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The Too-Easy Historical Assumptions of *Crawford v. Washington*

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As Roger Kirst points out in his contribution to this symposium,[1] a crucial assertion in Justice Scalia's opinion for the Court in *Crawford v. Washington* is that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."[2] This conclusion can be asserted with such certitude only by looking at confrontation in isolation, segregated from its constitutional and historical context.

The right of confrontation comes from the Sixth Amendment, which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[3]

The only part of the Sixth Amendment that *Crawford* discussed was confrontation. Justice Scalia's opinion, however, gives no explanation why it can be concluded that the Confrontation Clause constitutionalized common law as stated in English decisions when other parts of the Sixth Amendment expressly rejected English common law. This article will show that English common law was not the source for much of the Sixth Amendment, and by assuming that it was for confrontation, *Crawford*'s reasoning undercuts longstanding

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[1] *See* Roger Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35 (2005).

[2] Crawford v. Washington, 541 U.S. 36, 54 (2004).

[3] U.S. CONST. amend. VI.

Sixth Amendment jurisprudence. The right to counsel provision provides the most important example.

I. ASSISTANCE OF COUNSEL AND NOTICE AT COMMON LAW

The eighteenth century common law did not guarantee a criminal defendant the right to counsel. Instead, it actually prohibited the accused from having representation for serious charges. The Treason Act of 1696 did grant a right to counsel in treason cases,[4] and the common law permitted counsel in misdemeanor cases,[5] but the common law forbade an accused from being represented by counsel in all other prosecutions. While the prosecutor was free to have counsel assist the prosecution, under the common law, a person charged with an ordinary felony could not have an attorney assist in the development of facts. A defense attorney could help present legal arguments, but could not present evidence, examine or cross-examine witnesses, or address the jury in opening or closing statements. If these actions were to be done, the accused, unaided, had to do them.[6]

An accused charged with murder, robbery, or smuggling could not have counsel in England. While it is true that the restriction on counsel started to break down in the eighteenth century as English judges sometimes allowed defense counsel to cross-examine witnesses, this practice did not really begin to become institutionalized until the 1780s.[7] And, as J.M. Beattie stresses, even when defense counsel were allowed a role in the English felony cases,

> [t]hey did so under judicial sufferance, and . . . what they might do for their clients was limited by the bench. . . . [I]n particular, they constrained defense lawyers' activities in such a way that the accused were forced to continue to speak for themselves in court. The right to full defense by counsel was not granted until the passage of the Prisoner's Counsel Act of 1836. Until that legislation was enacted, lawyers acting for accused felons were allowed to do what the judges had always done for the defendant: to examine and cross-examine witnesses and to speak to rules of law. Counsel were not allowed, however, to act in those areas in which defendants had always been on their own. In particular, counsel were not allowed to speak to the jury on their client's behalf or to offer a defense against

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[4] 7 & 8 Will. 3, c. 3, § 1 (Eng.).

[5] Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 84 (1995).

[6] *Id.* at 82-83.

[7] *Id.* at 93.

> the facts put in evidence. Until 1836, prisoners who said that they wished to leave their defense to counsel were told that that was not possible and that they must speak for themselves.[8]

English common law did not have a right to counsel in felony cases. The right did not even exist in England until 1836. The Sixth Amendment, however, grants a right to counsel in all criminal cases.[9] Thus it is clear that the Sixth Amendment did not adopt the common law right to counsel, but in fact abrogated the common law rule prohibiting counsel.

The Sixth Amendment notice provision is similar. John Langbein explains that the common law on notice

> forbade the defendant from having a copy of the indictment specifying the charges against him, not only in advance of trial, but even at trial. Instead, the court clerk summarized the indictment to the defendant upon arraignment. The Treason Act of 1696 abrogated the rule against allowing the accused access to the text of the indictment, but only for cases of treason. For ordinary felony cases, the rule endured throughout the eighteenth century, and it impaired the defendant's ability to prepare his defense with precision.[10]

In English common law there was no right of notice in almost all criminal prosecutions. The Sixth Amendment, however, grants the right of notice in all criminal prosecutions. This Sixth Amendment provision did not constitutionalize English common law.

Since the Sixth Amendment did not constitutionalize the common law right to counsel and notice, but instead granted rights that did not exist at common law, there is little reason to assume, as *Crawford* does, that the Bill of Rights constitutionalized common law rights found in English decisions. If *Crawford* had not isolated confrontation from its context, but instead looked at the broader development of criminal procedure reflected in the Sixth Amendment, the Court should have seen that by the time of the Bill of Rights,

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[8] J. M. Beattie, *Scales of Justice: Defense Counsel and English Criminal Trials in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 230-31 (1991).

[9] U.S. CONST. amend. VI (beginning with "[i]n all criminal prosecutions").

[10] John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1058 (1994). Langbein also notes that the English common law did not provide for the defendant's right to subpoena witnesses to testify on his behalf. The right to call witnesses in England was not established until legislation was passed in the very late seventeenth and early eighteenth centuries, which was interpreted to provide for the right of compulsory process. *Id.* at 1055-56.

American trials had been following a path that diverged from the English model in significant ways.[11]

II. AMERICAN ADVERSARIAL TRIALS PRIOR TO THE BILL OF RIGHTS

The presence of defense counsel eventually changed English trials from judge-dominated proceedings to adversarial ones.[12] America granted the right to counsel long before England; indeed long before the Sixth Amendment. Shortly after declaring Independence, twelve of the thirteen states guaranteed criminal defendants the assistance of counsel, but going back as far as 1660 and 1701, a significant number of colonies granted the right to counsel for felonies other than treason.[13] As a result of these and other developments,[14] by the

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[11] In *Crawford*, Justice Scalia concluded that "the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure . . . ." 541 U.S. at 50. If so, then the Sixth Amendment as a whole had to be rejecting, not adopting, much of eighteenth century English criminal procedure. Felony trials without defense lawyers and notice were dominated by judges, thus making the trials as a whole, not just pretrial examinations, like civil-law trials. Professor Langbein explains:

> [W]ell into eighteenth century the procedure we have seen at work in the Old Bailey resembled the modern Continental more than the modern Anglo-American procedure . . . .
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> (1) In the Old Bailey, as on the Continent today, lawyers for the prosecution and defense were peripheral forensic figures, if present at all . . . . [I]t was the trial judge who examined the witnesses and the accused, and it was he who, like the modern Continental presiding judge, dominated the proceedings.
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> (2) The accused took the active role in his own defense, speaking directly and continuously to the court as he does today in the European systems. The privilege against self-incrimination was not yet working to silence the accused and distance him from the conduct of his own defense . . . .
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> (3) The Old Bailey trial judge deeply affected the adjudication of the jury . . . . [H]e could speak vigorously on the merits and had many ways to influence and control jury verdicts . . . .

John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 315 (1978). *See also* Jonakait, *supra* note 5, at 86-87:

> Judges . . . controlled English common law trials through their dominance over the development of facts at trial. That domination was intensified by judicial authority over the jury. Judges did not treat jurors as autonomous fact-finders, but instead treated them as a body bound by judicial views of the evidence. Due to this judicial domination, criminal proceedings were closer to present continental trials than to our modern ones.

[12] *See* Jonakait, *supra* note 5, at 87-94 for a summary of the developments. *See also* Powell v. Alabama, 287 U.S. 45, 60-65 (1932). As *Powell* stated, "[t]he [common-law] rule was rejected by the colonies." *Id.* at 61.

[13] Jonakait, *supra* note 5, at 94-95.

time of the framing of the Bill of Rights, American criminal procedure had moved towards an adversary system that was still unknown in England. The famous Boston Massacre trial illustrates.

While British troops were occupying Boston in 1770, a dispute erupted, and British soldiers killed three Bostonians. Eight British soldiers, with John Adams as their lead defense counsel, were tried for murder. In two trials, juries acquitted six of these soldiers and convicted the other two of only manslaughter. A transcript of one trial has survived, and the proceedings of the other have been pieced together from various sources. These historical materials reveal a trial unlike those then prevailing in England.

Defense counsel acted as skilled advocates freed from the constraints of the English common law. In defense of the British soldiers,

> John Adams and his colleagues cross-examined prosecution witness; they called and examined defense witnesses; and they addressed the jury, making both opening and closing arguments. They did not undertake these functions in a neutral or objective manner, but instead did so as advocates. They had a theory, self-defense or justification, and the defense lawyers used their tools to further that theory, just as a modern advocate would. . . . These were lawyers acting as we expect modern defense attorneys to act, as advocates for their clients in all parts of the trial. Not surprisingly, the records of the testimony read much like modern trial transcripts.[15]

The lawyers in the Boston Massacre trial were operating within a system not known to the English common law, and "[t]he key in the changed procedures seems to have been the full representation by defense counsel, which was

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[14] The development of the public prosecutor also moved American criminal procedure to an adversary system. Prosecutions for ordinary crimes in England were not done by the state but privately prosecuted by the victim or a victim's friend. A different process began to emerge here starting around 1700:

> Public officials took responsibility for the prosecutions of crimes generally, not just for the limited set of offenses that directly affected the sovereign. As public prosecutors emerged, private prosecution in the colonies disappeared. This evolution of the American criminal justice system was quick and thorough. By the time of the Revolution, public prosecution in America was standard, and private prosecution, in effect, was gone. Indeed, it was so established and taken for granted at the inception of the new federal republic that public prosecutors, although not mentioned in the Constitution, were, without debate, granted exclusive control over prosecutions in the federal courts.

Id. at 99.

[15] *Id.* at 137-39.

accepted without debate or comment in the . . . trials."[16] These procedures were not put in place just for this trial but must have been well established because "[l]awyers uncertain of their advocacy role or its limits were unlikely to perform as brilliantly as these lawyers did."[17]

What *Crawford*'s historical inquiry ignores is that American criminal procedure in the framing generation was simply not the same as England's; it had diverged in important ways and rejected significant restrictions imposed by English common law. It had shifted towards an adversary system providing an accused with true defense advocacy on his behalf.[18] Of course, it was this American procedure that the Framers were most familiar with. It should be remembered that the Bill of Rights was not designed to protect against the English government but came into being because of local concerns about the new federal government. If American criminal procedure protected rights better than English law, and it did, then the Framers would have wished to constitutionalize American procedures, not English law. To understand the history of confrontation and all other Sixth Amendment rights, we need to study the criminal procedures in the states when the Bill of Rights was adopted. It was these procedures that were the most immediate source for the Sixth Amendment.[19] That is at least what Justice Taney maintained in an opinion that *Crawford* completely ignored.

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[16] *Id.* at 139.

[17] *Id.* at 140.

[18] *Cf.* 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6348 (1997) ("[W]e cannot understand the meaning of 'confrontation' by looking at that clause alone; we must also look at the other provisions of the Sixth Amendment and to the Bill of Rights as a whole.").

[19] *See* Jonakait, *supra* note 5, at 112-13:

> While both English mistakes and rights might have given rise to notions of what needed protecting, Americans sought to protect rights viewed as fundamental regardless of their origin. If Americans had developed a criminal procedure thought to preserve fundamental rights better than the common law did, then Americans would have wished to preserve these rights . . . . If we want to know what confrontation was originally about, we should not concentrate on English law, but on the criminal procedures in the states when the Bill of Rights was adopted. It was these procedures, devised by Americans and familiar to them through daily practice in state courts, which were preserved in the Sixth Amendment.

III. STATE PROCEDURES AS THE SOURCE OF THE CONFRONTATION CLAUSE

In *United States v. Reid*,[20] a man accused of murder claimed that his compulsory process right was violated because an evidentiary restriction prevented him from calling a co-defendant as a witness. Justice Taney, writing for the Court, noted that early Americans had partially adopted and partially rejected the common law form of trials.[21] Trial by jury had been protected in all the colonies, but English common law undercut this right by denying the accused compulsory process. Although English statutes had modified some of the

> oppressive mode[s] of proceeding[,] the thirteen Colonies who united in the declaration of independence, as soon as they became States, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force. It was the people of these thirteen States which formed the Constitution of the United States, and ingrafted on it the provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression.[22]

Thus, in Justice Taney's view, while the Sixth Amendment did adopt the jury trial provision from England, it did not adopt the English method of conducting such trials. The source for the procedure at trial "could not be the common law as it existed at the time of the emigration of the colonists, for the constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer."[23] And, of course, the Sixth Amendment also abrogated the common law on the right to counsel and notice. Justice Taney concluded that the true source of the Sixth Amendment is found in state law: "[T]he only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts."[24]

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[20] 53 U.S. (12 How.) 361 (1851), *overruled in part by* Rosen v. United States, 245 U.S. 467 (1918).

[21] *See id.* at 363-64.

[22] *Id.* at 364.

[23] *Id.* at 365.

[24] *Id.*

If the notice, right to counsel, and compulsory process provisions of the Sixth Amendment were not adopting the English common law, as Justice Taney's opinion suggests, but adopting procedures that the states were already using when the Bill of Rights was framed, surely the same is true for the right of confrontation. Perhaps original notions of confrontation had roots in English practices,[25] but the development of the Sixth Amendment indicates the Confrontation Clause was constitutionalizing an American concept that was built upon the conjunction of old and new rights.[26] Certainly, Justice Scalia's assumption that the Confrontation Clause was constitutionalizing some sort of English common law right cannot convincingly stand merely by assertion when confrontation is seen in its Sixth Amendment context.[27] Indeed, without a hindsight bias, it is not clear that

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[25] *Cf.* WRIGHT & GRAHAM, *supra* note 18, at § 6344 ("Confrontation had a history in America prior to the adoption of the Sixth Amendment . . . . The American history is not a continuation of the story in England but a separate story that has significant overlap and interconnection with events in England.").

[26] The Framers of the Bill of Rights did intend for Sixth Amendment provisions to work together, as indicated by one of the sources cited by Justice Scalia's quotation. His opinion quotes from the pseudonymous Federal Farmer: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question . . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." Crawford v. Washington, 541 U.S. 36, 49 (2004) (citing Letter from Federal Farmer IV (Oct. 15, 1787), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 469, 473 (1971)) (alterations in original). The fuller quotation, however, indicates that this Farmer believed that confrontation did not stand alone but was supported by other rights. Federal Farmer also said:

> When I speak of the jury trial of the vicinage, or the trial of the fact in the neighborhood, I do not lay so much stress upon the circumstance of our being tried by our neighbours: in this enlightened country men may be probably impartially tried by those who do not live very near them: but the trial of facts in the neighbourhood is of great importance in other respects. Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. The common people can establish facts with much more ease with oral than written evidence; when trials of facts are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence, which to the common people is expensive and almost useless; it must be frequently taken ex porte [sic], and but very seldom leads to the proper discovery of truth.

Letter from Federal Farmer IV (Oct. 12, 1787), *reprinted in* SCHWARTZ, *supra*, at 473 (1971). Federal Farmer's comments tied together two rights that are now in the Sixth Amendment. The vicinage requirement helped assure cross-examination. Confrontation and the other rights cannot be placed into an interpretive segregation, for they were meant to work together to provide the accused with a fundamentally fair trial. *Cf.* WRIGHT & GRAHAM, *supra* note 18, at § 6347 (noting that Federal Farmer "saw the 'particular rights' such as confrontation as part of a system of justice rather than as a disconnected series of rights").

[27] *Cf.* Kirst, *supra* note 1, at 83:

a right of confrontation can even be found in the English cases Justice Scalia discusses.

IV. WAS THERE AN ENGLISH COMMON LAW RIGHT OF CONFRONTATION?

Justice Scalia's research into English practices shows that English courts argued over whether certain pieces of evidence could be admitted into criminal trials without cross-examination, but he presents no information that some broader principle of "confrontation" controlled these decisions.[28] A mind not already committed to finding a common law right of confrontation might simply have concluded that the English cases were only concerned with the admissibility of one kind of evidence, not a general right. Today, for example, we can find many decisions about subsequent remedial measures.[29] When we read these cases, we do not find some general "right" but simply conclude that a certain kind of evidence is inadmissible. Justice Scalia, however, has assumed that the Confrontation Clause was incorporating a common law right of confrontation; therefore, an English common law right of confrontation must be discoverable. The cited English cases are assumed to be the most relevant ones for determining that English right, and then a right of confrontation is found in them.[30] Without those assumptions, that right is not apparent.[31] If English history is examined without a particular kind of American hindsight bias, it simply is not clear that English common law at the time of our Bill of Right's adoption actually had a right of confrontation. Interestingly, and perhaps significantly, Justice Scalia does not cite any English materials that used the term

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English common law may be more accessible or more well-defined than American common law, but Justice Scalia's survey of the historical record did not provide any evidence that the original meaning was tied to English common law. There is no mention of English common law in the statements from the ratification debates quoted by Justice Scalia.

[28] *See generally Crawford*, 541 U.S. at 42-47.

[29] *See* FED. R. EVID. 407. *See, e.g.*, the cases collected in *Admissibility of Evidence of Subsequent Remedial Measures Under Rule 407 of the Federal Rules of Evidence*, 158 A.L.R. FED. 609.

[30] *See Crawford*, 541 U.S. at 42-47.

[31] This appears to be similar to what Professor Thomas Y. Davies, in this symposium, described as "prochronism," which he said "occurs when more recent concepts or events are erroneously projected backward into an earlier period." 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, 116 n.34 (2005).

"confront" or "confrontation."[32] *Crawford* states: "Early in the 18th century . . . the Virginia Council protested against the Governor for having 'privately issued several commissions to examine witness against particular men *ex parte*,' complaining that 'the person accused is not admitted to be confronted with, or defend himself against his accusers.'"[33] Thus, the earliest citation Justice Scalia's opinion gave to the use of the term "confront" comes not from England but from Virginia.

V. THE EARLY AMERICAN RIGHT OF CONFRONTATION

While the English cases do not indicate that their results are founded on some notion of a broader right, the first relevant American decision after the Bill of Rights does base its decision on a broad principle. The 1794 North Carolina case of *State v. Webb*, however, did not base its decision on the right to confront "testimonial statements," which Justice Scalia "found" in the English cases and claimed was at the core of the Confrontation Clause.[34] Instead, *Webb* stated, "it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not had the liberty to cross examine."[35] It goes unremarked in *Crawford* that the principle that compelled the result in *Webb* was different from the one Justice Scalia found in the Confrontation Clause.

Crawford also completely ignored the first interpretation of confrontation by a Supreme Court Justice. Chief Justice John Marshall presided at the 1807 trial of Aaron Burr.[36] The prosecution sought to introduce out-of-court statements made by the absent Herman Blennerhassett to one Neale as declarations of a coconspirator.[37] Chief Justice Marshall, relying on the right of confrontation, ruled the evidence inadmissible:

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[32] *Cf.* WRIGHT & GRAHAM, *supra* note 18, at § 6341 ("[C]onfrontation is rarely mentioned in historical documents . . . .").

[33] 541 U.S. at 47 (quoting A Memorial Concerning the Maladiminstrations of His Excellency of His Excellency Francis Nicholson, *reprinted in* 9 ENGLISH HISTORICAL DOCUMENTS 253, 257 (D. Douglas ed. 1955)).

[34] State v. Webb, 2 N.C. 103, 104 (1794).

[35] 541 U.S. at 49 (quoting *Webb*, 2 N.C. at 104).

[36] United States v. Burr, 25 F. Cas. 187 (C.C.C. Va. 1807) (No. 14,694).

[37] The prosecution argued either that there was "a conspiracy between these two [Blennerhassett and Burr] and others; and that the declarations of one conspirator were evidence against the others; or, 2d, that they were accomplices." *Id.* at 193.

> The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed by all essential to the correct administration of justice. I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.[38]

Chief Justice Marshall went on to indicate that coconspirator statements could be admitted to prove the crime of conspiracy, but they could not be introduced to prove other criminal conduct of an accused. Invoking the right of confrontation, Chief Justice Marshall was excluding hearsay evidence even though it was not an *ex parte* affidavit, deposition, or other kind of statement elicited by the government. Thus Chief Justice Marshall was not relying on the English right of confrontation as found in *Crawford* but apparently on an American notion of confrontation.

VI. IGNORING OTHER SIXTH AMENDMENT INTERPRETATIONS

By segregating confrontation, *Crawford* not only ignored necessary history, the Court also disregarded other Sixth Amendment interpretations contradicting *Crawford*'s assumptions. For example, Justice Scalia cited the 1895 case of *Mattox v. United States* for the proposition that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."[39] Because the Court ignored confrontation's Sixth Amendment context, the Court could also ignore modern Sixth Amendment interpretations that have rejected the approach of *Mattox*. This is illustrated by decisions about the constitutionally required size for a jury.

In the *Mattox* era, the Supreme Court held that the Constitution required a twelve-person jury. The defendant in

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[38] *Id.*

[39] 541 U.S. at 54 (citing Mattox v. United States, 156 U.S. 237, 243 (1895)).

Thompson v. Utah[40] was convicted by a jury of twelve in the Utah territory for calf-rustling, but he won a new trial. Utah subsequently gained statehood, and Thompson was re-tried in the state court by a jury of eight as provided for by Utah law. The Supreme Court concluded that the Sixth Amendment right to a jury trial applied in the territorial courts and that, whatever the normal powers of the state, any trial for a crime committed before statehood had to provide a jury consistent with the Federal Constitution. The Court then said that the common law at the adoption of the Bill of Rights required twelve jurors, and therefore this size jury was required by the Sixth Amendment:

> [T]he next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is constituted, as it was at common law, of twelve persons, neither more nor less . . . . This question must be answered in the affirmative . . . . [T]he word 'jury' and the words 'trial by jury' were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; . . . the supreme law of the land required that [Thompson] should be tried by a jury composed of not less than twelve persons . . . . [T]he wise men who framed the constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would be not adequately secured except through the unanimous verdict of twelve jurors.[41]

In 1970, however, when the Supreme Court revisited the issue of the size of the jury required by the Sixth Amendment, it took a different view of the Framers' intent. *Williams v. Florida*[42] did conclude that the common law at the time of the Constitution's adoption mandated twelve-person juries, but it rejected the "easy assumption" that the Sixth Amendment constitutionalized that common law requirement. The Court stated, "[w]hile 'the intent of the Framers' is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."[43] Doubt is cast on that assumption partly because "contemporary legislative and constitutional provisions

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[40] 170 U.S. 343 (1898).

[41] *Id.* at 349-53.

[42] 399 U.S. 78 (1970).

[43] *Id.* at 92.

indicate that where Congress wanted to leave no doubt that it was incorporating existing common law features of the jury system, it knew how to use express language to that effect."[44] This is illustrated by "the Seventh Amendment, providing for a jury trial in civil cases, [which] explicitly added that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"[45] *Williams* then came to what would seem to be the obvious and commonsensical conclusion – we can't really know today what the Framers specifically intended in adopting the Sixth Amendment provision:

> We do not pretend to be able to divine precisely what the word 'jury' imparted to the Framers, the First Congress, or the States in 1789. It may well be that the usual expectation was that the jury would consist of 12, and that hence, the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today. But there is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury.[46]

Since the Framers' intent concerning size was unknowable, the Court concluded that a functional approach to the provision was the correct one. "The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purpose of the jury trial."[47]

The modern Supreme Court has adopted a similar approach to other Sixth Amendment provisions. For example, it is clear that at common law an accused could not testify in his defense.[48] Even though the common law forbade such testimony, the Compulsory Process Clause of the Sixth Amendment, as *Rock v. Arkansas* makes clear, now grants an accused the right to testify.[49] The accused now has a right to testify because the collective function of various Sixth Amendment provisions, including confrontation, is to assure

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[44] *Id.* at 97.

[45] *Id. Cf.* Kirst, *supra* note 1, at 84 ("The Sixth Amendment's contrast with the Seventh Amendment is evidence that the Framers did not use language clearly intended to preserve the right of confrontation as it then existed in English common law.").

[46] 399 U.S. at 98-99.

[47] *Id.* at 99-100.

[48] Maine was the first of the states to abolish this common law prohibition, but not until 1859. The federal government did not permit such testimony until 1878. *See* Ferguson v. Georgia, 365 U.S. 570, 577 (1961).

[49] Rock v. Arkansas, 483 U.S. 44, 52 (1987) ("The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment.").

that an accused has the opportunity to be heard in his own defense, and today an accused's right to testify is necessary to satisfy that constitutional purpose.[50]

These and other Sixth Amendment cases raise major questions about the easy assumptions of *Crawford* and its interpretive approach. The Court has held that even though the common law clearly required twelve-person juries and many of the Framers may have assumed that the requirement would continue on, it cannot be known that the Framers and adopters of the Bill of Rights specifically intended to constitutionalize that specific jury feature. If that cannot be known, how can there be such certitude that the Sixth Amendment constitutionalized the much vaguer common law right of confrontation if such a right did exist? On the other hand, we can definitely say that the Framers did not constitutionalize a right for an accused to testify in the Compulsory Process Clause. Yet, that right exists. It exists because of an interpretive approach that examines the purposes of the Sixth Amendment in light of modern understandings of those goals. *Crawford* could ignore this Sixth Amendment jurisprudence only by looking at the Confrontation Clause in isolation from the rest of the Sixth Amendment.

VII. CONSEQUENCES OF *CRAWFORD*

If *Crawford*'s approach is correct, then it should be correct for the rest of the Sixth Amendment as well, or at least there should be an explanation of why some Sixth Amendment provisions are bound by one interpretive approach and not others. The Court's narrow focus allowed it to avoid such a question, but *Crawford*'s assumptions put at risk rights that are clearly considered fundamental today. For example, "[a]lthough there is little historical support" for the concept that the Framers were constitutionalizing the right of an indigent criminal defendant to have appointed counsel,[51] such a right is basic to the Sixth Amendment today. If *Crawford* is

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[50] *See, e.g.*, *In re* Oliver, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense–a right to his day in court–are basic in our system of jurisprudence; and these rights include, at a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.").

[51] CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 901 (4th ed. 2000).

right, shouldn't cases that grant indigents a constitutional right to appointed counsel, such as *Powell v. Alabama*,[52] *Johnson v. Zerbst*,[53] and *Gideon v. Wainwright*,[54] be overruled? *Crawford*'s simplistic historical assumptions about confrontation have called into doubt Sixth Amendment jurisprudence as a whole.

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[52] 287 U.S. 45 (1932).

[53] 304 U.S. 458 (1938).

[54] 372 U.S. 335 (1963).