁸⁶ The cross-examination rule was followed in a wide range of other contexts. Courts across the United States uniformly endorsed it after the framing. And the rule is more consistent with the text of the Confrontation Clause itself.

Crawford's cross-examination rule is therefore on solid ground.²⁸⁷ If the opinion is to be faulted for anything, it is only for *understating* the importance of physical presence, not for *overstating* the importance of cross-examination.²⁸⁸ At the

²⁸⁵ I therefore disagree with Landsman's claim that "[b]efore the early nineteenth century, the most that was ever called for was physical confrontation between witness and accused." Landsman, *supra* note 76, at 599. The cross-examination rule may have been *settled* in the nineteenth century, but it originated in the eighteenth.

²⁸⁶ Compare *supra* notes 165-78 and accompanying text with *supra* notes 128-44 and accompanying text.

²⁸⁷ Professor Davies thinks I advocate a position much weaker than Justice Scalia's in *Crawford*. See Davies, *supra* note 10, at 573-77. But even Justice Scalia acknowledged "doubts" over whether the Marian statutes prescribed an exception to the common-law cross-examination rule, citing among other authorities Lofft's 1791 edition of Gilbert and Grose and Kenyon's 1790 opinions in *Eriswell*. See *Crawford*, 541 U.S. at 46. Admittedly, near the end of a lengthy footnote responding to Chief Justice Rehnquist, the opinion also states that three particular sources (Hale, *Westbeer*, and *Eriswell*) did not show that the law in 1791 was "unsettled." *Id.* at 55 n.5. To the extent that sentence implies that the question was settled beyond *all* dispute, I agree it takes a position stronger than the one I take here. I also concede that, whatever its demerits, Buller's opinion in *Eriswell* does show that the issue was still debated. But I do not think those differences are as substantial as Davies makes them out to be. A framing-era legal rule need not be settled beyond dispute to be relevant to original meaning, so long as there are adequate reasons to believe the Framers would have resolved the dispute a particular way.

²⁸⁸ Cf. *Maryland v. Craig*, 497 U.S. 836 (1990).

framing, the right “to be confronted with the witnesses against him” was the right to be testified against in one’s presence; opportunity for cross-examination was not so much the confrontation right itself as the *reason* that right was secured (at least the principal one). That formulation changed over time so that, by 1824, Starkie could write simply that “the depositions of witnesses before magistrates, under the statutes of Philip and Mary, are not evidence, unless the prisoner had an opportunity to cross-examine those witnesses,” without even mentioning presence.²⁸⁹ The change, however, was more of emphasis than of substance.

Professor Davies’ article is objectionable, not because of the contrary conclusion he reaches, but because of his repeated dismissals of the opposing view as historical “fiction”—at one point going so far as to compare Justice Scalia’s opinion to “junk science.”²⁹⁰ Davies’ conclusion, however, rests critically on his premise that all English sources published after 1789 and all American sources published more than a few years after 1789 are irrelevant to original meaning; relax either of those two constraints and his argument unravels. Even if those novel constraints were defensible (which I doubt), the fact that Justice Scalia took a somewhat broader view of the post-framing evidence relevant to original meaning hardly makes his opinion “fictional.”²⁹¹

One suspects Davies chose the rhetorical style he did to justify his more general critique of originalism. It was not enough for him to show that *Crawford* resolved a debatable point over which reasonable legal historians could disagree; he had to show that *Crawford*’s history was so flawed that it was not even worth undertaking the inquiry. With respect, I do not believe he made that case; but I will let readers judge for themselves.

²⁸⁹ 1 STARKIE, *supra* note 11, at *96. Later formulations of the confrontation right likewise emphasized cross-examination over presence. See, e.g., 3 WIGMORE, *supra* note 49, § 1397, at 100 (“There never was at common law any recognized right to an indispensable thing called Confrontation as distinguished from Cross-examination.” (emphasis omitted)); FED. R. EVID. 804(b)(1).

²⁹⁰ Davies, *supra* note 5, at 216.

²⁹¹ I have focused this Article on the core issue of the cross-examination rule’s applicability to Marian examinations, rather than attempting to respond comprehensively to all of Davies’ other alleged “errors.” That limitation should not be taken as acquiescence. In particular, I have not addressed the validity of *Crawford*’s testimonial/nontestimonial distinction, because that topic has already been well addressed by other authors. See, e.g., Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998).