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COCONSPIRATOR HEARSAY,
SIR WALTER RALEIGH, AND THE SIXTH
AMENDMENT CONFRONTATION CLAUSE**

Ben Trachtenberg

64 FLORIDA LAW REVIEW 1669 (2012)

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CONFRONTING COVENTURERS: COCONSPIRATOR HEARSAY, SIR
WALTER RALEIGH, AND THE SIXTH AMENDMENT CONFRONTATION
CLAUSE

*Ben Trachtenberg**

Abstract

Using the example of a recent major terrorism prosecution, this Article addresses “coventurer hearsay” in the context of the ongoing Confrontation Clause debate concerning the United States Supreme Court’s decision in *Crawford v. Washington*. Courts have recently begun admitting hearsay evidence pursuant to a revisionist interpretation of the coconspirator statement exception to the hearsay rule. Under the new “lawful joint venture” theory, a hearsay statement may be admitted as a coconspirator statement if made in furtherance of a “joint undertaking”—defined as pretty much any cooperative activity—even if the “conspiracy” is not illegal. Because this new interpretation of an old hearsay exception cannot plausibly be described as “firmly rooted” in American law, nor does the hearsay included in the new exception bear “indicia of reliability,” coventurer hearsay would have been inadmissible at criminal trials under pre-*Crawford* Sixth Amendment jurisprudence. The overwhelming majority of coventurer statements, however, are not “testimonial,” meaning that current Confrontation Clause law does not prohibit their use against criminal defendants. Accordingly, coventurer hearsay demonstrates that defendants suffer prejudice from the Court’s reinterpretation of the Sixth Amendment.

After reviewing evidence that the *Crawford* majority misinterpreted the historical background of the Confrontation Clause, the Article argues that the Court should reexamine whether the Confrontation Clause, or perhaps the Due Process Clauses of the Fifth and Fourteenth Amendments, should be read to prohibit the admission of dangerously unreliable hearsay against criminal defendants, even if such hearsay is “nontestimonial.” The case of the Holy Land Foundation—in which the United States government closed America’s largest Muslim charity and convicted five leaders of funneling money to Hamas—provides a concrete example of coventurer hearsay run amok. The prosecution case relied heavily on “joint venture” hearsay, unreliable out-of-court statements admissible only pursuant to a new interpretation of the

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coconspirator exception, a hearsay exception likely to have been found unconstitutional under the Confrontation Clause jurisprudence upended by *Crawford*. The result exemplifies the injustice made possible by recent case law and provides a new challenge to the testimonial theory of confrontation law.

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INTRODUCTION

Until it was closed by the United States Government in 2001, the Holy Land Foundation for Relief and Development (HLF) was a pro-Palestinian charitable organization headquartered outside of Dallas. It was once the largest Muslim charity in the United States. After shutting down HLF in December 2001, the United States tried five HLF leaders for using the charity to funnel money to the terrorist group Hamas in

violation of federal law.¹ All five were eventually convicted.² The HLF prosecution raises several important issues related to the American criminal justice system, especially with respect to how that system handles cases related to terrorism.³ Among other evidence, prosecutors presented to the jury selections from a trove of documents related to Hamas; they contended that the documents “showed that HLF was a fundraising arm . . . in support of Hamas.”⁴ Like most statements recorded on paper, the documents were hearsay, and the defendants objected to their admission as evidence. Based on a novel interpretation of an ancient exception to the hearsay rule for coconspirator statements, the trial court admitted the documents, and a three-judge panel of the United States Court of Appeals for the Fifth Circuit approved the rulings in its opinion affirming the conviction.⁵ This Article explains that these decisions not only represent a misreading of the Federal Rules of Evidence but also starkly illustrate the flaws with recent Supreme Court decisions concerning the Confrontation Clause of the Sixth Amendment.

Since the Supreme Court upended its Confrontation Clause jurisprudence in *Crawford v. Washington*,⁶ scholars have vigorously debated whether the *Crawford* majority or Chief Justice William Rehnquist’s concurrence—or neither of them—accurately understood the meaning of a defendant’s Sixth Amendment right “to be confronted with the witnesses against him.”⁷ In addition, because the *Crawford*

1. See *United States v. El-Mezain*, 664 F.3d 467, 485 (5th Cir. 2011); see also Laurie Goodstein, *U.S. Muslims Taken Aback by a Charity’s Conviction*, N.Y. TIMES, Nov. 26, 2008, at A23.

2. See Gretel C. Kovach, *Five Convicted in Terrorism Financing Trial*, N.Y. TIMES, Nov. 25, 2008, at A16 (“On their second try, federal prosecutors won sweeping convictions Monday against five leaders of a Muslim charity in a retrial of the largest terrorism-financing case in the United States since the attacks of Sept. 11, 2001.”).

3. See, e.g., *El-Mezain*, 664 F.3d at 490 (evaluating whether use of witnesses known to jury and defense only by pseudonyms violated Fifth and Sixth Amendments); *id.* at 516–17 (evaluating whether the district court was required to issue “letter rogatory” to help defendants obtain evidence located in Israel); *id.* at 525 (determining what standard courts should use during “harmless error” analysis).

4. *Id.* at 501.

5. *Id.* at 501–07. Defendants filed a petition seeking a writ of certiorari from the Supreme Court of the United States. See Petition for Writ of Certiorari at i, *Elashi v. United States*, No. 11-1390 (U.S. May 17, 2012) (listing two questions presented, one of which concerns whether Federal Rule of Evidence 801(d)(2)(E) “extends to out-of-court statements in furtherance of a lawful joint venture”); see also Brief of Amici Curiae Professors of Evidence in Support of Petitioners, *Elashi v. United States*, No. 11-1390 (June 20, 2012). The Supreme Court recently denied certiorari. See *El-Mezain*, 664 F.3d 467, *cert. denied sub nom. Elashi v. United States*, 2012 WL 1833933 (U.S. Oct. 29, 2012) (No. 11-1390), and 2012 WL 1835124 (U.S. Oct. 29, 2012) (No. 11-10437).

6. 541 U.S. 36, 68–69 (2004).

7. See, e.g., Thomas Y. Davies, *What Did the Framers Know, and When Did They Know*

regime both admits some evidence in criminal trials barred by the prior doctrine of *Ohio v. Roberts*⁸ and excludes some evidence that had been admissible under *Roberts*,⁹ scholars and practitioners have debated the likely effect of the new constitutional doctrine. Would it help defendants? Would it hurt them?

The *Crawford* Court held that only “testimonial” hearsay is barred by the Confrontation Clause—that is, that a criminal trial court can admit “nontestimonial” hearsay at will against defendants without violating the Sixth Amendment. Testimonial hearsay comprises “formal statement[s] to government officers,” such as affidavits, fruits of interrogations, and other utterances that declarants reasonably expected would be used for prosecutorial purposes.¹⁰

As a practical matter, the *Crawford* holding is limited by the continuing existence of the hearsay rule. Because Federal Rule of Evidence 802 and its state counterparts exclude most hearsay, the absence of a constitutional prohibition of nontestimonial out-of-court statements generally does not prejudice defendants. Indeed, *Crawford* supporters have mentioned the lack of practical prejudice when responding to *Crawford*’s critics. They argue in essence that even if critics are correct about the majority opinion’s tenuous grasp on legal

It? Fictional Originalism in Crawford v. Washington, 71 BROOK. L. REV. 105, 106–07 (2005) [hereinafter Davies, *Fictional Originalism*]; Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 494 (2007); Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”*: A Reply to Mr. Kry, 72 BROOK. L. REV. 557, 557 (2007) [hereinafter Davies, *Revisiting the Fictional Originalism*]; see also Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L.J. 917, 918–21 (2007); Richard D. Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303 (2007). Professor Friedman enjoys the distinction of having been for *Crawford* before the case was even presented. See, e.g., Richard D. Friedman, *Confrontation as a Hot Topic: The Virtues of Going Back to Square One*, 21 QUINNIPIAC L. REV. 1041, 1043 (2003) (“If a person makes a testimonial statement, that statement cannot be introduced against an accused unless the accused has had an adequate opportunity to cross-examine the person, face to face and under oath.”); see also *Crawford*, 541 U.S. at 61 (citing Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998)).

8. 448 U.S. 56, 65–66 (1980); see also Lynn McLain, “*I’m Going to Dinner with Frank*”: Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone Other Than the Speaker—and the Role of the Due Process Clause, 32 CARDOZO L. REV. 373, 376 (2010).

9. For example, after *Crawford*, the Court has held that certain business records may not be admitted against a criminal defendant absent cross-examination of the author (regardless of hearsay law that would allow admission of the records at a civil trial). See, e.g., *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (holding that without the testimony of the person who performed the test, the admission of a chemical drug test report violated the Confrontation Clause).

10. See *Crawford*, 541 U.S. at 51–53.

history, so what? Debate has mostly shifted to questions of what precisely should count as testimonial under the new regime.¹¹

This Article addresses “coventurer hearsay” in the context of the ongoing *Crawford* debate. Courts have recently begun admitting hearsay evidence pursuant to a revisionist interpretation of the coconspirator statement exception to the hearsay rule.¹² Under the new theory, a hearsay statement may be admitted as a coconspirator statement if made in furtherance of a “joint venture”—defined as pretty much any cooperative activity—even if the “conspiracy” is not illegal.¹³ Under the traditional reading, the exception covered only statements made in furtherance of illegal objectives. Coventurer hearsay would have been inadmissible at criminal trials under pre-*Crawford* Confrontation Clause jurisprudence because this new interpretation of an old hearsay exception cannot plausibly be described as “firmly rooted” in American law,¹⁴ nor does the hearsay included in the expanded exception bear “indicia of reliability,”¹⁵ as was required by the *Roberts* regime.¹⁶ Post-*Crawford*, however, the overwhelming majority of coventurer statements are not testimonial, meaning that current Confrontation Clause law does not prohibit their use against

11. See, e.g., Richard D. Friedman, *Is a Forensic Laboratory Report Identifying a Substance as a Narcotic “Testimonial”?*, PREVIEW U.S. SUP. CT. CAS. 76, 77–78 (2008) (previewing *Melendez-Diaz*); George M. Tsiatis, *Putting Melendez-Diaz on Ice: How Autopsy Reports Can Survive the Supreme Court’s Confrontation Clause Jurisprudence*, 85 ST. JOHN’S L. REV. 355, 357 (2011); see also Amanda Harris, Note, *Surpassing Sentencing: The Controversial Next Step in Confrontation Clause Jurisprudence*, 64 FLA. L. REV. 1447 (2012) (discussing *Crawford*’s implications for confrontation in capital sentencing).

12. The Federal version of the coconspirator exception is codified at Federal Rule of Evidence 801(d)(2)(E). For state equivalents, see, for example, *Foster v. State*, 778 So. 2d 906, 915 (Fla. 2000) (citing FLA. STAT. § 90.803(18)(e) (1997)); *People v. Goodman*, 408 N.E.2d 215, 216 (Ill. 1980); *Commonwealth v. Collado*, 690 N.E.2d 424, 429 (Mass. 1998). In keeping with historical usage, I prefer the term “exception”—rather than “exemption” or “exclusion”—when referring to the coconspirator hearsay exception. The word choice has no substantive significance. See generally Sam Stonefield, *Rule 801(d)’s Oxymoronic “Not Hearsay” Classification: The Untold Backstory and a Suggested Amendment*, 5 FED. CTS. L. REV. 1 (2011); see also *Bourjailly v. United States*, 483 U.S. 171 (1987) (discussing “co-conspirator exception”); *Crawford*, 541 U.S. at 56 (discussing “hearsay exceptions” such as the one that covers “statements in furtherance of a conspiracy”).

13. See *United States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011) (“Although the rule speaks of statements made in furtherance of a ‘conspiracy,’ we have recognized that admissibility under Rule 801(d)(2)(E) does not turn on the criminal nature of the endeavor. . . . Instead, a statement may be admissible under Rule 801(d)(2)(E) if it is made in furtherance of a lawful joint undertaking.”); *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006); see also Ben Trachtenberg, *Coconspirators, “Coventurers,” and the Exception Swallowing the Hearsay Rule*, 61 HASTINGS L. J. 581, 583 (2010).

14. See generally *Idaho v. Wright*, 497 U.S. 805, 813–14 (1990); *Ohio v. Roberts*, 448 U.S. 56 (1980).

15. *Roberts*, 448 U.S. at 65.

16. See *infra* Subsection II.B.2.

criminal defendants.¹⁷ Accordingly, coventurer hearsay provides an example of how defendants can suffer prejudice from the Court's reinterpretation of the Sixth Amendment.

In addition to being a kind of hearsay that would have been prohibited under *Roberts* and is now admissible under *Crawford*,¹⁸ coventurer hearsay is a kind of hearsay uncannily like the hearsay used to condemn Sir Walter Raleigh, the Englishman whose trial¹⁹ received so much attention from the *Crawford* Court. As others have observed,²⁰ the statements of the "Portuguese gentleman" admitted against Raleigh were nontestimonial. There is every reason to believe that the authors and ratifiers of the Sixth Amendment were aware of such testimony and intended the Confrontation Clause to prohibit its use against criminal defendants.²¹ The traditional coconspirator statement exception already rests on shaky ideological grounds, remaining part of evidence law largely on the ground of "necessity."²² The revisionist exception cannot appeal even to tradition, nor can its proponents argue that "coventurers" have brought their problems upon themselves by their bad conduct, a common justification for admission of coconspirator statements.²³

Coventurer hearsay demonstrates the shortcomings of *Crawford* and illustrates the need for continuing reconsideration of the new Confrontation Clause regime. Commentators have proposed various solutions to *Crawford*'s apparent problems, including invocation of the Due Process Clause to bar certain nontestimonial hearsay.²⁴ Using the

17. See *infra* Subsection II.B.1. Before *Crawford*, the Court's Confrontation Clause cases did not turn on whether a statement was testimonial.

18. At least in those jurisdictions adopting the revisionist understanding of the coconspirator exception. I continue to argue that the revisionist take is simply mistaken as a matter of evidence law.

19. The Trial of Sir Walter Raleigh, 2 HOWELL'S STATE TRIALS 1, 25 (1603).

20. See Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 318-19 (2005) (noting the significant nontestimonial hearsay implicating Raleigh).

21. See Michael L. Seigel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-Crawford World*, 34 FLA. ST. U. L. REV. 877, 882 (2007) (citing 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6345 n.507 (Supp. 2006) (setting forth a letter from George Mason)).

22. See *infra* Subsection II.A.1.

23. See *infra* Subsections II.A.2-3. A theory of just deserts undergirds the exemption of all "party admissions" from the Hearsay Rule. See FED. R. EVID. 801(d)(2) (defining as "not hearsay" categories of statements including a party's own statement, adoptive admissions, statements by spokespersons, statements by a party's agent or employee, and coconspirator statements). For example, the saying goes that a party will not be heard to complain of the admission of his own statement; in other words, he said it, so he can explain himself to the jury. Similarly, a theory akin to the tort doctrine of respondeat superior justifies the admission of employee statements against employers.

24. See, e.g., Colin Miller, *Avoiding a Confrontation?: How Courts Have Erred in Finding that Nontestimonial Hearsay is Beyond the Scope of the Bruton Doctrine*, 77 BROOK. L.

Holy Land Foundation case, this Article provides a concrete example of why such reconsideration is necessary to avoid injustice. The *Crawford* line of cases does not merely rest on inaccurate “law office history.” In at least some cases, the new interpretation of the Confrontation Clause will allow the admission of unreliable hearsay into criminal trials, undercutting the purpose of the Sixth Amendment and increasing the risk of wrongful convictions.

I. BAD HISTORY MAKES BAD CONSTITUTIONAL LAW

Scholars, along with dissenting Justices, have long complained of the “law office history” occasionally used to justify Supreme Court decisions construing much-disputed constitutional provisions.²⁵ For example, in *Bowers v. Hardwick*, the Court denied the existence of “a fundamental right to homosexuals to engage in acts of consensual sodomy” and grounded its decision on historical analysis.²⁶ Seventeen years later, the Court overruled *Bowers* in *Lawrence v. Texas*, acknowledging the mediocre historiography of *Bowers*.²⁷ “In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion [by Justice Byron White] and the concurring opinion by Chief Justice [Warren] Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”²⁸ In other words, the *Bowers* majority wanted to reach a certain result—that is, to uphold the Georgia sodomy statute before it—and it quoted historical sources to provide a plausible justification for the preordained decision.²⁹

Not all reversals of constitutional doctrine represent a reinterpretation of constitutional history, however. When interpreting the Equal Protection Clause of the Fourteenth Amendment in 1896, the

REV. 625, 633, 635 (2012).

25. See, e.g., Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 523–29 (1995); Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 405–07 (2003).

26. 478 U.S. 186, 192–95 (1986). The dissents by Justice Harry Blackmun and Justice John Paul Stevens challenge the majority’s historical interpretations. E.g., *id.* at 215 & n.5 (Stevens, J., dissenting) (explaining that contrary to the majority’s claim, ancient statutes cited in the majority opinion did not show longstanding disapproval of homosexual activity but rather disapproval of certain sexual acts, even among husband and wife).

27. 539 U.S. 558, 567–68 (2003) (“In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*.”).

28. *Id.* at 571.

29. Such judicial behavior is no surprise to students of legal realism. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935) (“[O]ne may suspect that a court would not consistently hide behind a barrage of transcendental nonsense if the grounds of its [due process] decisions were such as could be presented without shame to the public.”).

Court in *Plessy v. Ferguson* justified its result—upholding a Louisiana statute “providing for separate railway carriages for the white and colored races”—with historical interpretation.³⁰ Noting that courts had long upheld segregated schools and bans of interracial marriage, the Court rejected the idea that the “object of the amendment” included banning segregated trains.³¹ In 1954, the Court overruled *Plessy* in *Brown v. Board of Education*, holding that the *Plessy* Court lacked the psychological and other knowledge necessary to understand the pernicious effects of “separate but equal” schools.³² Despite the rejection of *Plessy*’s holding, the *Brown* Court did not dispute *Plessy*’s history. The *Plessy* Court was correct when it noted that segregated schools existed before the Fourteenth Amendment, existed immediately after the Amendment’s ratification, and endured in 1896.³³ *Brown* rejected the idea that this history was consistent with the language of the Fourteenth Amendment, not that it had occurred.

While *Crawford v. Washington* surely lacks the historic resonance of *Brown* or *Lawrence*, those landmark cases can help commentators situate *Crawford* among other instances of the Supreme Court’s reversal of constitutional doctrine. When the Supreme Court overrules a prior decision that construed a constitutional provision, it may explain its decision with an appeal to justice, as was seen in *Brown*. Irrespective of decades of segregation following the ratification of the Fourteenth Amendment, the Court held that the rule of *Plessy* could stand no more.

30. 163 U.S. 537, 540, 544 (1896) (“The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.”).

31. *Id.* at 548–49.

32. 347 U.S. 483, 494–95 (1954) (“‘Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.’ Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”) (citations omitted); see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”).

33. It should be noted, however, that even when *Plessy* was decided, there were those who saw the decision as a retreat from a prior understanding of the Fourteenth Amendment, one that prohibited racial segregation. See, e.g., *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting); *Strauder v. West Virginia*, 100 U.S. 303, 306–08 (1879). Accordingly, *Plessy* can fairly be described as having support in neither history nor justice.

In *Lawrence*, by contrast, the Court attacked the *Bowers* precedent on two fronts: one of history and one of justice. The *Lawrence* majority rejected the *Bowers* Court's appeal to history, as we have seen. It also rejected the *Bowers* result as unjust: "Its continuance as precedent demeans the lives of homosexual persons."³⁴

Justice Antonin Scalia's majority opinion in *Crawford* attempts a similar two-front attack on the *Ohio v. Roberts* Court's Confrontation Clause interpretation. *Crawford* rejects the historical interpretation in *Roberts* as not "faithful to the original meaning of the Confrontation Clause,"³⁵ and also chides the discarded precedent as "a fundamental failure on [the Court's] part to interpret the Constitution in a way that secures its intended constraint on judicial discretion."³⁶ The remainder of this Part argues that the historical analysis in *Crawford* is not accurate, thereby undermining the first prong of the anti-*Roberts* attack. The next Part addresses the *Crawford* majority's appeal to justice.

A. Rebutting Crawford's "Law Office History"

The *Crawford* majority faced immediate criticism of its historical analysis. Indeed, Chief Justice Rehnquist wrote a separate concurrence to question reasoning he deemed not "sufficiently persuasive . . . to overrule long-established precedent."³⁷ Scholarly opprobrium promptly followed in Rehnquist's footsteps, providing further evidence of the majority's error.³⁸ For example, Professor Randolph Jonakait examined the 1828 *American Dictionary* by Noah Webster from which the *Crawford* majority gleaned its original understanding of the word "witness."³⁹ The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him," and Justice Scalia found in *Webster's* a definition of *witness* that supported his testimonial theory of the Confrontation Clause.⁴⁰ That definition concerned those who "bear

34. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

35. *Crawford v. Washington*, 541 U.S. 36, 60 (2004) ("Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause.").

36. *Id.* at 67.

37. *Id.* at 69 (Rehnquist, C.J., concurring) ("The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine.").

38. See generally GEORGE FISHER, EVIDENCE 587–93 (2d ed. 2008) (reviewing scholarly responses to the *Crawford* Court's "Contested Originalism").

39. Randolph N. Jonakait, "Witnesses" in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 157 (2006); see also Daniel Shaviro, *The Confrontation Clause Today in Light of its Common Law Background*, 26 VAL. U. L. REV. 337, 337 (1991).

40. *Crawford*, 541 U.S. at 51 ("It applies to 'witnesses' against the accused—in other

testimony,” which might support the conclusion that only testimonial statements are covered by a provision concerning witnesses. In addition to that definition, however, Professor Jonakait discovered another potentially relevant definition: “A person who knows or sees any thing; one personally present; as, he was *witness*; he was an *eye-witness*.”⁴¹ Accordingly, it is far from obvious that “witness” in the Confrontation Clause refers only to those who give testimony, and accordingly far from obvious that all nontestimonial hearsay resides beyond the scope of the Sixth Amendment.

In addition to plumbing the depths of ancient dictionaries, scholars have revealed more substantive errors in the *Crawford* opinion. First, hearsay law remained largely unsettled at the time of ratification, making it difficult to believe that the authors and ratifiers of the Sixth Amendment gave serious thought to the various classes of hearsay identified in modern blackletter evidence law.⁴² As Professor Thomas Davies wrote, lawyers in 1791 practiced in courts far less hospitable to informal hearsay than do modern practitioners.⁴³ Much of the nontestimonial hearsay now deemed outside the scope of the Sixth Amendment was certainly inadmissible at ratification-era criminal trials.⁴⁴ In addition, certain testimonial hearsay (such as witness statements gathered by justices of the peace pursuant to Marian statutes) was admissible at ratification-era criminal trials in England and America, even though such statements fall within the definition of testimonial hearsay set forth in *Crawford*.⁴⁵ The leading defender of *Crawford*’s historical analysis, Robert Kry, cannot support the Court’s claim that ratification-era criminal courts allowed the admission of nontestimonial hearsay against defendants—or that such hearsay would

words, those who bear testimony. ‘Testimony,’ in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’”) (citations omitted) (internal quotations omitted).

41. See Jonakait, *supra* note 39, at 159; see also *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) (addressing other *Webster*’s definition of *witness* in pre-*Crawford* dissent).

42. See Davies, *Fictional Originalism*, *supra* note 7, at 106–07. But see Kry, *supra* note 7, at 495–97. The unsettled nature of hearsay law in 1791 raises a concern familiar to critics of “originalist” analysis, which is that one cannot discern what the Framers thought about *X* when *X* was largely unknown to the Framers, whoever they were. Did Madison mean for the First Amendment Free Speech Clause to apply to the Internet? Was “chemical castration” a form of “cruel and unusual punishment” to those voting for ratification of the Eighth Amendment? (To be fair, originalists have put forth answers to questions like these. A broad assessment of the project of “original meaning” and “original understanding” is well beyond the scope of this Article, which will confine its analysis of the *Crawford* Court’s originalism to whether it got the history right in the first place.)

43. See Davies, *Fictional Originalism*, *supra* note 7, at 119.

44. *Id.* at 107, 119; Davies, *Revisiting the Fictional Originalism*, *supra* note 7, at 561–62.

45. Davies, *Fictional Originalism*, *supra* note 7, at 108.

not have concerned the authors and ratifiers of the Confrontation Clause.⁴⁶

In short, the concurring opinion of Chief Justice Rehnquist, although light on historical analysis, has been vindicated.⁴⁷ As Chief Justice Rehnquist correctly noted, the hearsay rejected by the *Crawford* majority as offensive to the Sixth Amendment—Sylvia Crawford’s unsworn statements to police—could easily have been stricken under the *Roberts* regime.⁴⁸ After an intermediate appellate court vacated Michael Crawford’s conviction on the ground that Sylvia’s statement was admitted in violation of the Confrontation Clause, the Supreme Court of Washington reinstated the conviction, “unanimously concluding that, although Sylvia’s statement did not fall under a firmly rooted hearsay exception, it bore guarantees of trustworthiness.”⁴⁹ Unless the state supreme court was correct—that is, unless the intermediate appellate court was wrong to vacate the conviction pursuant to the U.S. Supreme Court’s teaching in *Roberts* and its progeny—there was no need in *Crawford* to devise a new interpretation of the Sixth Amendment.⁵⁰

Further, Chief Justice Rehnquist was not a historian and was not pretending with his opinion to produce a scholarly treatise on the Confrontation Clause. Nonetheless, despite Chief Justice Rehnquist’s belief that no sweeping review of confrontation law was required by the case before the Court, his concurrence certainly included sufficient discussion of the relevant history to raise serious questions about the majority’s analysis.⁵¹ Although reasonable persons may disagree about

46. See Kry, *supra* note 7, at 494; see also Thomas Y. Davies, *Not “the Framers’ Design”*: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford–Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & POL’Y 349, 354 (2007).

47. I mean no criticism of Chief Justice Rehnquist in the characterization of his concurrence as light on historical analysis. Indeed, this Article might fairly be so described because I have sufficient respect for the historical analyses cited herein that I see no need to recreate them.

48. See *Crawford v. Washington*, 541 U.S. 36, 38 (“Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia’s tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination.”); see also *id.* at 69, 76 (Rehnquist, C.J., concurring) (noting that the decision “to overrule long-established precedent . . . [was] by no means necessary to decide the present case”).

49. *Id.* at 41.

50. As the concurrence put it, “A citation to *Idaho v. Wright*, [497 U.S. 805, 820–24 (1990)], would suffice.” *Id.* at 76.

51. See *id.* at 70 (citing *King v. Woodcock*, 168 Eng. Rep. 352, 353 (1789), for its proposition “that a statement taken by a justice of the peace may not be admitted into evidence unless taken under oath” and accordingly demonstrating that testimonial hearsay was sometimes admissible).

whether the “indicia of reliability” and “firmly rooted” rubrics of *Ohio v. Roberts* were working fine (albeit annoying to deal with) or were instead a jumble of inconsistent decisions causing needless hassles in the trial and appellate courts (not to mention occasional injustices), the historical arguments in favor of scrapping the *Roberts* regime on the basis of originalism cannot withstand scrutiny.

In particular, scholars have noted the confused treatment by the *Crawford* majority of the trial of Sir Walter Raleigh.⁵² Raleigh’s trial received substantial attention from the majority, which invoked Raleigh’s name nineteen times. Describing the trial as one of the “most notorious instances of civil-law examination,” the Court reported that one of the “trial judges later lamented that ‘the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.’”⁵³ The Court described the injustice as follows: “Lord Cobham, Raleigh’s alleged accomplice, had implicated him in an examination before the Privy Council and in a letter. At Raleigh’s trial, these were read to the jury.”⁵⁴ Few would dispute that the admission of Cobham’s testimonial statements caused great unfair prejudice to Raleigh, nor is there a clamor supporting admission of out-of-court statements such as these in modern America.

As others have observed, however, the Court’s intense attention on Raleigh somehow ignores the other infamous hearsay admitted against Raleigh, hearsay that falls outside the *Crawford* Court’s concept of *testimonial*. Professor Myrna Raeder reminds readers that “Cobham’s hearsay was not the only out-of-court statement introduced at Sir Walter Raleigh’s trial.”⁵⁵ She then asks, “Shouldn’t we be concerned about the statements of the pilot, Dyer, who repeated what a Portuguese gentleman had told him about the King never being crowned, because Raleigh and Cobham were going to cut his throat?”⁵⁶ The *Crawford* majority has no answer, at least not one grounded in history. It is possible, of course, for one to argue based on a close reading of the Sixth Amendment that statements like those of the Portuguese gentleman are not those of a “witness” “against” a criminal defendant and accordingly are not barred by the Confrontation Clause. *Crawford*, however, purports to issue a new interpretation of a constitutional provision that vindicates what the text has meant since 1791—thereby

52. See, e.g., Raeder, *supra* note 20, at 318–19; Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require That Roberts Had to Die*, 15 J.L. & POL’Y 685, 689 (2007).

53. *Crawford*, 541 U.S. at 44 (quoting 1 DAVID JARDINE, CRIMINAL TRIALS 487 (1832)).

54. *Id.*

55. Raeder, *supra* note 20, at 318; see *infra* notes 186–89 and accompanying text.

56. Raeder, *supra* note 20, at 318–19; see also The Trial of Sir Walter Raleigh, 2 HOWELL’S STATE TRIALS 1, 25 (1603); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100–01 (1972).

correcting two centuries of Supreme Court inattention—and the opinion’s historical analysis rests substantially on a single “infamous” trial well known to the Framers, who presumably wished to outlaw the trial’s procedures. It is odd indeed that the new definition of prohibited evidence would, if applied to Raleigh, have solved only about half of his infamous hearsay problem.

By omitting discussion of the ship pilot, Dyer, the *Crawford* majority opinion likely misunderstands the motivations of the authors and ratifiers of the Sixth Amendment. It is entirely believable that Raleigh’s trial was understood in colonial America as a terrible injustice that should not be repeated in the new United States. Accordingly, a new take on confrontation law that prohibited “Raleigh-style hearsay”—or otherwise analyzed the mistreatment of Raleigh and ensured that American defendants suffered no similar injustices—might make sense as an originalist project. *Crawford*’s new distinction between testimonial and nontestimonial hearsay, however, fails even as a clever thought experiment because the majority could not be bothered to confront the relevant history.⁵⁷

B. *The “So What?” Rejoinder*

Notwithstanding the robust historical criticism, scholarship has so far been light on examples of how the *Crawford* rule will admit out-of-court statements against criminal defendants that (1) would have been barred by *Roberts* and (2) violate the true meaning of the Sixth Amendment (as opposed to the testimonial hearsay meaning announced by the *Crawford* majority).⁵⁸ In other words, the question presented concerns the practical effect of the new Confrontation Clause regime: Just what actual problems will it cause? Real-life examples are difficult to find because the hearsay rule bars (as a matter of ordinary evidence law, not through the Constitution) a great deal of hearsay, regardless of what the Sixth Amendment says.

For example, imagine that Amy is in line at the bank and that Barry runs in and robs the bank. As it happens, Amy recognizes Barry as the childhood friend of Amy’s son, Charlie. That evening Amy calls Charlie and says: “Did you hear about the bank robbery downtown today? I was there, and I saw the robber. It was your friend, Barry, from

57. I do not dispute that the exclusion of testimonial hearsay might well be justified by either the language of the Confrontation Clause or by appeals to substantial justice, as Professor Friedman has powerfully argued. The appeal to justice is discussed in the next Part. I will note for now that even if one agrees that no testimonial hearsay should be admitted, it does not necessarily follow that all nontestimonial hearsay should fall outside the scope of the Confrontation Clause, much less that all such hearsay should be admissible.

58. “True meaning” here stands in for whatever a given commentator believes the Confrontation Clause should do, for whatever reason she believes it.

grade school. What a weird world.” At the subsequent bank robbery trial of Barry, Amy would probably be a great witness for the prosecution. If, however, Amy drops dead of a heart attack before trial, the prosecution might wish to call Charlie as a substitute, to testify about his conversation with Amy in the aftermath of the robbery. The statement would not be testimonial because Amy’s statement was not a solemn declaration intended to prove some fact; it was casual chatter.⁵⁹ Under *Crawford*, therefore, the Confrontation Clause would present no obstacle to Charlie’s testimony. But such testimony would, of course, be hearsay.⁶⁰ Charlie would be testifying about Amy’s out-of-court statement, and the statement would be offered as proof of the matter asserted—that Barry robbed the bank. Absent some highly-unusual hearsay exception operating in the jurisdiction in which this hypothetical robbery occurred, Charlie’s testimony would be excluded by the hearsay rule, regardless of what the United States Supreme Court does to Confrontation Clause jurisprudence.

The divergent results of the hearsay analysis and Sixth Amendment analysis should come as no surprise. Everyone agrees that the hearsay rule and the Sixth Amendment do not cover identical universes of statements, and this has been settled blackletter evidence law since well before *Crawford*.⁶¹ An utterance can be barred by neither the hearsay rule nor the Confrontation Clause,⁶² barred by both of them,⁶³ barred only by the Confrontation Clause,⁶⁴ or barred only by the hearsay rule.⁶⁵ Indeed, the very purpose of the *Roberts* “indicia of reliability” and “firmly rooted” tests was to ensure that the Confrontation Clause prevented the admission of certain evidence at criminal trials,

59. See *Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

60. See FED. R. EVID. 801(c).

61. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 131–34 & nn.193–97 (1998); KENNETH S. BROUN, *EVIDENCE: CASES AND MATERIALS* 801 (2002); PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* 319 (1999); see generally FISHER, *supra* note 38, at 567–68.

62. Such statements are admissible at criminal and civil trials, assuming they are otherwise proper evidence.

63. Such statements are inadmissible at civil and criminal trials.

64. Such statements are admissible at civil trials, are admissible at criminal trials against the prosecution, and are inadmissible against criminal defendants. If we assume that the Supreme Court of Washington correctly interpreted the state’s own hearsay law when it approved the admission of Sylvia Crawford’s statements at her husband’s criminal trial, these statements fall into this category. In other words, the statements could properly be used against Michael Crawford in Washington at a civil trial, at which the Confrontation Clause does not apply.

65. Such statements are inadmissible at civil and criminal trials. Charlie’s testimony about his mother’s statements falls into this category.

irrespective of the rules of evidence.⁶⁶ If a newer hearsay exception (not firmly rooted in American law) admitted evidence of questionable probative value (lacking sufficient indicia of reliability), legislatures and courts were nonetheless free to adopt the hearsay exception and admit the evidence for use at civil trials and for defendants' use at criminal trials. But under the *Roberts* interpretation of the Confrontation Clause, such evidence could not be offered against defendants at criminal trials. The general principle that the Confrontation Clause and the hearsay rule cover different sets of statements remains the same under *Crawford*. Only the identity of the statements covered by the Confrontation Clause has changed.

Accordingly, someone who might be outraged were Charlie to testify against Barry at a post-*Crawford* criminal trial will not actually have occasion to become upset, for the hearsay rule will preclude any need to consider a constitutional bar of Charlie's testimony. If a commentator uses this example to illustrate the problem with *Crawford*—that is, to argue that *Crawford* must be wrong because it would allow Charlie to testify against Barry in a way that seems unjust and also seems contrary to the spirit of the Confrontation Clause—the *Crawford* defense team has a ready response: “So what? Yes, it might be sad if, in the aftermath of *Crawford*, the terrible injustices of your paranoid fantasies were plaguing courtrooms across this great land. But in reality, the good sense embodied in the rules of evidence prevents the wrongs you fear.”

In addition to largely theoretical arguments about terrible evidence that *Crawford* would not bar from criminal trials,⁶⁷ *Crawford* skeptics present practical complaints about useful evidence—formerly admissible under *Roberts*—that prosecutors now cannot use.⁶⁸ Particular attention has been devoted to domestic violence cases, both by scholars and by Justices dissenting in post-*Crawford* cases.⁶⁹ These complaints suggest that *Crawford*'s scope is too broad, that it is overinclusive in defining hearsay properly barred by the Confrontation

66. See *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004) (“[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon ‘the law of Evidence for the time being.’”) (quoting JOHN HENRY WIGMORE, EVIDENCE § 1397, at 101 (2d ed. 1923)); *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (holding that admission of hearsay allowed under state evidence law violated Confrontation Clause); *United States v. Inadi*, 475 U.S. 387, 393, n.5 (1986).

67. “What if a state were to abolish the hearsay rule entirely? What then?”

68. See, e.g., Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of Regina v. Bedingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 118 (2010).

69. E.g., *id.* at 147; *Giles v. California*, 554 U.S. 353, 379–80 (2008) (Souter, J., dissenting); *id.* at 380–86 (Breyer, J., dissenting).

Clause. In response, the *Crawford* proponents enjoy the opportunity to flaunt their fidelity to principle. Writing for the majority in *Giles v. California*, Justice Scalia appeared shocked (shocked!) that his colleagues would consider watering down a constitutional command in the service of convenience:

[W]e are puzzled by the dissent's decision to devote its peroration to domestic-abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.⁷⁰

Such Sixth Amendment flag waving may ring a bit hollow when one reviews the Supreme Court's many compromises on matters of criminal procedure.⁷¹ No matter. The overinclusivity position is raised only to demonstrate that not all *Crawford* critics argue on behalf of criminal defendants.

II. BAD LAW IN BOOKS AND BAD LAW IN ACTION

The remainder of this Article will attend to hearsay evidence that (1) *Roberts* likely would have excluded from criminal trials, (2) *Crawford* very likely will not exclude, and (3) certainly ought to be excluded. This Part presents a real-life example of hearsay evidence that likely would have been barred under *Roberts* and has been admitted under *Crawford*—coventurer hearsay. After examining a new revisionist take on the coconspirator statement exception to the hearsay rule, this Part explains how Confrontation Clause jurisprudence under *Roberts* likely would have prevented the introduction of coventurer hearsay against criminal defendants, whereas *Crawford* and its progeny strongly suggest that the Supreme Court now perceives no constitutional bar to the

70. 554 U.S. at 376.

71. Consider, for example, the many exceptions to the warrant requirement of the Fourth Amendment, *see, e.g.*, *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring); the principle that undercover agents are not conducting “interrogations” for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), *see Illinois v. Perkins*, 496 U.S. 292, 295–98 (1990); the inapplicability of *Miranda* at ordinary traffic stops, *see Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984); and countless other doctrines.

admission of such evidence. Using a recent terrorism financing case, this Part then illustrates how unreliable, constitutionally-suspect evidence has begun infecting criminal trials of tremendous importance.

A. “Coventurer Hearsay”—An Exception Swallowing the Rule

Pursuant to the coconspirator statement exception to the hearsay rule, a statement is admissible as evidence against a party—even if the statement otherwise satisfies the definition of hearsay⁷²—if it “was made by the party’s coconspirator during and in furtherance of the conspiracy.”⁷³ Variations of this formulation have appeared in evidence treatises and cases for centuries.⁷⁴ Case report after case report tells of efforts to admit the hearsay statement of a declarant against a party, with courts debating one or more of the following questions: (1) were the declarant and the party in a conspiracy when the statement was made, and (2) if so, was the statement made in furtherance of the conspiracy?⁷⁵ The opinions do not, however, spend much time considering whether the word “conspiracy” refers only to unlawful joint activity, or instead refers broadly to all joint enterprises, whether legal or illegal. This oversight—the question seems simply not to have been raised, perhaps because the word “conspiracy” so clearly implies illegality to readers learned in the law—has opened the door to recent mischief. Seizing upon seemingly helpful strands of dicta and confused readings of both legislative history and Supreme Court precedent, prosecutors have been arguing that the coconspirator statement exception to the hearsay rule extends well beyond the common meaning of *conspiracy* and allows the admission of statements made in furtherance of perfectly lawful, even laudable, ventures.⁷⁶ Federal

72. See FED. R. EVID. 801(c) (“‘Hearsay’ means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”).

73. *Id.* 801(d)(2)(E).

74. *E.g.*, 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE, AND DIGEST OF PROOFS, IN CIVIL AND CRIMINAL PROCEEDINGS 402 (P.H. Nicklin & T. Johnson eds., 3d American ed. 1830).

75. See, e.g., *United States v. Rodriguez-Velez*, 597 F.3d 32, 39–40 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 154 (U.S. 2010). The requirements are sometimes stated as the “pendency requirement” (the statement must be made during the pendency of the conspiracy) and the “in furtherance requirement.” Occasionally a source states that three requirements must be satisfied: (1) existence of the conspiracy, (2) pendency, and (3) in furtherance. Because “pendency” and “in furtherance” imply the existence of a conspiracy, the analysis and results are identical under either formulation.

76. See, e.g., Letter Reply Brief of United States at 1, *United States v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. 2008) (Crim. No. 06-406) (“The defendant’s main contention is that the conspiracy or joint venture shown for purposes of Federal Rule of Evidence 801(d)(2)(E) must have as its object an unlawful purpose. The law, however, is to the contrary.”) (internal quotation marks omitted).

courts, instead of rejecting this dangerous deformation of evidence law, have embraced it.⁷⁷

The scope of the revisionist exception is even broader than the term “coventurer hearsay” might imply. If the new rule applied only to true “joint venturers” as those words are used in agency and partnership law or other substantive law governing organizations, the revisionist version of the coconspirator exception would be largely superfluous. Evidence law already includes a hearsay exception for the statements of a party’s agent or employee concerning matters related to the agency or employment relationship.⁷⁸ That rule has been applied to admit the statements of business partners against one another, so long as the statements were made in furtherance of the partnership.⁷⁹ The joint venturer exception (or coventurer exception), however, has been held to cover statements in furtherance of “common goals” or “plans” lacking anything close to the formality of a legal partnership.⁸⁰

1. Why Courts Admit Coconspirator Statements in the First Place

To understand the harmful nature of the revisionist take on the coconspirator statement exception, it helps to review the justification for the traditional version of the exception. Four primary arguments are advanced to justify the admission of coconspirator hearsay: (1) an analogy to agency theory, (2) an analogy to “verbal acts” or *res gestae*, (3) an assertion that coconspirator hearsay is reliable in a way similar to statements within other hearsay exceptions, and (4) an appeal to necessity, claiming that without such evidence many conspirators would go unpunished.⁸¹ The first three arguments withstand little scrutiny, leaving the appeal to necessity as the primary justification for the traditional coconspirator exception. Accordingly, traditional evidence law tolerates the admission of not-especially-reliable hearsay because

77. See *supra* note 13. But see *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012). In *Smith*, the Seventh Circuit cited approvingly to lawful “joint venture” cases, see *id.* at 904, but then held that Rule 801(d)(2)(E) does not apply to the challenged statements because the proponent of the evidence could not prove that the hearsay declarant and the party against whom the hearsay was offered “shared a common *unlawful* motive.” *Id.* at 905 (emphasis added).

78. See FED. R. EVID. 801(d)(2)(D).

79. See, e.g., *United States v. Kelley*, 305 Fed. Appx. 705, 707–08 (2d Cir. 2009); *United States v. Saks*, 964 F.2d 1514, 1523–24 (5th Cir. 1992).

80. See *infra* notes 125–28 and accompanying text; see also Government’s Trial Memorandum at 15–16, *United States v. Bruno* (N.D.N.Y. 2009) (No. 09-CR-029) (arguing that because the criminal defendant had entered lawful contracts with various entities, “documents of those entities, as well as oral statements made by their representatives, are admissible pursuant to Fed. R. Evid. 801(d)(2)(E) as co-conspirator statements”).

81. See, e.g., *United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997) (“The most that can be said is that the co-conspirator exception to hearsay is of long standing and makes a difficult-to-detect crime easier to prove.”).

that evidence helps lock up criminals. Further, the party against whom such evidence is used can be said to have brought his fate upon himself by joining the conspiracy in the first place.⁸²

Consider the first justification for the exception, though: the agency analogy. In the agency analogy, the argument goes that because each conspirator is the agent of every other member of the conspiracy, the words of one may properly be used against all.⁸³ The biggest problem with the analogy is that it misstates agency law. One might sensibly argue that a “corner boy” slinging illegal drugs is the “agent” of the drug kingpin for whom he works, but no one who understands agency law would argue that the kingpin is concurrently the agent of the low-level seller.⁸⁴ Yet the agency analogy requires such a belief. Otherwise, it cannot explain why the traditional coconspirator statement exception goes in two directions, allowing the statements of servants to be used against their masters and those of masters to be used against their servants.⁸⁵ In addition, the analogy ignores the existence of an independent hearsay exception covering the statements of agents and employees, allowing such statements to be used against principals and employers.⁸⁶ Indeed, the drafters of the Federal Rules of Evidence explicitly acknowledged that the agency analogy is “at best a fiction.”⁸⁷

The verbal acts (or *res gestae*) analogy, the second justification, fares little better. The theory goes that because actions taken in furtherance of a conspiracy are criminal in nature, coconspirator statements are not hearsay at all but instead are verbal acts one might analogize to the words: “By the authority vested in me, you are hereby married,” or “I accept your offer.”⁸⁸ The acceptance of an offer is not offered for its truth. To decide a question of contract formation, the jury needs to know only that someone *said* she accepted the offer, not what she really believed.

82. *See infra* Subsection II.A.2.

83. *See, e.g.*, *Van Riper v. United States*, 13 F.2d 961, 967 (2d Cir. 1926).

84. The best argument for this theory is that the corner boy and kingpin have joined a “partnership in crime,” making each responsible for the words and deeds of the other. *See id.* This too, however, is a weak analogy because coconspirators are not really “partners” as that term is understood in partnership law. The state punishes conspirators for the substantive crimes of their fellow criminals, *see Pinkerton v. United States*, 328 U.S. 640 (1964), not because they are truly partners but instead because they should have known better than to join a conspiracy.

85. *See United States v. Hunt*, 272 F.3d 488, 495 (7th Cir. 2001) (affirming defendant’s conviction where defendant was convicted of conspiracy after helping to count and launder money, based on out-of-court coconspirator statements by the “principal” in the “major cocaine trafficking conspiracy”); 4 STEVEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 801.02(6)(f)–(g) (8th ed. 2002).

86. *See* FED. R. EVID. 801(d)(2)(D).

87. *Id.* 801 (advisory committee note).

88. *See generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975) (examining speech acts).

Similarly, to return to conspiracies, if a person says, "Yes, I will help you murder the old man and steal his money," the statement itself could be proof of the element of agreement in a conspiracy prosecution. No subsequent murder is necessary for a conviction. Because, however, a statement offered into evidence as proof of verbal acts is not offered "to prove the truth of the matter asserted in the statement," verbal-act evidence is not hearsay at all.⁸⁹ And if an out-of-court statement does not fall within the definition of hearsay, then no hearsay exception is necessary to use it as evidence. The *res gestae* theory is therefore internally contradictory. If coconspirator statements are *res gestae* and accordingly are not hearsay, why then did the authors of the Federal Rules of Evidence include a special hearsay exception to allow coconspirator statements' admission at trial, and why do centuries of cases and commentaries discuss the contours of the exception? The answer, of course, is that while the criminality of certain ventures inspires a strong desire to see statements made in furtherance of those ventures admitted despite the hearsay rule, even the most powerful desire cannot transform a statement like "I got these drugs from Marlo Stanfield, and he'll kill anyone who tries to steal them" into a verbal act.

Likewise, under the third justification, the strong desire to see coconspirator hearsay statements used at trial exists in tension with the desire of evidence mavens to believe that evidence law separates the admissible wheat from the excluded chaff. Proponents of the traditional coconspirator hearsay exception, therefore, have occasionally opined that statements in furtherance of conspiracies bear hallmarks of reliability similar to other forms of admissible hearsay, such as statements made to obtain medical treatment.⁹⁰ The reality, however, is that coconspirator hearsay statements are admissible despite their unreliability, not because of any special probative value. Coconspirator hearsay must be viewed with at least some suspicion because, by definition, it is uttered by criminals. As Joseph Levie observed, "It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law."⁹¹ In addition, the secretive nature of conspiracies can create situations in which the extrajudicial declarant whose statement is admitted at trial had no personal knowledge of the defendant or her activities.

89. See FED. R. EVID. 801(c) (defining "hearsay").

90. See, e.g., 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1077 (Chadbourne rev. ed. 1974) ("[A]s a matter of probative value, the admissions of a person having precisely the same interests at stake will in general be likely to be equally worthy of consideration."); see also FED. R. EVID. 803(4) (medical diagnosis exception).

91. Joseph H. Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159, 1166 (1954).

Why then is such evidence admitted? Because of necessity. As the United States Court of Appeals for the Seventh Circuit observed, “It has also been candidly proposed by commentators, and implicitly acknowledged by the Advisory Committee for the Federal Rules of Evidence, that the exception is largely a result of necessity, since it is most often invoked in conspiracy cases in which the proof would otherwise be very difficult and the evidence largely circumstantial.”⁹² Criminal conspirators are not idiots; at least many of them are not. They realize that government agents desire to thwart their schemes, and they plan accordingly.⁹³ Yet defeating their aims ranks among the most important government tasks—one of the few activities acknowledged by nearly all political philosophies as a proper function of the state. In a free society, captured conspirators must be convicted before the state may incarcerate or otherwise incapacitate them, a requirement complicated by the secretive nature of much crime. So evidence law strikes a compromise. If a statement is made in furtherance of a conspiracy, one conspirator’s words may be used as evidence against all the others, despite the lack of inherent reliability. Such evidence is needed to fight crime. Besides, the evidence is used only against conspirators, a class of persons who suffer far worse insults at the hands of the law.

2. Why Courts Should Not Expand the Exception to Include Lawful Ventures

Because the coconspirator hearsay exception admits unreliable evidence—the Advisory Committee Note states that no “guarantee of trustworthiness” is required for the admission of such evidence—courts should hesitate to expand the scope of the exception absent a compelling reason. No such reason has been offered. Indeed, the primary justifications for the traditional coconspirator exception, (1) the need to uncover and prosecute serious offenses committed by shadowy groups in secret and (2) the idea that a coconspirator has brought his evidentiary problems upon himself by joining the conspiracy and accordingly deserves little sympathy when hanged by the words of his confederate, withstand no scrutiny when applied to lawful joint ventures. After all, the state is not traditionally in the business of destroying lawful projects undertaken by cooperative citizens, and

92. *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979).

93. For example, consider the initial meeting of Baltimore’s “New Day Co-Op.” Upon the conclusion of the meeting, chairman Stringer Bell angrily destroyed meeting minutes, chastising their author for taking notes of a criminal conspiracy in accordance with Robert’s Rules of Order. *The Wire: Straight and True* (HBO television broadcast Oct. 17, 2004). See also generally, e.g., LETIZIA PAOLI, *MAFIA BROTHERHOODS: ORGANIZED CRIME, ITALIAN STYLE* 101-40 (2008).

participation in such efforts is not the sort of activity that causes someone to “deserve” the admission of unreliable evidence against him at trial.

A recent federal civil trial in Washington, D.C., displayed the perils of the revisionist interpretation of the exception. In an unrelated prior case, the D.C. Circuit rejected the traditional rule “that Rule 801(d)(2)(E) of the Federal Rules of Evidence requires, before admission of co-conspirators’ out-of-court statements, a showing of an unlawful conspiracy, not merely action in concert toward a common goal.”⁹⁴ The trial concerned whether Company A and Company B—hired jointly to perform American-funded construction projects in Egypt—had engaged in a broad “bid-rigging” conspiracy.⁹⁵ Plaintiff, a former employee of Company A (who stood to win money if the court found fraud), sought to prove that executives at both companies knew of the bid-rigging scheme.⁹⁶ Specifically, Plaintiff testified about his own conversation with Supervisor, his immediate boss. When Plaintiff informed Supervisor about the scheme, Supervisor replied to the effect of, “I’ll tell the CEO.” The statement was offered to prove the truth of the matter asserted, that is, to prove that Supervisor indeed informed Company A’s CEO, meaning the CEO knew of the bid rigging. If it could be proven that Company A’s CEO knew about the scheme, it followed that Company B’s executives must have known, too. After all, the two companies submitted a joint bid for the project, and—as with tango—it takes two to rig bids.

Company B objected to the evidence as hearsay. Although the evidence might well have been admissible against Company A—because Supervisor was employed by Company A when he said, “I’ll tell the CEO,”⁹⁷—Company B is not responsible for Supervisor’s statements under the principal-agent exception to the hearsay rule. (Similarly, Company B would not generally be liable in tort for the actions of Company A employees under the respondeat superior doctrine.) Plaintiff responded that Supervisor’s statement was admissible under the coconspirator statement exception because it was

94. *See* *United States v. Gewin*, 471 F.3d 197, 200 (D.C. Cir. 2006).

95. *See* *Miller v. Holzmann*, 563 F. Supp. 2d 54, 73–75 (D.D.C. 2008). Because the names of the companies and their employees—including two corporations and one natural person, all named “Jones”—can cause confusion for readers, the discussion that follows uses pseudonyms. Other details not relevant to the evidence issue have also been changed to improve clarity.

96. Technically, Miller was a *qui tam* “relator” alleging fraud against the United States, not a plaintiff alleging his own injuries. *See* BLACK’S LAW DICTIONARY 1368 (9th ed. 2009) (defining *qui tam* action as “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive”). The difference is not material to the evidence question presented.

97. *See* FED. R. EVID. 801(d)(2)(D).

made in furtherance of the sewer-fixing joint venture between Company A and Company B. In other words, Plaintiff argued that any statement uttered by anyone working on the sewer project could be offered in evidence against any other such person, regardless of who employed the declarant or what the declarant's role was in the venture.⁹⁸

Neither Plaintiff nor Supervisor was in on the fraud; their only joint venture was the construction contract. And neither Plaintiff nor Supervisor worked for Company B, the party against whom the evidence was offered. The trial judge, finding that Supervisor's statement was in furtherance of "the joint venture [which] would [benefit] from uncovering any illegality among its activities," admitted the statements against Company B pursuant to Rule 801(d)(2)(E).⁹⁹ As a result, the jury heard out-of-court statements normally barred by the hearsay rule despite the lack of any special guarantees of trustworthiness. The justification was that the party the evidence was admitted against had joined a conspiracy to fix sewers in Cairo. Were the lawful joint venture theory truly based on agency law, the judge would have been right to admit the statements against the joint venture itself, that is, against the Company A–Company B entity that contracted to fix the sewers. Such an entity could fairly be held responsible for actions taken by employees working on the project, regardless of what company paid salaries to which employees. Accordingly, the principal–agent hearsay exception might sensibly apply to statements by such persons, including Plaintiff and Supervisor. But just as two employees of the same corporation are not normally considered agents of one another under the substantive law of agency, one cannot credibly argue that Plaintiff and Supervisor were agents of Company B.¹⁰⁰

To return from civil cases to the criminal law, imagine a corporate executive charged with misleading investors in violation of federal securities law.¹⁰¹ On a quarterly earnings call, the defendant spoke to

98. As we have seen before, this theory does not accord with the definition of *joint venture* as those words are commonly understood. See *supra* notes 78–80 and accompanying text. The joint venture to fix the Cairo sewers was an undertaking of Company A and Company B. Plaintiff and Supervisor, who happened to work for one of the companies participating in the venture, were not themselves members of the joint venture.

99. See *Miller*, 563 F. Supp. 2d at 86.

100. Another example: Publisher hires Scholar to write an evidence treatise. Are Publisher and Scholar now joint venturers responsible for one another's statements? Surely Publisher is not the "agent" of Scholar, and Scholar is not liable in tort for the acts or omissions of Publisher "in furtherance" of the treatise publication project (for example, if Publisher orders paper and then refuses to pay for it, the paper seller cannot sue Scholar). Their project is, however, at least as formal as other "ventures" deemed to have triggered the new version of Rule 801(d)(2)(E). See *infra* notes 125–128 and accompanying text.

101. This example is based loosely on *United States v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. 2008).

analysts about the state of his employer. The stock price remained high, and the defendant enjoyed a sizeable bonus based on the price of the stock on the day after the call. Some time later, however, bad news about the company leaked, and the stock tumbled, costing investors dearly.¹⁰² The indictment alleges that the defendant knowingly lied on the call to preserve his bonus. The defendant states that he knew nothing at the time about any impending problems; he was as surprised as anyone by the bad news.

Further, he contends that the bad news may not even have arisen by the time of the earnings call. To prove that the executive's statements were false when made, the prosecution offers e-mail messages exchanged by the company's low-level employees a few days before the earnings call. The messages show that the bad news—which eventually became widely known and caused the stock price to plunge—occurred before the call.¹⁰³ The messages would be offered as substantive evidence of the truth of the matter asserted. If the defense objects to the documents as hearsay, arguing that the prosecution should call the authors of the messages as witnesses subject to cross-examination at trial, the prosecution could respond that the messages are statements in furtherance of a lawful joint venture: the project of earning money for the company that employed the e-mail authors and the defendant alike.¹⁰⁴ Unlike in a traditional coconspirator hearsay case, the declarants here are not alleged to have done anything illegal, much less to have participated in an illegal scheme with the defendant. The “conspiracy” here is the daily workings of a legitimate corporate enterprise. And the action of the defendant that subjects him to out-of-court statements without the benefit of cross-examination—messages no more or less reliable than the vast universe of statements barred by the hearsay rule—is getting an honest job.¹⁰⁵

102. For example, sales data reveals that the company's new product is selling poorly, and a major customer has decided to buy no further goods from the company.

103. For example, one salesperson might have written to another, “The customers hate our new product; nothing is selling. Our biggest, most loyal customer said today it will take its business elsewhere.”

104. *See supra* note 76 (arguing that out-of-court statements of corporate employee made in furtherance of employer's aims are properly admissible under Rule 801(d)(2)(E) against every fellow employee of the corporation).

105. Depending on the precise relationship among the defendant executive and the declarant employees, the disputed statements might be admissible under the principal-agent exception. *See Lippay v. Christos*, 996 F.2d 1490, 1498 (3d Cir. 1993); *United States v. Young*, 736 F.2d 565, 567 (10th Cir. 1983) (per curiam) (“[W]hen such a statement is offered against another corporate employee, instead of the corporation, proper admission under Rule 801(d)(2)(D) will necessarily depend on the nature of the relationship between the declarant and the defendant.”), *rev'd on other grounds*, 470 U.S. 1 (1985). In such a case, however, no revision to the coconspirator exception would be needed.

3. How the Revisionists are Wrong about Congress and the Supreme Court

Congress is generally free to enact bad policy, and if the authors of the Federal Rules of Evidence had chosen to codify a joint venture exception to the hearsay rule, they could have done so. Accordingly, if the revisionists can show that the Rules truly require the admission of coventurer hearsay, then the policy analysis above becomes just so much academic carping. As it happens, however, the revisionists ask courts to adopt an interpretation that not only makes terrible policy but also flouts the plain meaning of Rule 801(d)(2)(E) and the intent of those who wrote it and voted for it.

As enacted in 1975, Rule 801(d)(2)(E) provided that a statement is not hearsay if it “is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.” This sentence should be enough to bury the revisionist interpretation of the coconspirator hearsay exception. To conclude that Rule 801(d)(2)(E) includes lawful joint ventures, one must believe that the United States Congress, seeking to convey a concept such as “any joint enterprise, whether legal or illegal” could find no word more apt than “conspiracy.” Proponents of the coventurer hearsay theory ask courts to hold that the word “conspiracy” does not connote illegality.¹⁰⁶ For example, a recent Fifth Circuit opinion reviews that court’s precedent on joint venture hearsay as follows:

[W]e held that a ship’s logbook was admissible under Rule 801(d)(2)(E) as a co-conspirator statement in a drug conspiracy prosecution because “it is not necessary that the conspiracy upon which admissibility of the statement is predicated be that charged. Moreover, the agreement need not be criminal in nature.” . . . We concluded that the ship’s crew were engaged in the voyage of the ship, which “was a ‘joint venture’ in and of itself apart from the illegality of its purpose,” and the logbook was created in furtherance of the voyage.¹⁰⁷

In the Fifth Circuit, therefore, “conspiracy” includes a recreational boat trip, and logbooks created in furtherance of such a venture contain coconspirator statements.¹⁰⁸ Similarly, the D.C. Circuit held that

106. *But see* BLACK’S LAW DICTIONARY 329 (8th ed. 2004) (defining “conspiracy” as “agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement’s objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose”).

107. *United States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011) (quoting *United States v. Postal*, 589 F.2d 862, 886 n. 41 (5th Cir. 1979)).

108. The discussion regarding lawful joint ventures in *Postal* is pure dicta because the case

“conspiracy” includes “a lawful joint enterprise to acquire . . . property,” which includes a situation in which one so-called “conspirator” was “acting as [another’s] real estate agent for his attempted purchase of the property.”¹⁰⁹ Respect for plain English demands rejection of the revisionist argument.

Significantly, neither the Advisory Committee Note to Rule 801 nor the legislative history contained in congressional committee reports provides any indication that those voting for the Federal Rules intended Rule 801(d)(2)(E) to cover statements made in furtherance of lawful ends. Although Rule 801(d)(2)(D), which codifies the principal-agent hearsay exception, was written to include “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” and was not limited to statements “in furtherance” of the agency or employment relationship, the Advisory Committee concluded that coconspirator hearsay is not properly analogized to statements of agents. The Advisory Committee Note states that “the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility [of coconspirator hearsay] beyond that already established.” The Note then cites cases and legal commentary, all of which concern statements in furtherance of illegal activity.¹¹⁰

Legislative history is no better for the revisionists. Revisionists like to quote the Senate Report on the Federal Rules of Evidence,¹¹¹ which states:

While the rule refers to a coconspirator, it is this committee’s understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged.¹¹²

The words “joint venturer” allow the initial misconception that no criminal act is required to create a “conspiracy” under the exception. Not so. What the Senate Report makes clear is that despite the inclusion of the word “conspiracy” in the codified exception, the drafters did not

concerned illegal drug smuggling. The *El-Mezain* court, however, used the “precedent” to support admitting true lawful joint venture hearsay pursuant to Rule 801(d)(2)(E). *See id.* at 503.

109. *See United States v. Brockenborough*, 575 F.3d 726, 734–35 (D.C. Cir. 2009).

110. *See Trachtenberg*, *supra* note 13, at 604–07 (reviewing cited cases and articles in detail).

111. For citations to this report in support of a joint venture hearsay theory, see, for example, *United States v. Gewin*, 471 F.3d 197, 200–01 (D.C. Cir. 2006); *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983); *United States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011).

112. S. REP. NO. 93–1277, at 26–27 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7073.

intend to limit the scope of the exception to *charged* conspiracies. Under Rule 801(d)(2)(E), a conspiracy may be uncharged, but it must still be a conspiracy. The two cases cited in the Senate Report make clear that lawful conduct was not on the legislative agenda.¹¹³

Further, a Supreme Court case commonly cited by revisionists, *Hitchman Coal & Coke Co. v. Mitchell*,¹¹⁴ simply does not support the application of the coconspirator exception to lawful ventures.¹¹⁵ True, the *Hitchman Coal* opinion recites the fiction that the coconspirator exception is justified by the law of agency,¹¹⁶ but the Court states *on the very same page* that a proponent of coconspirator hearsay must establish the “element of illegality” to win admission of the evidence.¹¹⁷ The dispute in *Hitchman Coal* was whether the out-of-court statements themselves could support a finding of illegality, not over whether illegality was a necessary part of coconspirator hearsay.¹¹⁸

B. Crawford Admits Against Defendants Evidence that Roberts Excluded

Had the Supreme Court never issued *Crawford* and its progeny—that is, were the *Roberts* regime still good law—the Sixth Amendment might serve as a last best chance of preventing coventurer hearsay from infecting American criminal trials. Because *Roberts* interpreted the Confrontation Clause as prohibiting the admission of hearsay against criminal defendants unless the hearsay either satisfied a “firmly rooted” hearsay exception, or otherwise exhibited the “indicia of reliability” associated with such venerable exceptions, the revisionist interpretation

113. The cited cases are *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir. 1968) (declarant and defendant “were engaged in an illegal joint enterprise” to make false statements to the Immigration and Naturalization Service), and *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969) (declarant and defendant “were engaged in a common enterprise, with the objective of dealing in and disposing of . . . heroin”).

114. 245 U.S. 229 (1917).

115. For briefs citing *Hitchman Coal* in support of the joint venture theory, see Final Brief of United States at 39–40, *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006) (No. 05-3086), 2006 WL 1197222; Memorandum in Support of the Motion in Limine of the United States at 2–3, *United States v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. 2008) (Crim. No. 06-406); Government’s Memorandum of Law in Support of its Motion in Limine at 12, *United States v. Stein*, 488 F. Supp. 2d 370 (S.D.N.Y. 2007) (No. S1-05-Cr. 888), 2007 WL 1833480.

116. See *Hitchman Coal*, 245 U.S. at 250.

117. *Id.* at 249.

118. *Id.* at 248–49. Indeed, the dissent—which rejects the majority’s conclusion that certain United Mine Workers activities were illegal—states that “declarations of alleged co-conspirators were obviously inadmissible [because there was] no foundation for the conspiracy charge.” *Id.* at 268–69 & n.3 (Brandeis, J., dissenting). The dissent’s argument makes no sense if hearsay statements in furtherance of lawful ventures are admissible evidence; the union activity was undoubtedly a joint undertaking.

of the coconspirator hearsay exception would not pass constitutional muster under *Roberts*.

Under *Crawford*, however, coventurer hearsay almost certainly presents no Confrontation Clause problems for prosecutors because the overwhelming majority of coventurer hearsay is nontestimonial.¹¹⁹ Unless the Court finds some way to exclude dangerously unreliable nontestimonial hearsay, perhaps pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments, the spread of the coventurer exception will not be checked by appeals to the Constitution.

1. Today's Constitution Will Not Save Us

Although substantial doubt remains concerning the precise boundaries of testimonial hearsay—and accordingly, the universe of statements barred by the post-*Crawford* Confrontation Clause remains unsettled—the post-*Crawford* treatment of coconspirator hearsay is largely resolved. Testimonial hearsay comprises “formal statement[s] to government officers,” such as affidavits, fruits of interrogations, and other utterances that declarants reasonably expected would be used for prosecutorial purposes.¹²⁰ To satisfy the definition of coconspirator hearsay provided in the Federal Rules, a statement must be made “during and in furtherance of [a] conspiracy.”¹²¹ By definition, therefore, it is almost impossible for coconspirator hearsay to qualify as testimonial, for conspirators generally have no interest in aiding prosecution.¹²² Indeed, the *Crawford* majority opinion disclaims having any effect on the coconspirator exception.¹²³

119. While the overwhelming majority of coventurer hearsay is nontestimonial, not all of it is. If, for example, a corporate employee testified as a Rule 30(b)(6) witness, the sworn statements would be testimonial, and they would also presumably be “in furtherance” of the interests of a corporate employer, a joint venture involving everyone else employed by the corporation. An ordinary fact witness employed by an organizational defendant (such as someone who observed a slip-and-fall at work) might also be considered to speak in furtherance of the organization if her testimony is favorable to her employer.

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

121. FED. R. EVID. 801(d)(2)(E).

122. Almost impossible, but not quite. For example, conspirators A and B might scheme to falsely accuse their enemy, C, of murder. If A lied to a grand jury to secure C's indictment, A's statements might well be in furtherance of the frame-job conspiracy, and they would also be testimonial. Similarly, if a criminal defendant suborns perjury from an alibi witness, the witness's false testimony would further a conspiracy to obstruct justice. Such examples constitute a tiny fraction of statements in furtherance of conspiracies.

123. See *Crawford*, 541 U.S. at 56, 59 n.9. Because *Crawford* did not involve coconspirator hearsay, such musings by the Court are dicta. Nonetheless, the result of a Confrontation Clause challenge to run-of-the-mill coconspirator hearsay seems foreordained by the logic of *Crawford*. See, e.g., *United States v. Logan*, 419 F.3d 172, 178 (2d Cir. 2005) (“In general, statements of co-conspirators in furtherance of a conspiracy are non-testimonial.”); *State v. Larson*, 788 N.W.2d 25, 36–37 (Minn. 2010).

A simple example illustrates why the usual hearsay is nontestimonial: Imagine that a group of terrorists plans to detonate a bomb at the Super Bowl. The ringleader, Brady, orders his confederate, Favre, to purchase a specific kind of explosive—Brand X. But Favre is lazy and delegates the purchase to another confederate, Elway. Unfortunately for the terrorists, the FBI has tapped Favre’s phone, and agents record Favre telling Elway, “Brady wants ten pounds of Brand X explosive, pronto.” Favre’s statement could be used against Brady pursuant to Rule 801(d)(2)(E). It was made during and in furtherance of a conspiracy involving the declarant (Favre) and the party against whom the evidence is offered (Brady). And the statement is clearly nontestimonial. The last thing Favre desired while speaking to Elway was for law enforcement to use Favre’s words to prosecute anyone. When one considers the sorts of things said in furtherance of conspiracies,¹²⁴ it becomes obvious that the overwhelming bulk of coconspirator hearsay creates no Sixth Amendment problems for prosecutors under *Crawford*.¹²⁵

The analysis is similar when one considers statements made “during and in furtherance of” lawful joint ventures. According to the Fifth Circuit’s decision in *United States v. El-Mezain*,¹²⁶ admissibility of statements under the coconspirator hearsay exception “does not turn on the criminal nature of the endeavor.” Instead, “a statement may be admissible under Rule 801(d)(2)(E) if it is made in furtherance of a lawful joint undertaking.”¹²⁷ The *El-Mezain* court offered the example of “a ship’s logbook,” which it concluded was properly admissible against members of “the ship’s crew,” all of whom “were engaged in the voyage of the ship,” because “the logbook was created in furtherance of the voyage.”¹²⁸ The D.C. Circuit used similarly broad language in *United States v. Gewin* when describing the sort of ventures

124. A few more examples of such statements can be found in popular films. *See, e.g.*, THE GODFATHER: PART II (Paramount Pictures 1974) (“Michael Corleone says ‘Hello!’”); STAR WARS (Twentieth Century Fox 1977) (“Help me, Obi-Wan Kenobi. You’re my only hope.”); PULP FICTION (Jersey Films et al. 1994) (“You ain’t got no problem, Jules. . . . [W]ait for the Wolf who should be coming directly.”).

125. In addition, the Court stated unanimously in *Whorton v. Bockting*, 549 U.S. 406 (2007), that if a hearsay statement is nontestimonial, then the Sixth Amendment presents no barrier to its admission after *Crawford*. *See id.* at 420 (stating that *Crawford* “eliminat[ed] . . . Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements”).

126. 664 F.3d 467 (5th Cir. 2011). This case involved a drug conspiracy prosecution. *See supra* notes 106–09 for further discussion of this case.

127. 664 F.3d at 502.

128. *Id.* (quoting *United States v. Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979)). As it happens, the “voyage” at issue in *Postal* involved the smuggling of eight thousand pounds of marijuana, meaning that any discussion of statements made in furtherance of lawful joint ventures was dicta. *See* 589 F.2d at 867–68.

that count as a “conspiracy” for purposes of Rule 801(d)(2)(E), stating that “the rule . . . ‘embodies the long-standing doctrine that when two or more individuals are acting in concert toward a common goal, the out-of-court statements of one are . . . admissible against the others, if made in furtherance of the common goal.’”¹²⁹ These expansive definitions of coventurer hearsay lead to two conclusions. First, a tremendous amount of statements otherwise excluded by the hearsay rule are now admissible evidence pursuant to the revisionist interpretation of the coconspirator statement exception. Second, most (although not all) such hearsay is nontestimonial.

The first conclusion follows from the observation that pretty much everyone makes statements in furtherance of joint undertakings pretty much every day, yet a person can go years without uttering anything plausibly described as testimonial. A secretary says to his colleague, “The boss likes this report and wants fifty color copies.” The statement is in furtherance of the employees’ joint venture—that is, the work of their common employer¹³⁰—and has no reasonably predictable relation to any prosecution. If the colleague were to testify, “My coworker said our boss liked the report and wanted fifty copies,” the defense could object on hearsay grounds. After all, the colleague is repeating the secretary’s out-of-court statement to prove the truth of the matter asserted, that is, that the boss truly wanted the copies made and liked the report. If, however, the boss is a criminal defendant,¹³¹ prosecutors (at least in some circuits) can now respond that the statement is admissible under Rule 801(d)(2)(E). If the defense attorney graduated from law school some years ago and has not followed the Supreme Court’s reimagining of the Confrontation Clause, an objection might ensue on Sixth Amendment grounds. The objection would be overruled because the secretary’s statement, “The boss likes this report and wants fifty

129. *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006) (quoting *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983)). As it happens, the joint venture at issue in *Weisz* “was to bribe a Congressman,” 718 F.2d at 434, meaning that any discussion of statements made in furtherance of lawful joint ventures was dicta.

130. Readers skeptical that work for a common employer could really be deemed a “conspiracy” under Rule 801(d)(2)(E) should see *Gewin*, 471 F.3d at 200 (affirming admission of evidence under the coconspirator exception based on “a preponderance of the evidence support[ing] a finding that the group had engaged in a common enterprise of stock promotion” and rejecting argument that the Rule requires, “before admission of co-conspirators’ out-of-court statements, a showing of an *unlawful* conspiracy, not merely action in concert toward a common goal”); readers should also see Memorandum in Support of the Motion in Limine of the United States to Admit Statements at 1, *United States v. Schiff*, 538 F. Supp. 2d 818 (D.N.J. Feb. 12, 2008) (Crim. No. 06-406) (seeking admission against criminal defendants of statements made by other employees in furtherance of the business of their common pharmaceutical company employer).

131. Perhaps the boss’s knowledge of the contents of the report is evidence of scienter in a securities fraud case.

color copies,” was not an utterance that the secretary reasonably expected would be used for prosecutorial purposes.¹³²

The joint venture need not even be as formal as a business to satisfy the revisionist interpretation of the coconspirator exception.¹³³ After all, a ship’s voyage counts. If on Monday Abel says, “Hey, Cain, let’s go fishing on Saturday; I have plenty of beer,” the statement demonstrates that “two or more individuals are acting in concert toward a common goal.”¹³⁴ Let us imagine that the boat sinks during the trip and that Abel drowns. Abel’s widow sues Cain, alleging he piloted the boat while intoxicated, thereby negligently causing Abel’s death. If Cain asserts that no booze was taken on the fishing trip, plaintiff’s counsel might wish to use Abel’s statement (“I have plenty of beer”) as evidence that Cain and Abel had alcohol on board. If someone who overheard Abel’s side of the conversation is called as a witness, his testimony that Abel claimed to possess copious beer would normally be inadmissible hearsay—the repetition of an out-of-court statement to prove its truth. Fortunately for Abel’s widow, however, Abel was speaking in furtherance of the fishing trip when he mentioned the beer, and the trip was a joint project of the declarant and Cain, the party against whom the evidence is offered. The scope of the revisionist coventurer exception therefore includes the statement. Further, no part of the fishing-trip-planning discussions was testimonial.

Certain readers will object, upon reading the prior paragraph, that the Confrontation Clause is irrelevant to the Cain and Abel trial because the clause applies only to evidence offered against criminal defendants. The Supreme Court has often instructed that regardless of changing interpretations of the hearsay rule, the Sixth Amendment has an independent meaning, and it keeps out statements that would violate the confrontation rights of criminal defendants regardless of how one reads the rules of evidence.¹³⁵ This distinction makes sense. Drafters of rules of evidence cannot eliminate constitutional protections any more than drafters of criminal procedure rules could authorize compulsory self-incrimination. While a state would be free to repeal the hearsay rule entirely,¹³⁶ the Sixth Amendment would continue to apply to criminal trials in that state, causing testimonial hearsay to remain inadmissible. Similarly, if a state adopted the revisionist interpretation of the

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

133. Indeed, federal prosecutors recently argued that a common goal of getting a favored candidate elected to office qualifies as a “conspiracy” under Rule 801(d)(2)(E), and one need not even be employed by the campaign to qualify as a member of the conspiracy. See *infra* note 242 and accompanying text.

134. See *Gewin*, 471 F.3d at 201.

135. See, e.g., *Idaho v. Wright*, 497 U.S. 805 (1990).

136. For a recent proposal to that effect, see Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last*, 26 ME. B.J. 126 (2011).

coconspirator hearsay exception, the Sixth Amendment, depending on how it is interpreted, might preclude the use of coventurer hearsay at criminal trials.¹³⁷

2. Yesterday's Constitution Might Well Have Saved Us

To see how the Sixth Amendment might affect coventurer hearsay, let us imagine that Cain, in addition to facing a lawsuit, has been charged with negligent homicide and the reckless piloting of a ship.¹³⁸ We have seen that under *Crawford*, Abel's "I have plenty of beer" declaration is equally admissible against Cain at civil and criminal trials. Under *Roberts*, however, Cain's civil and criminal trials would have proceeded differently. Because the Confrontation Clause had no more bearing on civil trials under *Roberts* than it does under *Crawford*, the civil trial would be unchanged under a *Roberts* Sixth Amendment regime. In other words, in a state or federal court adopting the revisionist interpretation of the coconspirator hearsay exception, the "I have plenty of beer" evidence is admissible against Cain at a civil trial as a coventurer hearsay.

The distinction is seen at the criminal trial, where Cain stands charged with negligent homicide or some other offense. Under *Roberts*, the admissibility of hearsay did not depend on whether the Supreme Court deemed an out-of-court declaration to be "testimonial." It depended instead on whether the statement was considered reliable, with the reliability analysis relying in part on centuries of judicial consideration of which hearsay is properly admissible at trial. As the *Roberts* Court explained, the hearsay declaration of someone unavailable to testify "is admissible only if it bears adequate 'indicia of reliability.'"¹³⁹ The Court explained further that such reliability may be presumed for statements falling "within a firmly rooted hearsay exception," such as an excited utterance or a business record.¹⁴⁰ In addition, hearsay not within a venerable exception might pass Sixth Amendment muster if it exhibited "a showing of particular guarantees of trustworthiness."¹⁴¹

137. See *supra* notes 61–65 and accompanying text.

138. For a real-world criminal case involving coventurer hearsay, consider the prosecution of Senator John Edwards for campaign finance law violations. See *infra* note 238 and accompanying text.

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

140. See FED. R. EVID. 803(2), 803(6); *Roberts*, 448 U.S. at 66. Before the question was settled in *Bourjaily v. United States*, 483 U.S. 171, 183 (1987), there was a circuit split concerning whether the coconspirator statement exception was "firmly rooted." See *Sanson v. United States*, 467 U.S. 1264, 1265 (1984) (White, J., dissenting); see also *People v. Sanders*, 436 N.E.2d 480 (N.Y. 1982) (interpreting *Ohio v. Roberts* and holding that not all coconspirator hearsay was admissible under state confrontation clause).

141. *Roberts*, 448 U.S. at 66.

In *Idaho v. Wright*, the Court explained that the “guarantees of trustworthiness” demanded in *Roberts* could not consist of external evidence that the hearsay declarant spoke truthfully.¹⁴² The Court made clear that the proponent of hearsay evidence could not satisfy the Sixth Amendment simply by providing extrinsic evidence bolstering the veracity of the out-of-court speaker. Rather, the admissibility depended “only [on] those [circumstances] that surround[ed] the making of the statement and that render[ed] the declarant particularly worthy of belief.”¹⁴³ The facts of *Wright* help illustrate the distinction. In *Wright*, the prosecution introduced evidence of hearsay statements uttered by a two-and-a-half-year-old girl to a doctor during a criminal investigation. The Court held that independent evidence that the girl spoke truthfully when describing sexual abuse (observations by her doctor of the girl’s physical condition) would not serve to justify admitting her hearsay; instead, a criminal trial court could admit evidence of her statements only upon a finding that declarants in her situation have the same overall trustworthiness as declarants whose statements fall within traditional hearsay exceptions.¹⁴⁴

In the Cain criminal trial, the prosecution would likely desire to offer the “I have plenty of beer” statement made by Abel shortly before his death. The evidence would tend to prove that Cain and Abel took beer along on their fatal fishing trip. Although the evidence would not prove conclusively that the pair brought booze with them, much less that Cain imbibed, it would easily satisfy the relevance standard of Federal Rule of Evidence 401. And although the statement is hearsay—an out-of-court statement offered to prove the truth of the matter asserted, that is, that Abel possessed plenty of beer immediately before the fishing trip and probably intended to bring the beer on the trip—a court applying the revisionist interpretation of Rule 801(d)(2)(E) or a state equivalent could admit the evidence as a statement made in furtherance of the joint fishing excursion. But not without considering the Confrontation Clause. While the coconspirator exception has been part of the federal common law of evidence for hundreds of years, and has been codified in the Federal Rules since 1975, courts have admitted coventurer hearsay pursuant to that exception only for a few years.¹⁴⁵ Accordingly, Abel’s statement is not within a “firmly rooted” hearsay exception.¹⁴⁶

142. 497 U.S. 805 (1990).

143. *Id.* at 819, 822.

144. *Id.* at 822–23; *see also* *Lilly v. Virginia*, 527 U.S. 116, 137–38 (1999) (rejecting hearsay on Sixth Amendment grounds upon finding that the circumstances of its utterance lack “particularized guarantees of trustworthiness”).

145. *See generally* Trachtenberg, *supra* note 13.

146. One can hardly doubt that the revisionist exception is not firmly rooted. After all, the

Nor does Abel's statement bear special indicia of trustworthiness that might satisfy the *Roberts* reliability requirement despite the absence of a firmly rooted hearsay exception. A person who tells a fishing buddy "I have plenty of beer" may be telling the truth, and he may be inaccurate. Perhaps he misremembers the state of his beer supplies; the extent of last night's drinking session can be a hazy matter. Perhaps he knows he lacks beer and fully intends to buy some before the trip, making his statement a harmless "little white lie" necessary to entice his friend to join a mutually agreeable excursion. Perhaps he correctly believes that he left the house with a fridge full of beer that morning, but his unemployed brother-in-law has consumed it all while he was at work. Perhaps his house has been destroyed by fire, with no beer spared from the insatiable flames. Perhaps his wife, tired of his destructive drinking habit, has poured the beer down the drain. Who can know? The declarant is not available for cross-examination, and his statement is no more reliable than the common out-of-court dross excluded by the hearsay rule since the seventeenth century. Under *Ohio v. Roberts* and *Idaho v. Wright*, Cain might well have suffered the admission of Abel's unreliable statement at his civil trial. But he could have relied upon the Sixth Amendment to protect him from being sent to prison on the basis of the idle chatter of an out-of-court declarant not subject to cross-examination.

The trials of Cain demonstrate that with coventurer hearsay, we have proof that the *Crawford* regime is failing in the important task of providing a constitutional backstop to rules of evidence (or, to put it another way, failing to set an appropriate minimum level of confrontation rights). Hardly any boundary circumscribes the vast territory of coventurer hearsay. A person who says to coworkers, "Smith will be late to work today; his car broke down" is presumably speaking in furtherance of his employer's interests, broadly defined. Under the revisionist exception, the statement is admissible against Smith at a criminal trial,¹⁴⁷ as well as against any other employee of the same employer.¹⁴⁸ No evidence of reliability is necessary under Rule 801(d)(2). The statement is also almost surely not testimonial. But is it the kind of statement sensibly admitted against a criminal defendant

traditional coconspirator hearsay exception was the subject of a circuit split concerning the firmness of its roots. See *supra* note 136. Had *Crawford* not mooted the question, revisionists might well have argued that the coventurer exception is as firmly rooted as the coconspirator exception; indeed, they argue that the exceptions are one and the same. I respectfully disagree with such historical claims.

147. Such evidence might undermine Smith's alibi, were he charged with a crime committed near his home around 9 a.m. that he claims he could not have perpetrated because he was at work.

148. Perhaps a different employee has been charged, and she claims that Smith saw her arrive at work on time. Evidence that Smith was late would rebut her defense.

who ostensibly has the right “to be confronted with the witnesses against him”?¹⁴⁹ For all we know, Smith convinced a friend to drive him to work, or his car was fixed the previous day unbeknown to his colleague. The declarant might well have eventually learned whether his statement was correct; he may have seen Smith arrive late, or arrive on time, or heard later from someone else about the timing of Smith’s arrival. Absent the chance to cross-examine the declarant, a party against whom the hearsay is presented must somehow repair the damage caused by unreliable evidence admitted pursuant to a newfangled hearsay exception. *Roberts* limited the effect of such amendments to the law of evidence, but *Crawford* stands aside as evidence law denies criminal defendants the opportunity to question the declarants of statements used to incriminate them.

3. Will Tomorrow’s Constitution Save Us?

Although *Crawford* is written with a tone that suggests that the Confrontation Clause problem has been solved once and for all, some doubt remains about whether the “testimonial or not” test will remain the touchstone of confrontation law without further tweaking. In recent years, commentators have wondered whether other constitutional provisions might stand in for the absent Confrontation Clause to preclude the admission of certain unreliable or unfairly prejudicial hearsay.¹⁵⁰ For example, admission of evidence that is sufficiently unreliable—lacking probative value—and concurrently is quite unfairly prejudicial might violate the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁵¹ True, such evidence “may be excluded” pursuant to ordinary evidence law,¹⁵² and the failure to exclude such evidence occasionally causes appellate courts to vacate convictions upon finding that trial judges abused their discretion.¹⁵³ It is well settled,

149. U.S. CONST. amend. VI; *see also* *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004) (noting that the Confrontation Clause is supposed to limit judicial discretion with respect to the admission of out-of-court statements against criminal defendants).

150. *See, e.g.*, Colin Miller, *Avoiding a Confrontation?: How Courts Have Erred in Finding that Nontestimonial Hearsay is Beyond the Scope of the Bruton Doctrine*, 77 BROOK. L. REV. 625, 673 n.357 (2012) (“Some have argued that courts should find that the admission of co-defendant confessions at joint jury trials can violate the Due Process Clause based upon the likelihood that jurors would ignore limiting instructions.”).

151. *See* James B. Haddad, *Post-Bruton Developments: A Reconsideration of the Confrontation Rationale, and a Proposal for a Due Process Evaluation of Limiting Instructions*, 18 AM. CRIM. L. REV. 1, 8 (1980).

152. *See* FED. R. EVID. 403.

153. *See, e.g.*, *United States v. Robinson*, 560 F.2d 507, 509 (2d Cir. 1977) (en banc) (considering “the recurring questions of when evidence of a defendant’s possession of a weapon at the time of arrest may properly be admitted under Rule 403”); *id.* at 518 (Oakes, J., dissenting); *see also* *United States v. James*, 169 F.3d 1210 (9th Cir. 1999).

however, that the Constitution provides for a minimum of fair procedures at criminal trials, irrespective of changes to, and interpretations of, the rules of evidence.

Professor Akhil Amar, writing in the context of the Double Jeopardy Clause, argues persuasively that when the correct reading of a constitutional provision denies someone fundamental fairness, the better solution is to find a right to the desired fairness in the Due Process Clause, not to create nonsensical interpretations of other clauses to reach a desired result.¹⁵⁴ Accordingly, even if one assumes that every jot of *Crawford's* historical analysis is correct and that Justice Scalia has divined the intentions of the Framers of the Confrontation Clause in all material respects, one need not conclude that any nontestimonial statement may freely be admitted against criminal defendants without causing constitutional injury. Professor Amar writes that “to say that the Double Jeopardy Clause does not reach civil cases about money is not to leave defendants in these cases defenseless against state assault. Rather, it is to give them the shield of the Due Process Clause.”¹⁵⁵ Similarly, if the Confrontation Clause does not apply to coventurer hearsay uttered in a nontestimonial manner, criminal defendants need not be helpless against the revisionist coconspirator hearsay exception; they too should seek shelter in due process.¹⁵⁶

How might such a due process analysis unfold? The answer, as unpalatable as it may be to *Crawford* proponents, would probably have much in common with *Roberts*. Out-of-court statements offered against criminal defendants under *Roberts* were evaluated according to criteria related to fundamental fairness. If a declarant could not be cross-examined, a trial court would consider the reliability of the evidence offered. Statements offered pursuant to firmly rooted hearsay exceptions were presumed generally reliable because the longstanding existence of a hearsay exception demonstrated a judicial consensus on the expected reliability of a class of statements. In the Advisory Committee Note to Federal Rule of Evidence 803, for example, one finds explanations for the several hearsay exceptions codified in that rule. The “excited utterance” exception is codified because “circumstances may produce a

154. See Akil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1809 (1997) (“[T]he clean and simple rules of the Double Jeopardy Clause must be supplemented by several broader but more flexible commonsense principles protected by the Due Process Clause.”).

155. *Id.* at 1812.

156. For additional examples of when the Due Process Clause might be invoked to solve the problem of a constitutional clause that appears too narrow to address a specific injustice, see Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 18–20 (1998) (“The [Due Process] clause is a grand and general guarantee of fair procedures, and it makes no sense to undo it because other clauses also aim at fair procedures, clarifying and specifying what general fairness might mean in a given context.”).

condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”¹⁵⁷ Although the Note acknowledges criticism of the exception “on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication,” it was ultimately included because “it finds support in cases without number.” Applying the rule of *Roberts* to this exception, the Supreme Court held that excited utterances (also known as “spontaneous declarations”) by out-of-court declarants not available for cross-examination were properly admitted despite the Confrontation Clause.¹⁵⁸

If the Supreme Court remains convinced that excited utterances are largely reliable and that subsequent cross-examination of a previously excited declarant would add little truth-seeking value, then a due process challenge to the admission of excited utterances should fail. If, however, the Court were somehow convinced that excited utterances are not so accurate after all—accepting the critiques mentioned in passing by the Advisory Committee—then perhaps the use of such hearsay against criminal defendants denies them due process of law.¹⁵⁹ A defendant raising a due process challenge would presumably argue that excited utterances lack “indicia of reliability,” even if the defendant did not use the shibboleth seemingly discredited by *Crawford*, for the use of unreliable and highly prejudicial evidence appears offensive to the standards of fair play and substantial justice. The same exercise can proceed for coventurer hearsay. Even if one concedes that the Confrontation Clause question is settled by *Crawford*, hearsay sufficiently lacking in probative value and causing sufficient unfair prejudice to defendants may one day be found to violate the Due Process Clauses.¹⁶⁰ The absence of case law construing the application of the Due Process Clauses to unreliable hearsay is easily explained: The exclusion of such hearsay was until recently the job of the

157. FED. R. EVID. 803 (advisory committee note).

158. See *White v. Illinois*, 502 U.S. 346, 355–57 (1992).

159. The Court invited such challenges in *California v. Green*, 399 U.S. 149, 163 n.15 (1970) (predicting that the Court “may agree that considerations of due process, wholly apart from the Confrontation Clause, might prevent convictions where a reliable evidentiary basis is totally lacking”).

160. The Court has repeatedly noted the interrelatedness of the Due Process Clause and the Confrontation Clause. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (stating that both clauses protect access to courts); see also *Lindsey v. United States*, 484 U.S. 934, 934 (1987) (White, J., dissenting from denial of certiorari) (“The issue here is whether a defendant’s rights under the Due Process and Confrontation Clauses are violated when the Government forces a witness to take the stand solely to invoke his privilege against self-incrimination in front of the jury even though the Government already knew that the witness would refuse to testify.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 72 (1987) (Brennan, J., dissenting).

Confrontation Clause.¹⁶¹ The new vision of that clause set forth by the Supreme Court in *Crawford* and subsequent cases has laid the groundwork for new due process arguments.¹⁶² A more muscular application of due process to hearsay would not render the Confrontation Clause irrelevant. Certain testimonial hearsay might well violate *Crawford* if admitted without the opportunity for cross-examination of the declarant without being sufficiently unreliable to offend due process rules. Regardless, some redundancy among the Due Process Clauses and other rights-protecting constitutional provisions is inevitable and no cause for alarm.¹⁶³

In addition to the Due Process Clauses, objections to unreliable nontestimonial hearsay may yet find some support in the Confrontation Clause, even after *Crawford*. A few post-*Crawford* opinions have hinted that—at least for some Justices—reliability remains relevant to Confrontation Clause analysis. For example, in *Bullcoming v. New Mexico*, Justice Anthony Kennedy wrote a dissent for four Justices.¹⁶⁴ The issue presented in that case was whether the Confrontation Clause allows the prosecution to introduce a forensic laboratory report including a certification via the testimony of a scientist who was not the scientist who signed the certification or observed or performed the test described in the certification. The majority held that a defendant has the right to be confronted with the analyst who made the certification—not a surrogate analyst.¹⁶⁵ The dissenters argued that admitting the report through another analyst is “fully consistent with the Confrontation Clause and with well-established principles for ensuring that criminal trials are conducted in full accord with *requirements of fairness and reliability* and with the confrontation guarantee.”¹⁶⁶ Replacement of a

161. Even in the days of *Roberts*, courts did note the importance of due process analysis to Confrontation Clause concerns. See, e.g., *United States v. Belle*, 593 F.2d 487, 502–03 & n.4 (3d Cir. 1979) (stating that “the intrinsic interests of due process and fairness . . . [are among the] significant underpinnings of the right of confrontation”).

162. Cf. *Holmes v. South Carolina*, 547 U.S. 319 (2006). The Court noted that while criminal trial courts have broad latitude concerning what evidence to exclude, “[t]his latitude . . . has limits. ‘Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.”’” *Id.* at 324 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

163. For example, demanding excessive bail might violate a defendant’s due process rights, as might a denial of the rights protected by the Compulsory Process Clause and the Assistance of Counsel Clause.

164. See 131 S. Ct. 2705, 2723 (2011) (Kennedy, J., dissenting). The dissenters objected to the majority’s decision, which they believed “held that the Confrontation Clause bars admission of scientific findings when an employee of the testing laboratory authenticates the findings, testifies to the laboratory’s methods and practices, and is cross-examined at trial.” *Id.*

165. *Id.* at 2710.

166. *Id.* at 2723 (Kennedy, J., dissenting) (emphasis added).

single Justice could create a majority that once again believes that “reliability is a legitimate concern” in Confrontation Clause jurisprudence.¹⁶⁷ Also, the concurring opinion of Justice Sonia Sotomayor—whose vote was necessary to obtain a majority but who was not willing to join the opinion of the Court—left some ambiguity as to what precise holding could attract five votes.¹⁶⁸

Further ambiguity was sown by the opinions in *Michigan v. Bryant*,¹⁶⁹ in which the Court deemed statements made by a gunshot victim to police to be nontestimonial, holding that the victim’s responses to police questioning could be admitted without violating the defendant shooter’s Confrontation Clause rights. Writing for the majority, Justice Sotomayor wrote that “standard rules of hearsay, designed to identify some statements as reliable, will be relevant” in deciding what statements are nontestimonial and accordingly are not covered by the Confrontation Clause.¹⁷⁰ Justice Scalia mourned in his dissent that the majority “distorts [the Court’s] Confrontation Clause jurisprudence and leaves it in a shambles.”¹⁷¹

Most recently, a fractured Court in *Williams v. Illinois* demonstrated that the Justices have reached no consensus about the Sixth Amendment.¹⁷² The case concerned yet another lab report, this one concerning DNA analysis.¹⁷³ The primary difference was that in *Williams*, at least in theory, the hearsay report at issue was not offered directly into evidence for its truth. Instead, a testifying DNA expert claimed to rely on the report of a different, absent technician in forming her own expert opinion.¹⁷⁴ The Court upheld the conviction but did not present a justification for the result accepted by a majority of Justices. A plurality opinion by Justice Samuel Alito, written for himself and three other Justices, stated that the absent author’s report was not admitted for its truth and that the statements in the report were not testimonial.¹⁷⁵

167. *Id.* at 2725.

168. See Colin Miller, *Independence Day?: What Does Justice Sotomayor’s Bullcoming Concurrence Tell Us About Expert Opinions Based Upon Non-Admitted Testimonial Reports?*, EVIDENCEPROF BLOG (June 28, 2011), <http://lawprofessors.typepad.com/evidenceprof/2011/06/while-i-was-away-guest-blogger-ann-murphywrote-an-excellent-post-about-the-supreme-courts-recent-opinion-in-bullcoming-v-ne.html>.

169. 131 S. Ct. 1143 (2011).

170. *Id.* at 1155.

171. *Id.* at 1168 (Scalia, J., dissenting) (“Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford* . . . I dissent.”).

172. See *Williams v. Illinois*, 132 S. Ct. 2221 (2012). For a thoughtful analysis of *Williams*, along with the prior lab report cases of *Melendez-Diaz* and *Bullcoming*, see George Fisher, *Williams v. Illinois*: Case Note, (June 25, 2012) (on file with author).

173. See *Williams*, 132 S. Ct. at 2227–28.

174. See *id.*

175. See *id.* at 2236–38, 2242–44. Justice Alito was joined by Chief Justice John Roberts and Justices Stephen Breyer and Anthony Kennedy. *Id.* at 2227.

Justice Clarence Thomas concurred in the result only, agreeing that the statements were nontestimonial but declining to join any of the plurality opinion.¹⁷⁶ In a dissent written for herself and three other Justices, Justice Elena Kagan noted that a majority of the Court (the four dissenters and Justice Thomas) rejected the reasoning of the plurality opinion.¹⁷⁷

The dissenters argued that the facts of *Williams* did not differ materially from those of *Melendez-Diaz* and *Bullcoming*, and that reaching the same result—exclusion of the challenged hearsay—should be easy.¹⁷⁸ Reiterating the importance of cross-examination, the dissenters seemed concerned with the unreliability of testimony repeating the conclusions of an absent DNA technician. Indeed, the dissent opened with an anecdote of a DNA expert (from the same lab at issue in *Williams*, in another case concerning DNA samples from a rape victim and an accused rapist) recanting testimony on the stand after undergoing an effective cross-examination.¹⁷⁹ The anecdote shows that a scientific test “is only as reliable as the people who perform it,” the dissent opined.¹⁸⁰ Does this opinion imply that four Justices are ready to return to a reliability analysis seemingly rejected in *Crawford*? Probably not.¹⁸¹ And putting together a majority seems even less likely. Then again, a majority of Justices have joined opinions, all written after *Crawford*, that suggest the importance of reliability (or, the dangers of unreliability) to proper Confrontation Clause analysis.¹⁸² In any event, the uncertainty inspired by *Bullcoming*, *Bryant*, and *Williams* at least leaves open the possibility that sufficiently unreliable hearsay may face successful Confrontation Clause challenges even if not squarely within the definition of testimonial set forth in *Crawford*.

176. *See id.* at 2255 (Thomas, J., concurring in the judgment). As Justice Kagan noted in dissent, the definition of *testimonial* used by Justice Thomas in *Williams* has been accepted by no other Justice. *See id.* at 2273, 2275–76 (Kagan, J., dissenting).

177. *See id.* at 2268. Kagan was joined by Justices Ruth Bader Ginsburg, Antonin Scalia, and Sonia Sotomayor. *Id.* at 2264.

178. *See id.* at 2265 (“Under our Confrontation Clause precedents, this is an open-and-shut case.”).

179. *See id.* at 2264 (“But after undergoing cross-examination, the analyst realized she had made a mortifying error. She took the stand again, but this time to admit that the report listed the victim’s control sample as coming from [the defendant] Kocak, and Kocak’s as coming from the victim.”).

180. *Id.* at 2275.

181. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007) (unanimous opinion stating that nontestimonial hearsay is completely unregulated by the Sixth Amendment under *Crawford*, regardless of reliability).

182. *See Fisher*, *supra* note 172, at 13–17 (“[T]he urge to root the rationale and reach of the Confrontation Clause to the apparent unreliability of contested hearsay evidence has gripped at least five members of the Court [T]he broader question is whether the revival of reliability reasoning someday might claim a stable Court majority.”).

III. ANSWERING THE “SO WHAT?” REJOINER

Why then should a reader care about all this doctrinal dispute? Even if this Article correctly identifies a shortcoming in recent Sixth Amendment jurisprudence, surely the possibility of imperfect constitutional law is not news.¹⁸³ If Justices Scalia, Sotomayor, Thomas, and the rest of the Court cannot agree on a definition of *testimonial*, perhaps even diligent observers of criminal procedure can be excused if they turn their attention elsewhere. The answer is that for all their historiographical mediocrity, Justice Scalia’s recent Confrontation Clause opinions correctly assert the importance of cross-examination to the American criminal justice system, as well as the danger that hearsay admitted by well-meaning courts can present to fundamental fairness and substantial justice. In other words, *Crawford*’s primary value is in *barring* certain evidence; it would be ironic and inappropriate to allow *Crawford* to be the basis for *admitting* evidence such as coventurer hearsay.¹⁸⁴ This Part begins with a return to the historical record, explaining that coventurer hearsay is much like certain hearsay offered against Sir Walter Raleigh at his infamous trial. Returning to this century, the remainder of this Part examines the admission of joint venturer statements against criminal defendants, arguing that such evidence has no place in American criminal courts.

A. *Historical Evidence Argues Against Admission of Coventurer Hearsay*

If the Supreme Court continues to invoke the name of Sir Walter Raleigh to defend *Crawford* and its progeny, the Court may well wear it out.¹⁸⁵ Yet the very hearsay written out of the Confrontation Clause by *Crawford*—that is, casual nontestimonial chatter by unreliable, absent declarants—was instrumental in the conviction and execution of Raleigh at the trial decried by Justice Scalia.¹⁸⁶ Accordingly, if one

183. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 356 (1981).

184. I do not mean to argue that a new constitutional evidence or criminal procedure rule can never properly allow the admission of evidence previously excluded by Supreme Court precedent. In this specific case, however, the newly admitted evidence is precisely the sort that ought to be excluded by the historical arguments and moral appeals justifying the new rule.

185. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143, 1173 (2011) (Scalia, J., dissenting) (“Royal officials conducted many of the ex parte examinations introduced against Sir Walter Raleigh and Sir John Fenwick while investigating alleged treasonous conspiracies of unknown scope, aimed at killing or overthrowing the King.”); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2535 (2009) (“[T]he purported distinctions respondent and the dissent identify between this case and Sir Walter Raleigh’s ‘conventional’ accusers do not survive scrutiny.”); *Crawford v. Washington*, 541 U.S. 36, 43–44, 50–51, 62, 68 (2004) (mentioning Raleigh nineteen times in majority opinion).

186. *Crawford*, 541 U.S. at 44 (“One of Raleigh’s trial judges later lamented that ‘the

believes that the authors and ratifiers of the Sixth Amendment intended to prohibit the sorts of injustices visited upon Raleigh, then a review of the historical record reveals that *Crawford* allows too much hearsay into criminal trials.

In particular, a complete appraisal of the Raleigh trial must confront the statement of Dyer, a ship's pilot who testified about a trip he took to Portugal.

[The prosecution] then produced one Dyer, a pilot, who being sworn, said, Being at Lisbon, there came to me a Portugal gentleman who asked me how the King of England did, and whether he was crowned? I answered him that I hoped our noble King was well and crowned by this, but the time was not come when I came from the coast for Spain. "Nay," says he, "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned." And this in time was found to be spoken in mid July.¹⁸⁷

Raleigh objected to the evidence, not by contesting its admissibility but rather by attacking its weight. "This is the saying of some wild Jesuit or beggarly Priest; but what proof is it against me?" The prosecutor replied, "It must per force arise out of some preceding intelligence, and shows that your treason had wings."¹⁸⁸ Raleigh, of course, had no opportunity to cross-examine the "Portugal gentleman" whose purported statement Dyer repeated at Raleigh's trial. Observers writing long before the birth of Michael Crawford understood the importance of Dyer's testimony. An English historian wrote, after recounting Dyer's testimony in a 1920 book, "A trial thus conducted left the prisoner no hope."¹⁸⁹ Justice William O. Douglas wrote in a 1953 article:

A virus had infected the trial and put it beyond salvation. The one witness called, a man by the name of Dyer, testified to the rankest form of hearsay . . . This was some of the stuff behind the clamor for a Bill of Rights at the time of the adoption of our Constitution.¹⁹⁰

justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh."").

187. *Trial of Sir Walter Raleigh*, in 1 CRIMINAL TRIALS 400, 436 (David Jardine ed., 1832).

188. *Id.*

189. See FRANCIS CHARLES MONTAGUE, THE HISTORY OF ENGLAND, FROM THE ACCESSION OF JAMES I TO THE RESTORATION 9 (1920); see also WILLIAM STEBBING, SIR WALTER RALEIGH: A BIOGRAPHY 216 (Clarendon Press, 1891) (calling Dyer's testimony "worse than irrelevant").

190. William O. Douglas, *A Crusade for the Bar: Due Process in a Time of World Conflict*, 39 A.B.A. J. 871, 872 (1953). Justice Douglas then compared Raleigh's trial to the Salem Witch

Ironically, at least one court expressed its concern that the *Roberts* regime might allow testimony such as Dyer's into American trials, a result nearly guaranteed by *Crawford*. "One would think that the possibility that the fisherman's testimony would be admissible today had been safely put to rest. Yet, if a federal judge believed that the Portuguese gentleman's statement was made under conditions suggesting its trustworthiness, Sir Walter might fare no better today than he did under Elizabeth."¹⁹¹ *Roberts* and its progeny left some doubt about what particular hearsay might be admissible. After all, judicial opinions cannot define with precision which statements possess "indicia of reliability," particularly with respect to statements not yet uttered. Nonetheless, it was once believed by criminal procedure scholars that "[w]hatever the origins of the confrontation clause, it exists to prevent abuses in criminal trials like those suffered by Sir Walter Raleigh."¹⁹² Today, Dyer's hearsay testimony offered at Raleigh's trial is nontestimonial and outside the scope of the Sixth Amendment.

Coventurer statements—despite being nontestimonial—are just the kind of confrontation-free testimony that the Sixth Amendment ought to prevent. Coventurer hearsay is no more inherently reliable than idle chatter among gentlemen and sailors. It does not have the indicia of reliability that justified the admission of certain hearsay under *Roberts*. Unlike in the rare scenarios in which post-*Crawford* decisions have said testimonial hearsay might be used, such as forfeiture,¹⁹³ participants in lawful ventures have done nothing to justify the elimination of their constitutional right to confront witnesses. In addition, unlike true coconspirator hearsay, a species of nontestimonial hearsay permitted under the *Roberts* regime, participants in lawful ventures have done nothing to justify eliminating their constitutional right to confront witnesses.

Trials. *Id.* at 872–73; see also 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 333–36 (London, MacMillan & Co. 1883) (discussing common law confrontation right developed in response to injustices at Raleigh's trial).

191. *Hennigan v. State*, 746 P.2d 360, 406 (Wyo. 1987) (quoting Paul Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 KY. L.J. 841, 883 (1987)).

192. Frederic L. Borch III, *The Use of Co-conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility*, 124 MIL. L. REV. 163, 177 (1989); see also *California v. Green*, 399 U.S. 149, 157 n.10 (1970) ("At least one author traces the Confrontation Clause to the common-law reaction against these abuses of the Raleigh trial.") (citing FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 104 (1969)); *Dutton v. Evans*, 400 U.S. 74, 86 n.16 (1970).

193. See *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008). The Court held that even the murder of a potential witness does not allow testimonial hearsay to be used against the killer in a criminal case, unless the defendant killed the witness with the purpose of preventing him from testifying. *Id.* at 2687–91.

To understand the historical background of the Confrontation Clause, it is not enough to review infamous English injustices like the Raleigh trial. One must also consider the context of colonial America in which the Sixth Amendment was written. As Professor Randolph Jonakait has written, the Sixth Amendment did not merely adopt English common law protections in force at the time of ratification. The Assistance of Counsel Clause, for example, provides far greater access to trial counsel than was permitted in England in 1791.¹⁹⁴ Recognizing that in the late eighteenth century American states relied substantially more on cross-examination to protect the rights of accused than did contemporary English trials (in England, the trial judge was presumed to look after the interests of defendants), Professor Jonakait argues persuasively that the Sixth Amendment “constitutionalized the criminal procedure that Americans had developed and . . . constitutionalized a procedure where the accused could truly test and challenge the government’s case.”¹⁹⁵ Or, in the words of Professor Kenneth Graham, “the right of confrontation is an American innovation, not an import from England,” and the “Founders wanted a right to confront not only the ‘witnesses’ who appeared at trial but the ‘accusers’ who lurked in the shadows.”¹⁹⁶

As a result, the historical touchstone for judging the admissibility of challenged hearsay at a modern trial is not the state of English evidence law in 1791. And the question is not whether a given piece of hearsay promotes the trial’s search for truth and accuracy. Instead, the question is “whether the admission of disputed evidence furthers the constitutionally protected adversary system by guaranteeing the accused the right to challenge that evidence.”¹⁹⁷

Alas, this touchstone is tricky to use. The Supreme Court has never interpreted the Sixth Amendment as barring all hearsay, and lines must be drawn somewhere. As is true of so many constitutional phrases, the correct application of the Confrontation Clause to modern problems—even if one puts the clause in its proper context—is not obvious.¹⁹⁸

194. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 82–84, 92, 94, 96, 109 (1995).

195. *Id.* at 164. But see Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (articulating a far narrower vision of who counts as a “witness” under the Confrontation Clause).

196. Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 220 (2005).

197. Jonakait, *supra* note 194, at 168; see also Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 616–17 (1992).

198. See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1643 (2009) (“The drafters and ratifiers of the Confrontation Clause left little direct evidence of what they intended to require; the clause comes to us, the Justices have noted, ‘on faded parchment.’”) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988)).

Hearsay law was unsettled in 1791, and we lack good records of ratification-era trials. The proper treatment of a DNA analysis report offered without giving the accused the opportunity to confront the author of the report cannot be discerned from a close reading of historical texts; reasonable persons may disagree about whether the admission of the report violates the Confrontation Clause. The same may be said for the traditional coconspirator hearsay exception, which was viewed with great suspicion by Chief Justice John Marshall.¹⁹⁹

Nonetheless, certain cases are easy. The government may not indict a defendant, take a deposition of a key prosecution witness in secret, and then admit the deposition transcript at a criminal trial without producing the witness for cross-examination. The prosecution may, however, call a witness to repeat the excited utterance made by a declarant who had no knowledge of any impending criminal prosecution, much less a desire to bear testimony.

While reasonable persons may draw different lines separating the hearsay that does and does not violate the Sixth Amendment, coventurer hearsay falls on the wrong side of any reasonable line. An interpretation of the Confrontation Clause that allows such hearsay against criminal defendants (1) would do nothing about one of the worst pieces of evidence wrongly admitted against Raleigh—the testimony of Dyer concerning the Portuguese sailor; (2) would expand a hearsay exception whose traditional, narrower meaning unnerved Chief Justice Marshall and fomented a Sixth Amendment circuit split nearly two centuries after ratification; and (3) would undermine the adversary system by opening American courts to a vast universe of unreliable hearsay. Considering the historical ambiguity concerning the precise meaning of the clause,²⁰⁰ why interpret it in such a fashion?

B. *Modern Practice Shows the Evil of Admitting Coventurer Hearsay*

To see the corrosive effect that the joint venture hearsay theory and the *Crawford* doctrine produce together upon American criminal justice, consider again the Holy Land Foundation (HLF) case, *United States v. El-Mezain*, in which five defendants were convicted of giving money to Hamas.²⁰¹ The defendants were sentenced to lengthy prison terms,

199. See *United States v. Burr*, 25 F. Cas. 187, 194 (C.C. Va. 1807) (No. 14,694) (Marshall, C.J.) (“I have not been able to find in the books a single decision, or a solitary dictum which would countenance the attempt that is now made to introduce as testimony the declarations of third persons, made in the absence of the person on trial, under the idea of a conspiracy, where no conspiracy is alleged in the indictment.”).

200. See *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring) (“There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean.”).

201. See *supra* notes 1–2 and accompanying text.

ranging from fifteen to sixty-five years.²⁰² The case involved “many years of painstaking investigative and prosecutorial work at the federal, state and local levels,”²⁰³ and it has tremendous importance well beyond the fate of the five defendants. Several major American charities (having nothing to do with HLF or its work) filed a brief as amici curiae arguing that the legal theory underlying the HLF convictions, “if upheld on appeal, would jeopardize the legitimate charitable work of countless foundations and charities throughout the United States.”²⁰⁴ In addition, the prosecution roiled the American Muslim community.²⁰⁵ If the government of the United States is to shutter the largest Muslim charity in the country and send its leaders to prison for decades, it should obtain convictions with evidence of unquestioned legitimacy. Instead, the prosecution used the revisionist interpretation of the coconspirator statement exception to admit unreliable hearsay documents offered to prove that HLF was the fundraising arm of Hamas in the United States.²⁰⁶

In its effort to prove that the defendants had directed money to a terrorist organization,²⁰⁷ the government sought to demonstrate that the American organization they worked for was linked with Hamas.²⁰⁸ Hamas—a Palestinian political party with varying levels of official authority in the West Bank and the Gaza Strip—is considered a terrorist organization by the United States and many other countries, and it is a

202. See U.S. Dep’t of Justice, *Federal Judge Hands Downs Sentences in Holy Land Foundation Case* (May 27, 2009), available at <http://www.justice.gov/opa/pr/2009/May/09-nsd-519.html>.

203. *Id.*

204. See Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, and Constitutional Rights Organizations In Support of Defendants and Urging Reversal of Convictions of Counts 2–10 at 1, *United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560). The amici included the Carter Center, the American Friends Service Committee, and the Nathan Cummings Foundation. *Id.* at 29–30.

205. See Goodstein, *supra* note 1; *Holy Land Foundation*, MUSLIM LEGAL FUND OF AM., <http://mlfa.org/holy-land-foundation-hlf> (last visited Oct. 6, 2012) (“In an attempt to smear the entire Muslim community, the Justice Department also released to the media a list of more than 300 Muslim organizations and individuals they consider unindicted co-conspirators. . . . This potentially criminalizes your Muslim charity.”).

206. See Brief for the United States at 10–11, 22–23, 30, 70–73, *El-Mezain*, 664 F.3d 467 (No. 09-10560).

207. The defendants were charged with (among other offenses) providing material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1), which makes it a crime to “knowingly” provide such support. See *El-Mezain*, 664 F.3d at 485.

208. “HAMAS is an acronym for Islamic Resistance Movement in Arabic, Harakat al-Muqawamah al-Islamiyya. On October 8, 1997, the U.S. Secretary of State designated HAMAS as a Foreign Terrorist Organization pursuant to 8 U.S.C. § 1189.” *Ashqar v. Holder*, 355 Fed. App’x 705, 708 n.3 (4th Cir. 2009) (internal citations omitted); see also *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 471 n.1 (5th Cir. 2007).

federal crime to provide material support to Hamas.²⁰⁹ During the HLF trial,²¹⁰ the United States presented dozens of documents found during searches of the homes of two “unindicted co-conspirators.”²¹¹ Although the documents were found in the homes of Ismail Elbarasse and Abdelhaleen Masan Ashqar and accordingly came to be known as the “Elbarasse and Ashqar documents,”²¹² there is no evidence that Elbarasse or Ashqar created the documents; indeed, the identity of the authors is a mystery for at least some of the documents.²¹³

Unlike hearsay documents admissible under Rule 803(6), these records were not shown by the proponent (that is, the prosecution) to have been “kept in the course of a regularly conducted activity of a business, organization, occupation, or calling,” nor did the prosecution offer “the testimony of the custodian or another qualified witness” concerning the creation and maintenance of the documents.²¹⁴ And the prosecution also did not show that the documents were statements of agents or servants of the defendants, which would make the documents party admissions under Rule 801(d)(2)(D).²¹⁵ Rather, the prosecution asserted that even though the documents were created before providing support to Hamas violated United States law in any way—because the United States had not yet added Hamas to the list of prohibited recipients of funds—the documents nonetheless qualified as “statements . . . made . . . during and in furtherance of [a] conspiracy” between the HLF defendants and the authors of the documents.²¹⁶ The “conspiracy” was the joint undertaking to support an organization, the support of which was fully lawful at the time the statements “in furtherance” of the project were made.²¹⁷

209. See generally *Times Topics: Hamas*, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/organizations/h/hamas/index.html> (last updated May 21, 2012).

210. Unless otherwise stated, all references to the “HLF trial” refer to the second trial, at which the jury found all five defendants guilty.

211. See Brief for the United States at 70–71, *El-Mezain*, 664 F.3d 467 (No. 09-10560).

212. See *id.* at 71.

213. See Opening Brief of Appellant Ghassan Elashi (with common issues) at 49 n.28, *El-Mezain*, 664 F.3d 467 (No. 09-10560).

214. See FED. R. EVID. 803(6).

215. Technically, the statements formerly called “admissions by party-opponents” in the Federal Rules of Evidence are now called “opposing party’s statements” following the December 2011 “restyling” of the Rules. See *id.* 801(d)(2). The Advisory Committee Notes to the 2011 amendments make clear that “[n]o change in application of the exclusion is intended.” *Id.* The old language is still being used by at least some courts. See, e.g., *United States v. Nunez*, 673 F.3d 661, 663 (7th Cir. 2012).

216. See FED. R. EVID. 801(d)(2)(E); Brief for the United States at 74–78, *El-Mezain*, 664 F.3d 467 (No. 09-10560); see also Reply Brief for Defendants at 23, *El-Mezain*, 664 F.3d 467 (No. 09-10560) (“The government concedes that the Elbarasse and Ashqar documents were created before 1995, when it became unlawful to support Hamas.”).

217. As it happens, the Palestinian organizations to whom HLF directed money (the

These documents, which the prosecution did not claim were admissible pursuant to any hearsay exception other than the coventurer hearsay exception, were vital to the case against the defendants. As the United States argued on appeal, “The documents establish that HLF was the Palestine Committee’s official fund-raising organization for the purpose of collecting donations for Hamas, and they specifically provide that the Palestine Committee would govern HLF’s activities and that HLF would report to the Committee.”²¹⁸ Although the Fifth Circuit accepted many “harmless error” arguments advanced by the prosecution on appeal,²¹⁹ the United States did not even argue that the convictions of the defendants could be upheld if the Elbarasse and Ashqar documents were not proper evidence.²²⁰ The importance of the documents would preclude a harmless error finding if they were wrongly admitted. Indeed, the Fifth Circuit decision affirming the conviction was justified in part by the evidence in these documents.²²¹

A reconsideration of the justifications for the traditional coconspirator exception reveals that none of them, other than perhaps bare “necessity,” supports the admission of the Elbarasse and Ashqar documents against the HLF defendants.²²² The four arguments raised to justify the admission against one conspirator of the statements of others

funding that served as the basis of the defendants’ conviction) received funds from the United States government directly, even after the government shut down HLF and after the defendants were indicted. *See* Appellant’s Joint Petition for Rehearing En Banc at 3, *El-Mezain*, 664 F.3d 467 (No. 09-10560). Of course, the United States government is free to criminalize private donations to entities that the government supports, albeit not without raising eyebrows.

218. *See* Brief for the United States at 73, *El-Mezain*, 664 F.3d 467 (No. 09-10560). Lawyers for the United States made a similar argument with respect to joint venture hearsay in another terrorist financing case. *See* United States v. Islamic Am. Relief Agency, No. 07-00087-CR-W-NKL, 2009 WL 3062175 (W.D. Mo. Sept. 21, 2009); Government’s Response in Opposition to Joint Motion at 7, *Islamic Am. Relief Agency*, 2009 WL 3062175 (“[I]t is sufficient if the statements are the result of his involvement in a legal or illegal joint venture[.]”).

219. *See El-Mezain*, 664 F.3d at 525–35.

220. *See* Brief for the United States at 69, 94, *El-Mezain*, 664 F.3d 467 (No. 09-10560) (arguing that various alleged trial errors were harmless); *id.* at 70–78 (discussing admission of Elbarasse and Ashqar documents under coventurer hearsay theory without asserting harmless error).

221. *See El-Mezain*, 664 F.3d at 534 (recounting trial evidence that “the 1991 Elbarasse No. 22 letter . . . indicated that Hamas controlled the zakat [Muslim charity] committee” and that “[e]vidence seized from HLF included a letter . . . addressed to the Ramallah Zakat Committee’s director . . . whose name and telephone number also appeared along with several other people identified as Hamas members on a list seized from Elbarasse’s home”); *see also* Jason J. Kilborn, *Foundations of Forgiveness in Islamic Bankruptcy Law: Sources, Methodology, Diversity*, 85 AM. BANKR. L.J. 323, 357–58 (2011) (discussing principles of *zakat*).

222. *See supra* Subsection II.A.1 (discussing traditional justifications for the coconspirator exception).

made in furtherance of their common illegal schemes are (1) an analogy to agency theory, (2) an analogy to verbal acts or *res gestae*, (3) the assertion that coconspirator hearsay is reliable in a way similar to statements within other hearsay exceptions, and (4) an appeal to necessity, claiming that without such evidence many conspirators would go unpunished. The first three arguments have no application to the Elbarasse and Ashqar documents.

Agency analogy. The prosecution did not allege, much less prove, that the authors of the documents (whoever they may have been) were the agents of any of the HLF defendants. Even if somehow the author of one document were truly proven to have been acting as the agent of one of the HLF defendants, the document would have been good evidence only against that defendant, not against the others.²²³ The other defendants would have been entitled to a limiting instruction to the effect that the evidence could be considered by the jury only against the “principal,” and they might well have been entitled to separate trials because of the importance of the documents to the prosecution case.²²⁴

“Verbal acts” analogy. Because the documents were not made in furtherance of any illegal venture, they cannot plausibly be described as *res gestae* (the “thing itself”) of crime. For example, one of the Ashqar documents relied upon by the Fifth Circuit was titled “Important phone and fax numbers. Palestine Section/Outside America.”²²⁵ In the infancy of the coconspirator hearsay exception, commentators analogized such hearsay to *res gestae* because certain coconspirator statements were truly criminal in nature, such as a letter urging a foreign enemy to invade.²²⁶ Compiling a contact list for a legal organization is not a verbal act in any sense of the term.

Reliability. The prosecution cannot identify the authors of the Elbarasse and Ashqar documents, nor can it produce a witness concerning the creation or maintenance of the records. The documents therefore lack the indications of reliability required for the admission of ordinary business records such as telephone bills or pay stubs.²²⁷ Further, the United States alleges that the documents were made in

223. See FED. R. EVID. 105; Daniel J. Capra, *Instructions on Admissions for a Limited Purpose*, 211 N.Y.L.J. 3 (Mar. 11, 1994).

224. See *United States v. Tutino*, 883 F.2d 1125, 1129–30 (2d Cir. 1989); *United States v. Figueroa*, 618 F.2d 934, 946–48 (2d Cir. 1980); *Castro v. United States*, 296 F.2d 540, 543 (5th Cir. 1961).

225. See *El-Mezain*, 664 F.3d at 528.

226. See, e.g., *Trial of William Lord Russell*, 9 HOWELL’S STATE TRIALS 577, 604 (1683); see also Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 325–26 (1984).

227. See *Pierce v. Atchison Topeka & Santa Fe Ry. Co.*, 110 F.3d 431, 444 (7th Cir. 1997); FED. R. EVID. 803(6); Charles V. Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276 (1961).

furtherance of a shadowy scheme aimed at the secret diversion of purported charitable funds into terrorist coffers.²²⁸ Accordingly, such hearsay should be considered no more reliable than most statements uttered by criminals, whom sensible persons do not deem more credible than law-abiding citizens whose out-of-court utterances are traditionally excluded from evidence by the hearsay rule.

Necessity. All that is left is necessity—the difficulty of convicting certain defendants without the desired evidence—which is the only justification of the traditional coconspirator exception to withstand sustained scrutiny.²²⁹ If necessity, crude as it may seem, is sufficient to justify a longstanding hearsay exception such as that for coconspirator hearsay, why may it not then serve to justify the expansion of the exception to statements made in furtherance of lawful ventures? The answer is that as is the case for other party admissions, the use of coconspirator hearsay is made palatable by a theory of desert, which holds that a conspirator may fairly suffer the use against him of the unreliable out-of-court statements of his confederates because he deserves such harms (and more) by virtue of his decision to join a conspiracy. An example using other forms of party admissions illustrates the importance of desert to Rule 801(d)(2).

Imagine that the rollercoaster at Awesome Amusements speeds out of control, causing severe injuries to children on the ride. Hours after the accident, a parent of one of the accident victims overhears Casey Jones, an Awesome Amusements employee say, “I really shouldn’t have shown up high on cocaine on the day I was in charge of the rollercoaster. I’ve got trouble ahead.”²³⁰ The injured child sues Casey Jones, Awesome Amusements, and Jerry Garcia, another Awesome Amusements employee, whom the plaintiff alleges was also negligent on the day of the accident. Jones’s “high on cocaine” hearsay would be admissible against Jones because it is his own statement.²³¹ And it would be admissible against his employer, Awesome Amusements, because it was “made by the party’s agent or employee on a matter

228. See Brief for the United States at 7–8, *El-Mezain*, 664 F.3d 467 (5th Cir. 2011) (No. 09-10560) (Jan. 28, 2011) (“Appellant Holy Land Foundation . . . was founded and operated for the purpose of raising money for the Palestinian terrorist group Hamas From the founding of Hamas and HLF in the late 1980s, HLF supported Hamas by raising millions of dollars for the movement and distributing proceeds to Hamas-controlled entities in the West Bank and Gaza.”).

229. See *supra* Subsection II.A.1.

230. Note that despite the implication by the Grateful Dead in their “Casey Jones” song, the actual John Luther “Casey” Jones died heroically, attempting to save lives in a train accident unrelated to drug use. See MASSENA F. JONES, *THE CHOO-CHOO STOPPED AT VAUGHAN* (1979); GRATEFUL DEAD, *Casey Jones, on WORKINGMAN’S DEAD* (Warner Bros. 1970) (“Driving that train, high on cocaine / Casey Jones you better watch your speed.”).

231. See FED. R. EVID. 801(d)(2)(A).

within the scope of that relationship and while it existed.”²³² It would probably not, however, be admissible against Garcia, unless somehow Jones was found to have been Garcia’s agent, or Garcia somehow ratified Jones’s words.²³³

This result, that the statement can be used against two defendants but not against the third,²³⁴ cannot be explained by reliability. Jones either spoke accurately or he did not; the answer does not depend on the person against whom his words will be used at trial. The explanation is that anything Jones says “can and will be used against him in a court of law,” a maxim more commonly associated with criminal cases but nonetheless widely understood. He said it; let him explain it. And although Awesome Amusements did not “say it” exactly, it did hire Jones and take responsibility for his actions while on the job. After all, the liability of the company for Jones’s negligent operation of the amusement ride depends on the theory of respondeat superior. It is but a small leap from a substantive rule that the employer should be responsible for the actions of its employee to the evidentiary rule that the employer should be confronted with the words of its employee.

Garcia, on the other hand, just works there. He does not control Jones’s words or deeds. Just as he cannot be held vicariously liable should Jones be found to have acted negligently, he does not deserve to face the out-of-court statements with which Jones may have hanged himself and his employer. Unless Jones’s statement meets the standard of a hearsay exception justified by reliability (such as an excited utterance), the admission of Jones’s words against Garcia would be unjust, and evidence law does not allow it.

The concept of desert also explains the Confrontation Clause procedure known as the *Bruton* Doctrine, which often prevents the use of one codefendant’s confession at a trial when such evidence is inadmissible against other defendants.²³⁵ For example, imagine that Jones and Garcia were jointly tried for the crime of reckless endangerment. Jones, failing again to keep his mouth shut, tells police before trial, “Garcia and I were both high on cocaine on the day of the accident.” The confession would be properly admissible against Jones (he said it; let him explain it) but not against Garcia. A limiting instruction such as “the jury shall not consider the Jones confession as

232. *See id.* 801(d)(2)(D).

233. *See id.* 801(d)(2)(B).

234. It is possible that Jones’s statements could be found admissible against any party as a “statement against interest.” This would require, however, that Jones be unavailable at trial. *See id.* 804(b)(3).

235. *See Bruton v. United States*, 391 U.S. 123, 137 (1968); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE: PRACTICE UNDER THE RULES* § 1.15, at 91–92 (1999).

evidence against Mr. Garcia” would be insufficient to protect Garcia’s rights under the Sixth Amendment.²³⁶ To use the statement against Jones, the prosecution must either consent to separate trials or otherwise ensure that the jury deciding Garcia’s case hears no mention of Jones’s statement concerning Garcia.²³⁷ These constitutional constraints on the use of Jones’s statements are not based on reliability. If Jones’s words are reliable at his own trial, they are reliable at Garcia’s. The explanation is that despite the uncertain reliability of Jones—some people lie to police, others speak truth, and the traditional sorting method at trial involves cross-examination, not a blanket assumption of accuracy—evidence law and constitutional law allow Jones’s words to be used against him because he brought his problems upon himself when he opened his mouth.

Another illustration of the disconnect between coventurer hearsay and the normal theory of desert underlying the coconspirator exception was presented by the recent trial of Senator John Edwards for campaign finance crimes. The Edwards trial concerned money paid by supporters to help Edwards placate and hide his mistress, Rielle Hunter, whom Edwards had impregnated.²³⁸ Federal prosecutors argued that they could offer against Edwards any statement made in furtherance of the goal of electing Edwards to the presidency of the United States.²³⁹ A prosecution brief referred to “a common goal among . . . Edwards [and others] to keep Rielle Hunter happy and out of the spotlight in order to protect Edwards’ candidacy” and argued that statements “made in furtherance of that joint effort fall within the scope of Rule 801(d)(2)(E).”²⁴⁰ If this theory is correct, such statements would be admissible against any member of the Edwards campaign—including volunteers; the declarants at issue were not campaign staff members—because coconspirator statements may be used against all members of a conspiracy, not only the leader.²⁴¹

236. See *Cruz v. New York*, 481 U.S. 186, 190–91, 193 (1987); see also *United States v. Alcantar*, 271 F.3d 731, 739 (8th Cir. 2001); MUELLER & KIRKPATRICK, *supra* note 235, § 8.28, at 1101. Garcia could not confront Jones about the statement unless Jones waived his Fifth Amendment rights and chose to testify at trial.

237. For example, the court might empanel two juries, removing the Garcia jury from the courtroom when the Jones confession is offered as evidence. Or the statement could be redacted, reading something like, “I [was] high on cocaine on the day of the accident.” See *Richardson v. Marsh*, 481 U.S. 200, 209 (1987); MUELLER & KIRKPATRICK, *supra* note 235, § 8.28, at 1101–02.

238. See Kim Severson, *Defense Rests in Edwards Trial Without Having Called Major Players to the Stand*, N.Y. TIMES, May 17, 2012, at A20.

239. See Government’s Motion in Limine at 7, *United States v. Edwards*, No. 1:11-CR-161-1-CCE, 2012 WL 628691 (M.D.N.C. Feb. 15, 2012).

240. *Id.*

241. See *supra* note 85 and accompanying text.

It might make sense to offer against Edwards statements made by his campaign employees, and perhaps even low-level volunteers shaking hands in Iowa, because such persons may fairly be described as “agents” of a candidate running for president. Edwards had the ability to fire campaign staff and volunteers; they worked for him. Accordingly, Rule 801(d)(2)(D) might allow admission of the statements under the principal–agent exception to the hearsay rule. But surely it cannot be correct that if someone volunteers to canvass for a presidential campaign in Iowa, she is on the hook for any statements made by her “coconspirators” shaking hands and kissing babies in New Hampshire. Edwards’s prosecutors would go even further, exposing these low-level volunteers to statements made by campaign supporters who gave money and took Hunter shopping with the goal of helping the candidate.²⁴²

As in the Walter Raleigh trial, the hearsay admitted in the Holy Land Foundation case offends Anglo-American notions of fair play and substantial justice because (1) the evidence bears no hallmarks of reliability that distinguish it from commonly inadmissible out-of-court statements, and (2) the defendants have committed no unlawful act that makes them “deserve” to face unreliable evidence in court. When Raleigh’s alleged coconspirator, Cobham, confessed, Raleigh demanded the right to confront the witness in open court. The court’s denial of that request earned it an ignominious reputation that endures centuries later, as the *Crawford* Court duly noted.²⁴³ Similarly, when the ship’s pilot Dyer recounted the alleged statements of an unnamed Portuguese gentleman, Raleigh did not bother demanding the right to cross-examine the declarant because the court could not have produced the “gentleman” even if it had desired to do so. Cobham’s written confession was not especially reliable, nor was the gossip recounted by Dyer. Other than his status as a person charged with serious crimes, nothing about Raleigh merited the admission against him of such questionable evidence. In the HLF trial, the prosecution offered dozens of documents absent any knowledge of who created them, how they might have been altered since then, and whether whoever wrote them was especially knowledgeable about their subjects. These documents are no more reliable than others commonly rejected as hearsay unable to fit within the scope of the business records exception. And other than their status as persons charged with serious crimes, the HLF defendants had done nothing to merit the admission against them of such questionable evidence. Indeed, the United States concedes that the

242. See Government’s Motion in *Limine*, *supra* note 239, at 4. The prosecution’s brief cited the Fifth Circuit’s opinion in *El-Mezain* to support this theory. *Id.* at 6.

243. *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (citing 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373–74 (1768)).

documents were created before it was even possible to violate the ban on funding Hamas.

The *Roberts* doctrine accepted the traditional coconspirator hearsay exception as “firmly rooted” and allowed the use of coconspirator hearsay against criminal defendants. But the expansion of the exception to include statements in furtherance of lawful joint ventures almost certainly would have been deemed a Confrontation Clause violation had *Roberts* survived when courts began adopting the revisionist interpretation of the coconspirator hearsay exception. As the Holy Land Foundation case illustrates, the failure of *Crawford* to exclude hearsay that *Roberts* likely would have barred from criminal trials demonstrates a vital weakness in the Court’s new Sixth Amendment jurisprudence. Put simply, the new doctrine allows significant injustices that the old doctrine would have prevented. If the Court continues to confine the Confrontation Clause to testimonial hearsay, it must find some other method—perhaps through the Due Process Clauses—to exclude coventurer hearsay from criminal trials. To the extent that the Justices continue to tweak the definition of *testimonial*, they should endeavor to find a way to include unreliable statements in furtherance of perfectly lawful joint undertakings in the list of hearsay excluded by the Sixth Amendment.

CONCLUSION

The Confrontation Clause interpretation set forth in *Crawford v. Washington* allows significant injustices that the discarded doctrine of *Ohio v. Roberts* would have prevented. Refuting claims that *Crawford* is perhaps wrong as a historical matter but sound as a practical matter, the example of coventurer hearsay proves that in at least some cases, *Crawford* allows formerly prohibited evidence (in the form of out-of-court statements by declarants whom a defendant cannot confront) into criminal trials despite (1) the absence of any good arguments for its reliability compared to excluded hearsay, and (2) the absence of any good arguments that the defendants “deserve” to face such evidence because of their own conduct. The Court should correct the deficiencies of the *Crawford* doctrine before it allows unreliable hearsay to further infect American criminal trials.