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Revisiting the Fictional Originalism in *Crawford's* “Cross-Examination Rule”

A REPLY TO MR. KRY

Thomas Y. Davies[†]

[The] process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding.

—Frederic Maitland^{††}

I. INTRODUCTION

Originalists attribute heightened normative importance to the original meaning of a constitutional provision. Given that position, should they be expected to exercise discipline in making claims about the historical content of the original meaning? Should they refrain from making originalist claims in the absence of clear historical evidence of the Framers' understanding? If so, what are the criteria for identifying valid historical evidence of the Framers' design?

These issues are at the root of a controversy regarding one of the two originalist claims that appeared in Justice Scalia's 2004 opinion for the Court in *Crawford v. Washington*.¹ In a 2005 article in this *Law Review*, I criticized the historical claims in *Crawford* as yet another example of fictional originalism in Supreme Court opinions.² Mr. Robert Kry, who clerked for Justice Scalia during the term in which *Crawford*

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^{††} Frederic Maitland, Inaugural Lecture at Cambridge (1888), *quoted in* 3 PETER GAY & VICTORIA G. WEXLER, HISTORIANS AT WORK 301-02 (1975).

Quotations of historical sources are presented in this article with the original spelling, capitalization, and punctuation, but in modern typeface.

¹ 541 U.S. 36 (2004).

² Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

was decided, now responds that my criticisms of one of *Crawford's* originalist claims were unfounded.³ I reply to Mr. Kry in this article.

A. *Justice Scalia's Originalist Claims in Crawford*

The subject in dispute is a facet of the original meaning of the Sixth Amendment Confrontation Clause in the Bill of Rights. There is no doubt that the Framers intended for that Clause to require that evidence in criminal trials usually be presented by live witnesses, in the presence of the defendant, and subject to cross-examination by the defendant in the view of the jury. However, the scope and content of the confrontation right has seemed problematic with regard to the admission of hearsay evidence—a witness's repetition at trial of an out-of-court statement made by a declarant who does not testify at the trial.

Because admitting out-of-court statements made by a person who does not testify at trial contravenes the face-to-face and cross-examination aspects of the defendant's confrontation right, it seems apparent that such statements should not be admissible if the out-of-court declarant is available to be produced as a prosecution witness at trial. In fact, the use of out-of-court statements of persons who could have testified in person is the specific abuse associated with the creation of the confrontation right.⁴ However, the admissibility of out-of-court

³ Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493, 494 (2007). Kry notes that his focus on this aspect should not be viewed as "acquiescence" in other aspects of my criticism of *Crawford*. *Id.* at 556 n.291.

⁴ For example, the admission of out-of-court statements by a person who was available to be called as a witness was one of the notorious defects in Sir Walter Raleigh's 1603 trial. *See* Raleigh's Case, 2 How. St. Tr. 1 (1603). That defect was noted in legal authorities widely used by the Framers, such as Sergeant William Hawkins's leading treatise on criminal law and procedure, which also stated that it was subsequently adjudged that out-of-court depositions of persons who might have been produced as witnesses at trial could not be admitted into evidence. *See, e.g.*, 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 430 (5th ed. 1771).

Volume one of Hawkins's treatise was initially published in 1716; volume 2 in 1721. Several subsequent editions that were virtually identical to the first edition were published in 1724-1726, 1739, and 1771. For simplicity, I cite to the 1771 edition. For bibliographic information, see 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 362-63 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter MAXWELL].

Thomas Leach edited two further editions of Hawkins's treatise in which he made substantial additions. He published an edition in 1787 in which he added substantial notes and sometimes textual material to Hawkins's original work. Most of the surviving copies of that edition in American libraries are of a 1788 Dublin

statements made by a genuinely *unavailable* declarant (for example, a declarant who has died prior to the trial) poses a more difficult issue, because such statements may involve important evidence, or even the most pertinent evidence, that could not be presented in any other way. How should the confrontation right now be understood with regard to the admissibility of out-of-court statements?

In *Crawford*, Justice Scalia asserted that originalism could answer that question and made two related claims about “the Framers’ design” for the application of the Confrontation Clause to such hearsay statements.⁵ First, he asserted that the Framers’ concern was “focused” on “testimonial” out-of-court statements⁶—that is, statements comparable to formal witness examinations taken by justices of the peace during the eighteenth century. On that basis, he strongly suggested that the confrontation right should apply only to “testimonial” out-of-court statements, but not to more casual or “nontestimonial” sorts of hearsay statements.⁷ In other words, the Confrontation Clause would not bar the admission of “nontestimonial” out-of-court statements even when the declarant was readily available to be produced by the prosecution as a trial witness, and even when the out-of-court statements provided crucial evidence for the defendant’s conviction. (*Crawford* left defining the boundary between the “testimonial” and “nontestimonial” categories “for another day,”⁸ but the distinction it suggested has since become law in the 2006 decision *Davis v. Washington*.⁹)

reprinting, so that edition was only becoming available in America in 1789. Additionally, Leach also published a four-volume enlarged edition in 1795 in which he added considerable new material. To differentiate Leach’s work from Hawkins’s original work, I cite Leach’s 1787 and 1795 editions as LEACH’S HAWKINS.

⁵ 541 U.S. at 68.

⁶ *Id.* at 50-53.

⁷ *Id.* at 60-61.

⁸ *Id.* at 68.

⁹ 547 U.S. ___, 126 S. Ct. 2266 (2006). *Davis* and the companion decision in *Hammon v. Indiana* provided some indications of the testimonial/nontestimonial boundary, but still stopped short of offering a broad definition of the boundary. See Materials distributed at Brooklyn Law School Symposium, *Crawford* and Beyond Revisited in Dialogue (Sept. 29, 2006) [hereinafter Symposium]. In *Hammon*, the Court concluded that statements made to police officers by a victim of a domestic assault after the assault ended were testimonial and subject to the confrontation right because the statements were primarily for the purpose of preparing for a prosecution. *Davis*, 547 U.S. at ___, 126 S. Ct. at 2278. Conversely, in *Davis*, the Court found that statements made to a 911 operator during a domestic assault were nontestimonial and not subject to the confrontation right because they were not made primarily for the purpose of preparing a prosecution. *Id.* at ___, 126 S. Ct. at 2276-78.

Second, with regard to “testimonial” out-of-court statements, to which the confrontation right would apply, Justice Scalia asserted that the Framers understood that the confrontation right would be violated by the admission of such a statement in a criminal trial unless (1) the declarant was genuinely unavailable to testify, and (2) the defendant had a previous opportunity to cross-examine the declarant.¹⁰ Justice Scalia dubbed this latter requirement the “cross-examination rule,”¹¹ and asserted that this rule was part of the original understanding of the Confrontation Clause.¹² Specifically, Justice Scalia asserted that the cross-examination rule regulated the admissibility in criminal trials of witness examinations taken pursuant to the Marian post-arrest procedure that applied in all felony prosecutions in eighteenth-century England and America.¹³

¹⁰ *Crawford*, 541 U.S. at 53-54.

¹¹ *Id.* at 46.

¹² *Id.* at 53-56.

¹³ The Marian statutes, enacted in the mid-sixteenth century, provided the procedure for initiating felony prosecutions. *See* 1 & 2 Phil. & Mar. 1554, c. 13, § IV; 2 & 3 Phil. & Mar. 1555, c. 10, § II. The provisions of the statutes applied when a person was arrested for a felony or manslaughter. They required the justice of the peace to whom the “prisoner” (that is, the arrestee) was taken to take the sworn “information” of the witnesses who made the arrest and brought the prisoner, as well as the unsworn “examination” of the arrestee himself, to reduce those statements to writing, and to certify those written records to the next session of the felony trial court (either the court of “gaol-delivery” or “sessions of the peace,” depending on the specific felony). The Marian statutes also required coroners to take the sworn information of homicide witnesses and certify it to the trial court. For a more detailed discussion, see Davies, *supra* note 2, at 126-30.

I realize that the reader, who will almost certainly be aware that we no longer use Marian examination procedure—and who will possibly never have heard of any such procedure prior to encountering *Crawford*—may think that an argument about Marian committal procedure is a rather arcane basis on which to construe the Confrontation Clause today. I think that, too. *See* Davies, *supra* note 2, at 189. However, this is the kind of historical inquiry to which originalism leads.

More accurately, this is the kind of inquiry that originalism may pose. Often there is a preliminary question of exactly what aspects of framing-era law are deemed pertinent. In *Crawford*, Justice Scalia directed attention to what he termed a common-law “cross-examination rule” and to the “statutory derogation” posed by the use of Marian witness examinations. *See supra* text accompanying note 11. However, as I pointed out in my previous article, the Framers would have had no difficulty deciding the outcome of the actual issue in *Crawford* on a much narrower ground. The statement at issue in *Crawford* was a wife’s statement that tended to incriminate her husband; however, framing-era sources stated a clear rule that a wife’s examination could not be used against her husband as evidence. *See* Davies, *supra* note 2, at 110 n.18. Hence, *Crawford* purported to provide an originalist construction of the Confrontation Clause by disregarding the fact that the Framers would have decided the question on an entirely different ground.

B. *My Criticisms of Crawford*

In a 2005 article in this *Law Review*, I argued that the two originalist claims that Justice Scalia made in *Crawford* both rested on misconceptions of the evidence regime that shaped the Framers' expectations about the confrontation right in 1789. Specifically, I argued that he interpreted the original scope of the right too narrowly, but also overstated one aspect of the substance of the right.

With regard to the original scope of the confrontation right, I argued that there was no historical basis for the restriction of the confrontation right to only "testimonial" hearsay, but not "nontestimonial" hearsay. Because an oath was still a necessary requisite for admissible evidence in a criminal trial under framing-era law,¹⁴ and "hearsay" was then defined as any out-of-court statement not made under oath, the rule was still that "[h]earsay is no evidence."¹⁵ Thus, because

¹⁴ In *Crawford*, Justice Scalia asserted that unsworn statements obtained by police interrogations would be "testimonial" because police interrogations bore a "striking resemblance" to Marian witness examinations taken by justices of the peace. *Crawford*, 541 U.S. at 52. He dismissed the significance of the fact that Marian examinations were taken under oath, but that the modern police interrogation at issue in *Crawford* did not involve an oath. *See id.* at 52-53. However, that departed from the framing-era understanding of valid evidence. *See Davies, supra* note 2, at 202-03 (noting that the police testimony regarding an out-of-court statement in *Crawford* would have been inadmissible in 1789 for lack of an oath).

Justice Scalia's dismissal of the historical oath requirement was especially noteworthy because the importance of the oath as a condition for admissible evidence was emphatically stated in two English cases cited in *Crawford*. In *King v. Woodcock*, Leach (1st ed. 1789) 437, 440 (Old Bailey 1789), the 1789 case that Justice Scalia cited as evidence of a "cross-examination rule," *Crawford*, 541 U.S. at 46, 54 n.5, the trial judge ruled that the out-of-court statement at issue "cannot be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken."

In addition, in *King v. Brasier*, 1 Leach (4th ed. 1814) 199, 168 Eng. Rep. 202 (Twelve Judges 1779), *cited in Crawford*, 541 U.S. at 69-70 (Rehnquist, C.J., concurring), the Twelve Judges stated that "no testimony whatsoever can be legally received [in a felony trial] except upon oath." *Id.* at 200, 168 Eng. Rep. at 202. The description of the evidence admitted in the trial in the report of *Brasier* cited in *Crawford* differed significantly from that which appeared in the initial version published in 1789, but there was no change in the statement of the Twelve Judges. *See Brasier*, Leach (1st ed. 1789), at 346.

Indeed, peace officers were not permitted to conduct interrogations of arrestees during the framing-era. Police interrogation arose during the nineteenth century after the standard for warrantless arrests was reduced to "probable cause." *See Thomas Y. Davies, Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial" Right in Chavez v. Martinez*, 70 TENN. L. REV. 987, 1030-33 (2003) [hereinafter *Davies, Self-Incrimination*].

¹⁵ *See, e.g.,* GEOFFREY GILBERT, THE LAW OF EVIDENCE 107 (1st ed. 1754) ("a mere Hearsay is no evidence"); *id.* at 149-50 (4th ed. 1777) (same). For bibliographic information, see *Davies, supra* note 2, at 143 n.123. Under modern evidence doctrine,

there was no distinction of hearsay into categories, I argued that Justice Scalia's claim that the *original* confrontation right was limited to only "testimonial" out-of-court statements was merely a political choice posing as history.¹⁶ *Crawford's* categorization of some out-of-court statements as "nontestimonial" permits the admission of *unsworn* hearsay statements that would have been inadmissible under framing-era law.

I criticize the originalist claims made in *Crawford* and *Davis* about the "testimonial" scope of the confrontation right in more detail in a forthcoming article.¹⁷ However, because Mr. Kry does not address this aspect of my 2005 article,¹⁸ I do not discuss *Crawford's* restriction of the scope of the confrontation right in this article, even though it seems likely that the limitation of the confrontation right to only "testimonial" hearsay will prove to be the more significant dimension of *Crawford's* originalist scheme.¹⁹

of course, an out-of-court statement is not hearsay unless the statement is offered in evidence for the truth of the content of the statement. However, that reflects a post-framing alteration of the definition of hearsay that does not appear in framing-era sources. Rather, framing-era evidence law treated all *unsworn* out-of-court statements as "hearsay" and, thus, as "no evidence." See GILBERT, *supra*, at 107-08 (1754 ed.); *id.* at 149-50 (1777 ed.).

¹⁶ Davies, *supra* note 2, at 189-206. The potential implications of limiting the confrontation right to "testimonial" hearsay statements is discussed *infra* note 46.

¹⁷ I further develop my criticisms of this aspect of *Crawford* in a follow-up article, *Not "the Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y (forthcoming 2007) [hereinafter Davies, *Not the Framers' Design*]. This article further develops my presentation in Symposium, *supra* note 9, at 85-109, titled *Originalist Alchemy: Applying the Crawford-Davis Testimonial/Nontestimonial Distinction Despite the Framing-Era General Ban Against Hearsay Evidence*.

¹⁸ Kry states that he does not acquiesce in my criticisms of *Crawford's* testimonial/nontestimonial distinction but does not address it because it has been well addressed by other authors, and cites Richard Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998). See Kry, *supra* note 3, at 556 n.291. However, Friedman's article merely mentions some of the very early history of the confrontation right, but makes no attempt to address either the right or the conception of hearsay at the time of the framing of the Confrontation Clause. See Friedman, *supra*, at 1022-25 (discussing the confrontation right to the middle of the seventeenth century).

¹⁹ The significance of the cross-examination rule announced in *Crawford* will depend upon how broadly or narrowly the justices define the concept of "testimonial" out-of-court statements. The 2006 decision in *Davis* leaves open the possibility that only statements made to government agents can be "testimonial," but that not all such statements will be "testimonial." Indeed, Justice Scalia stated in *Davis* that whether a statement is "testimonial" will depend upon its "primary" purpose and that "initial inquiries" made by police will "often" be nontestimonial and thus not subject to the confrontation right. See *Davis*, 547 U.S. at ___, 126 S. Ct. at 2279. Hence, although the *Crawford* opinion itself may convey the impression of a robust confrontation right,

In my 2005 article, I also criticized Justice Scalia's originalist claim regarding a Marian cross-examination rule. Based on my prior research regarding the Framers' understanding of the criminal procedure provisions of the Bill of Rights,²⁰ it was apparent to me when I read *Crawford* that Justice Scalia's opinion did not reflect sufficient discipline regarding the historical materials that he offered as evidence that a cross-examination rule was part of the original Confrontation Clause. Justice Scalia had cited reports of two 1696 English proceedings and three English cases decided in 1787, 1789, and 1791.²¹ On the basis of those sources, Justice Scalia claimed that at the time the Sixth Amendment Confrontation Clause was ratified in 1791, it was settled law that the written record of a Marian examination of a witness who had become genuinely unavailable to testify prior to the trial could not be admitted as evidence in a felony trial unless the defendant had had an opportunity to cross-examine the witness when the examination was taken. Additionally, Justice Scalia asserted that post-framing English commentaries and cases and post-framing American state cases also demonstrated that the cross-examination rule announced in *Crawford* had been part of the original meaning of the Confrontation Clause.²²

However, I was aware that the 1787, 1789, and 1791 English cases that Justice Scalia had cited as evidence of a

it will not be surprising if future rulings circumscribe "testimonial" statements so narrowly that the confrontation right and its cross-examination rule rarely apply. See *infra* note 46.

²⁰ To date, I have researched original meaning and criticized erroneous Supreme Court "originalist" claims regarding the Fourth Amendment, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) [hereinafter Davies, *Fourth Amendment*], the law of warrantless arrest, Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002) [hereinafter Davies, *Arrest*], and the Fifth Amendment right against compelled self-incrimination, Davies, *Self-Incrimination*, *supra* note 14, at 1023-28.

²¹ *Crawford*, 541 U.S. at 45-47, 54 n.5 (citing Fenwick's Case, 13 How. St. Tr. 537 (H.C. 1696); King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696); King v. Radbourne, 1 Leach (4th ed. 1815) 457, 168 Eng. Rep. 330 (Old Bailey and Twelve Judges 1787); King v. Woodcock, 1 Leach (4th ed. 1815) 500, 168 Eng. Rep. 352 (Old Bailey 1789); King v. Dingler, 2 Leach 561, 168 Eng. Rep. 383 (Old Bailey 1791)).

²² *Id.* at 47, 49-50. Justice Scalia also cited some colonial and framing-era statements by Americans, but they only endorsed the confrontation right in general terms, but did not actually address the specific issue of the admissibility of Marian witness examinations. See *id.* at 47-49. One of those statements was altered by editing and does not appear to have addressed confrontation in criminal cases. See *infra* note 81.

settled cross-examination rule had all been published in London too late to have come to the Framers' attention when the Confrontation Clause was *framed* in mid-1789.²³ (As I explain below, further research has uncovered additional objections to the 1787 and 1791 cases: the initial version of the 1787 case differed significantly from the later version cited in *Crawford*;²⁴ and the 1791 case was not published until 1800.²⁵)

My previous research also led me to doubt that the Framers were familiar with the details of the seventeenth-century English treason trials that Justice Scalia discussed. Additionally, that research convinced me that post-framing sources could not be assumed to be trustworthy guides to the original meaning. With regard to the latter, the reality is that judges, abetted by commentators, have altered legal doctrine more drastically over the two centuries since the framing of the Bill of Rights than is commonly recognized. Put bluntly, during that time, judges and commentators have repeatedly revised major legal doctrines while pretending to simply apply existing doctrine, and the cumulative effect of their misdescriptions has often produced mythical descriptions of framing-era doctrine.²⁶ Hence, descriptions of original meaning that depend upon post-framing sources are rarely accurate.

²³ In a 2003 article, I had previously noted that all of the English cases first reported in Thomas Leach's *Cases in Crown Law* were published too late to have come to the Framers' attention prior to the framing of the Bill of Rights because that volume was not published until 1789. See Davies, *Self-Incrimination*, *supra* note 14, at 1026-28. In my 2005 article criticizing *Crawford*, I was able to document more precisely that Leach's volume could not have been published any earlier than May 1789—although it could have been later—because that volume reported a case from late April 1789. See Davies, *supra* note 2, at 160-62 n.182.

Additional information now suggests that the first edition was probably published late in 1789. Mr. Kry has informed me that the 1792 second edition of Leach's reports presented cases only through July 1791. See Kry, *supra* note 3, at 520 n.107. Thus, there was a publication delay in the 1792 second edition of at least six months after the last reported case. If there were a similar delay in the first edition, it would not have been published in London earlier than October 1789.

Moreover, it is increasingly apparent that Americans did not immediately consult Leach's reports of Old Bailey cases when they were published. See *infra* notes 289, 296, 301.

²⁴ See *infra* notes 175-92 and accompanying text.

²⁵ See *infra* text accompanying notes 206-10.

²⁶ For example, modern Supreme Court opinions have stated that "probable cause" was the pre-framing—or even the ancient—arrest standard, but that is only a myth. If one consults historical statements of arrest standards it is patent that nineteenth-century English and American courts had relaxed the framing-era "felony in fact" arrest standard to the modern "probable cause" standard, and had conferred more arrest authority on peace officers than private persons, all without acknowledging those changes. See, e.g., Davies, *Fourth Amendment*, *supra* note 20, at 634-40, 639 n.252.

Thus, in my 2005 article, I argued that Justice Scalia's "cross-examination rule" was itself a misstatement of the original content of the Confrontation Clause that would exclude some out-of-court statements that framing-era law would have treated as admissible evidence. I argued that the significant date for assessing the original meaning of the Confrontation Clause was the Clause's 1789 framing date, rather than the 1791 ratification date that Justice Scalia used in *Crawford*.²⁷ I also pointed out that no statement that could constitute a "cross-examination rule" had appeared in the discussions of the admissibility of Marian witness examinations in any of the legal authorities that the American Framers actually could have consulted prior to the 1789 framing.²⁸

In particular, no statements imposing a cross-examination requirement on Marian witness examinations appeared in any of the leading eighteenth-century English treatises on criminal procedure and evidence, or in any of the excerpts of those treatises that appeared in the justice of the peace manuals that were published in America and widely used by the framing-era American officials who took Marian witness examinations. Rather, the framing-era authorities simply indicated that the written record of a sworn Marian examination was admissible if the witness had become

There is also an even larger dimension of the judicial revision of the Framers' understanding of constitutional criminal procedure protections; namely, the state supreme courts and the Federal Supreme Court relocated the standard for lawful arrest from its initial locus in the state "law of the land" constitutional clauses and in the Fifth Amendment requirement of "due process of law" to the state provisions banning general warrants and to the Fourth Amendment, which was initially only a ban against legislative approval of general warrants—again without any acknowledgement by the judges who brought about that massive alteration of doctrine and constitutional content. See Davies, *Arrest*, *supra* note 20, at 216 n.344.

²⁷ Although the Bill of Rights was not ratified until December 1791, the text of the Confrontation Clause took its final form on July 11, 1789, and the Bill of Rights was adopted by the First Congress on September 25, 1789. See Davies, *supra* note 2, at 157-60. I argued that the original meaning has to be that which informed the First Congress, not merely the later ratifiers. *Id.* I further argued that, as a general matter, statements appearing in English sources after 1775 probably do not constitute valid evidence of the American original understanding of provisions of the Bill of Rights. *Id.* at 153-56. The use of the inappropriate 1791 date mattered for Justice Scalia's analysis in *Crawford* because it seemed to allow the use of a 1791 English decision (so long as one did not consider when the case report was published) and also because it allowed Justice Scalia to deflect statements by English judges in the 1790 English decision in *King v. Eriswell*, 3 T.R. 707, 100 Eng. Rep. 815 (K.B.). See *Crawford*, 541 U.S. at 54-55 n.5. I explain the difficulty *Eriswell* posed *infra* notes 218-40 and accompanying text.

²⁸ Davies, *supra* note 2, at 135-53, 160-62.

genuinely unavailable prior to trial.²⁹ Hence, Justice Scalia misstated the authentic history when he claimed that the American Framers would have understood that there was a settled rule that the admissibility of a Marian examination of an unavailable witness depended on the defendant having had an opportunity to cross-examine the witness at the time the examination was taken. There is no evidence that framing-era Americans were aware of any such rule.

I agreed that endorsements of a cross-examination rule began to appear in English authorities that reached America in the decades *after* the framing of the Confrontation Clause, and that such a rule also became evident in nineteenth-century American state cases.³⁰ However, I concluded that Justice Scalia had made a prochronistic error when he asserted that the original Confrontation Clause included an existing cross-examination rule.³¹ Thus, I identified both Justice Scalia's cross-examination rule claim and his unhistorical testimonial/nontestimonial hearsay distinction as further examples of historical fiction in Supreme Court originalist claims regarding criminal procedure.³²

C. *Mr. Kry's Response to One of My Criticisms*

Mr. Kry now responds to my criticism of *Crawford's* originalist claim of a cross-examination rule by asserting an expansive view of what can constitute valid evidence of original meaning. Indeed, he ups the ante by invoking substantial additional materials that pertain to English Marian practices that were not mentioned in *Crawford*.

In particular, Kry agrees that Marian procedure was a standard feature of felony prosecutions in England and America during the eighteenth century, but complains that I overlooked how Marian committal hearings were actually conducted in eighteenth-century England, or at least in

²⁹ *Id.* at 143-52, 182-87.

³⁰ *Id.* at 173-78, 187.

³¹ *Id.* at 119, 161. *See also id.* at 116 n.34 (defining "prochronism" as the specific form of anachronism in which later conceptions are imposed on earlier understandings).

³² *Id.* at 188-89 (describing the claim of a framing-era cross-examination rule as "historical fiction"). I have used the phrase before in discussing historical errors in Supreme Court opinions. *See, e.g.,* Davies, *Arrest*, *supra* note 20, at 239 (titled "*The Fictional Character of Law-and-Order Originalism*").

London.³³ He asserts that the arrestee was “routinely,” or even “almost invariably,” present when a Marian witness examination was taken,³⁴ and that this in-the-presence-of-the-prisoner practice evolved into an in-the-presence rule, which then further evolved “at some point” into a rule that a Marian witness examination was inadmissible unless the arrestee had had an opportunity to cross-examine.³⁵ Additionally, Kry insists it is appropriate to project statements in nineteenth-century English cases and commentaries and nineteenth-century American state cases backward in time and treat them as valid evidence of an earlier, framing-era American understanding of the confrontation right. Thus, he treats post-framing sources as evidence of the original meaning of the Confrontation Clause.³⁶ Like Justice Scalia in *Crawford*, however, Kry pays little attention to what the American Framers could have known, or when they could have known it.

D. *Overview of My Reply*

I welcome this exchange with Mr. Kry because I think it provides a useful opportunity to reiterate the requisites of a valid claim of original meaning. In Part II, I argue that, precisely because originalists assert that original meaning should be accorded a heightened normative status in constitutional discourse, it is appropriate to insist that they exercise historical discipline and make a claim of original meaning only when there is clear historical evidence of the Framers’ understanding when the provision at issue was framed.

In Part III, I call attention to an important point that should not be lost amid the specific disagreements between Kry and me: although Kry attacks my article, he makes a significantly different and significantly weaker historical claim than that asserted in *Crawford* itself. Although Kry’s general remarks sometimes conflate an in-the-presence practice with a cross-examination rule, his pre-framing evidence indicates, at most, only a London framing-era *practice* in which Marian examinations were taken *in the presence* of “the prisoner” (that

³³ See *infra* notes 241-42 and accompanying text.

³⁴ See Kry, *supra* note 3, at 495, 512-16.

³⁵ See *id.* at 495.

³⁶ *Id.* at 545-48.

is, the arrestee³⁷), but not the supposedly settled *rule* requiring an opportunity for *cross-examination* that Justice Scalia asserted in *Crawford*.

In particular, although Justice Scalia invoked the 1791 date of the ratification of the Bill of Rights as the relevant date for original meaning in *Crawford*,³⁸ Kry does not actively dispute my conclusion that the important date for assessing original meaning is the date of the framing in 1789.³⁹ Additionally, Kry concedes at several points that, even in London, as of 1789 there still was only a controversy but not a settled rule regarding an arrestee's opportunity to cross-examine during a Marian witness examination.⁴⁰ Hence, even compared to Kry's historical account of London practice, Justice Scalia's originalist claim in *Crawford* regarding a settled "cross-examination rule" was fictional.

In Part IV, I respond to the specific *pre-framing* evidence that Kry offers for his conclusion that an in-the-presence-of-the-prisoner standard had become part of English Marian practice by the time of the framing, and argue that his conclusions outrun his evidence. I begin by challenging his suggestion that the mere requirement that Marian witness examinations be taken before an arrestee was committed to jail to await trial or was released on bail supports an inference that the defendant necessarily would have been present.

I next reiterate the profound silence in the framing-era legal authorities as to even an in-the-presence rule. In my prior article, I noted the absence of any reference to cross-examination in the statements regarding the admissibility of Marian examinations of unavailable witnesses in criminal

³⁷ Framing-era usage deemed an arrest to be "the beginning of imprisonment." See Davies, *Arrest*, *supra* note 20, at 392 n.518. Hence, the arrestee was commonly referred to as the "prisoner" and that term was also commonly used to identify the defendant in a criminal trial.

³⁸ *Crawford*, 541 U.S. at 46, 54 n.5.

³⁹ Davies, *supra* note 2, at 157-60. Kry writes that he "take[s] no position on whether 1789 or 1791 is the more relevant date for assessing original meaning because [he does] not view that two-year difference as having much practical significance." Kry, *supra* note 3, at 522 n.119. However, he effectively concedes that 1789 is the significant date when he repeatedly refers to the date "of the framing" throughout his article. Of course, the date "of the framing" is 1789. See *supra* note 27.

⁴⁰ See *infra* text accompanying notes 65-67. Additionally, in *Crawford*, Justice Scalia downplayed Marian procedure as merely a departure from "common law." See Davies, *supra* note 2, at 132-35. In contrast, Kry acknowledges that "[b]ecause those Marian examinations were a routine feature of felony prosecutions at the time the Sixth Amendment was framed, their admissibility is relevant to any general theory of the Confrontation Clause." Kry, *supra* note 3, at 493-94.

trials. In this article, I point out that the same silence also appears in the framing-era descriptions of Marian procedure itself. I also call more attention to a point I only touched on before—that a number of the framing-era authorities, including the leading *English* justice of the peace manual, actually *contrasted* Marian witness examinations to the cross-examination standard that applied to depositions taken in civil lawsuits. Hence, the legal authorities that framing-era Americans could have consulted regarding the arrestee's presence or opportunity to cross-examine during a Marian witness examination did not indicate any such legal requirements.

I then turn to the pre-framing English evidence Kry offers regarding the practice of taking Marian witness examinations in the presence of the arrestee. I initially consider the two seventeenth-century sources Kry invokes. Kry insists that the 1696 ruling in *King v. Paine* and the 1696 attainder proceeding in Parliament in *Fenwick's Case* provide significant evidence. I persist in the view that *Paine*, as a ruling in a misdemeanor case, carried no implications for the Marian procedure that applied specifically to all felony prosecutions. I likewise persist in the opinion that it is highly unlikely that Americans were aware of any discussion of a witness deposition in *Fenwick*.⁴¹ Additionally, I note that Kry's conclusion that there was only a controversy about cross-examination in Marian examinations in London in 1789 demonstrates rather clearly that these two cases could not have been understood to have mandated a cross-examination rule during the eighteenth century.

Moving on to Kry's description of eighteenth-century Marian practice in England, I argue that, regardless of the historical validity of his description of the evolution of English Marian practice (which strikes me as plausible), the practice he describes still does not constitute significant evidence of the *American understanding* of the confrontation right at the time of the framing *in 1789*. For one thing, common practices are not equivalent to legal rules or rights. Although Kry sometimes concludes that there was an in-the-presence rule by the time of the framing, the evidence he presents falls short of

⁴¹ As I discuss below, Kry does correctly point out that I overlooked the potential implication of a margin citation to a page in the report of *Fenwick* that appeared in a prominent treatise; however, I do not think that alters the larger picture. See *infra* text accompanying notes 152-60.

a rule, and far short of the settled cross-examination rule that Justice Scalia asserted in *Crawford*. Moreover, it is unclear that the London practices that Kry describes were even typical of the rest of England; there is no reason to assume they shed light on American Marian practices. Of course, it is also unclear how framing-era Americans would have learned of the English practices Kry describes in the absence of any published accounts.

The salient feature of Kry's evidence about Marian procedure is what is missing—he does not identify a single legal authority that states a Marian in-the-presence rule that Americans could have consulted prior to the 1789 framing of the Confrontation Clause. Hence, I do not think Kry has identified evidence that framing-era Americans would have thought that Marian witness examinations were subject to even a legal in-the-presence requirement, let alone the settled cross-examination rule that Justice Scalia asserted in *Crawford*.

In Part V, I discuss Kry's heavy reliance on *post-framing* materials, including nineteenth-century English cases and commentaries and nineteenth-century American state cases. Although Kry sometimes discusses these sources in terms of relevance, he relies on them so heavily that he effectively projects nineteenth-century English statements backward in time as though they provide direct evidence of the framing-era American understanding of the confrontation right. However, I think that Kry's reliance upon post-framing statements collides with the story Kry himself tells about *evolution and change* in English Marian practice. How can later sources provide evidence of earlier understandings if legal practices and doctrine were undergoing change? Legal history refutes any assumption of necessary doctrinal consistency over time because it provides innumerable examples of judges and commentators who reshaped earlier cases and authorities to comport with the preferred conceptions of their own times.⁴² Post-framing sources reveal only post-framing understandings; they cannot be taken as accurate guides to earlier, framing-era understandings.

Finally, in Part VI, I briefly conclude by calling attention to one of the most serious drawbacks of originalist

⁴² See, e.g., Frederic Maitland, Inaugural Lecture at Cambridge (1888), quoted in 3 PETER GAY & VICTORIA G. WEXLER, HISTORIANS AT WORK 301-02 (1975).

justifications for constitutional rulings—the absence of any procedure for vetting the historical validity of originalist claims constructed in a single justice’s chambers before those claims become enshrined in an opinion of the Court.

II. WHAT BURDEN OF PROOF SHOULD ORIGINALISTS MEET?

Much of the difference between Kry’s historical account and mine, and between *Crawford’s* account and mine, arises from a difference of opinion regarding the burden of proof that originalists should meet. Precisely because originalists attribute a privileged normative position to claims about the original understanding of a constitutional provision, I think it is appropriate to insist that originalists practice originalism with historical discipline.

Of course, judges often justify decisions by claiming continuity with the past—*stare decisis* is simply a claim that “we have done it that way before.” If the claim is also that “we have done it that way for a long time,” that adds a traditionalist gloss. However, traditionalism is obviously vulnerable to arguments that conditions have changed or that the evolution of legal conceptions and standards has made prior conceptions obsolete. If recent developments have broken from an earlier traditional position, traditionalism itself does not provide a justification for returning to the earlier position. For example, Justice Scalia could hardly have justified the adoption of the cross-examination rule simply by noting that mid-nineteenth century American cases adopted such a rule even if recent decisions have not.

Originalism is different. Originalism rests on the premise that a constitutional provision’s original meaning—the public meaning when it was framed⁴³—is the content to which the Framers agreed. Thus, originalists accord original meaning the normative stature of the political contract itself. Moreover, originalists attribute a *fixed* content to the original meaning.⁴⁴ Because they characterize the original meaning as unchanging, originalists present claims about the original

⁴³ See Davies, *supra* note 2, at 105 n.1.

⁴⁴ For example, Justice Scalia has recently declared, “There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. . . . This reference to changeable law poses no problem for the originalist.” *Georgia v. Randolph*, 547 U.S. ___, ___, 126 S. Ct. 1515, 1540 (2006).

meaning as though they carry considerably more normative punch than a simple traditionalist claim.

In particular, because originalism posits a fixed original meaning, originalism uniquely can seem to justify wiping out recent legal developments in order to *return* to the purportedly fixed original meaning. For example, *Crawford* itself wiped out several decades of prior confrontation rulings.⁴⁵ The unique platform that originalism provides for undoing precedents is probably the primary attraction that originalism now holds for justices toward the right end of the Court's ideological spectrum. Originalism provides a justification for breaching the norm of *stare decisis* that otherwise protects recent "liberal" doctrinal developments, and thus provides a justification for wiping out those developments.⁴⁶ Hence, originalism today is often a platform for "activist" rulings.⁴⁷

If originalists are going to claim this added normative punch, it seems appropriate that they should invoke claims of original meaning with historical discipline—that is, claims

⁴⁵ *Crawford v. Washington*, 541 U.S. 36 (2004), overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), a precedent that was just shy of lasting for a quarter of a century.

⁴⁶ For a discussion of the recent emphasis on originalism in constitutional criminal procedure cases, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1745-70 (2000). See also Davies, *supra* note 2, at 207; Davies, *Arrest*, *supra* note 20, at 252-66.

The cross-examination rule adopted in *Crawford* may appear somewhat "liberal" in the sense that it provides a more substantial content to a criminal defendant's confrontation right than prior law. However, that is only one prong of *Crawford*; the other prong, the limitation of the confrontation right to "testimonial" hearsay, has a different ideological content, and—depending on how the boundary between testimonial and nontestimonial hearsay is ultimately defined—may yet mean that the strong protection afforded by the cross-examination rule applicable to "testimonial" hearsay will rarely apply, in which case the confrontation right will have little practical substance.

To date, *Crawford* and *Davis* have treated only statements obtained during police interrogation as "testimonial" statements subject to the cross-examination rule. Moreover, *Davis* has indicated that only statements made during police interrogations that were conducted "primarily" to obtain evidence will be deemed "testimonial," and has suggested that statements obtained during interrogations will "often" be "nontestimonial" and not subject to the confrontation right or its cross-examination rule. *Davis v. Washington*, 547 U.S. ___, ___, 126 S. Ct. 2266, 2279 (2006).

Davis has also limited the scope of the confrontation right, and its cross-examination rule, by indicating that even "testimonial" hearsay statements may be admitted in hearings to determine whether a defendant has "forfeited" his confrontation right by preventing a potential witness from appearing at trial. *Id.* at ___, 126 S. Ct. at 2279-80. Hence, it may yet turn out that *Crawford's* cross-examination rule will bar hearsay evidence only infrequently. See also *supra* note 21.

⁴⁷ It may not be coincidental that a recent study has concluded that Justices Scalia and Thomas are somewhat more prone to overturn prior precedents than the other justices. See Lori A. Ringhand, *Judicial Activism: An Empirical Examination of Voting Behavior on the Rehnquist Natural Court*, 24 CONST. COMMENT. (forthcoming 2007).

about the Framers' design should be made only in instances when valid and relevant historical sources provide strong evidence of the Framers' understanding of a constitutional provision at the time the provision was framed. After all, original meaning is hardly a necessary ground of decision. Most of the Supreme Court's constitutional decisions do not rest on originalist justifications. Indeed, even those justices who purport to be originalists resort to originalism rather selectively.⁴⁸ Hence, there is no excuse for fictional originalist claims that are based only on weak, marginal, or nonexistent evidence, rather than on the most direct historical evidence of what the Framers actually knew and thought at the time of the framing.⁴⁹

Mr. Kry apparently has a more relaxed view of the criteria for valid originalist claims. Indeed, he defends *Crawford's* originalist cross-examination rule claim even though he offers a markedly different historical account of Marian procedure than that which appeared in *Crawford* itself and arrives at a significantly weaker conclusion.

III. THE DIFFERENCES BETWEEN KRY'S HISTORY AND JUSTICE SCALIA'S

As I indicated in my previous article, I had difficulty deciphering precisely what historical claim Justice Scalia made in *Crawford* when he cryptically referred to the admission of Marian witness examinations as a "derogation" of a common-law cross-examination rule.⁵⁰ Because I thought Justice Scalia was most likely arguing that Marian examinations of witnesses who had died or had otherwise become unavailable had once been admitted in criminal trials without consideration of cross-examination, but that framing-era English law had come to impose a cross-examination requirement as a condition for admitting a Marian examination as evidence in a criminal trial, I focused on that admissibility claim. I found no evidence

⁴⁸ See, e.g., Davies, *Arrest*, *supra* note 20, at 260-62.

⁴⁹ As is probably clear to the reader by this point, I am not an originalist. I do not research original meaning to formulate a program for returning to framing-era conceptions of rights or to promote an alternative originalist program to that endorsed by the self-described originalists on the Supreme Court. Rather, I think that an authentic reconstruction of the Framers' conception of criminal procedure can provide a useful perspective on the larger trajectory of constitutional criminal procedure and may also provide an antidote, to some degree, to the mythical conceptions that too often appear in United States Reports.

⁵⁰ See, e.g., *Crawford*, 541 U.S. at 46.

in the framing-era authorities that an opportunity for cross-examination had been made a criterion for admitting a Marian witness examination of an unavailable witness in a felony trial.⁵¹

Kry now asserts that I focused on the wrong argument. Instead, he contends that *Crawford* should be read to make what I termed a more “nuanced” claim—that cross-examination emerged within Marian procedure itself, and had become a settled part of that procedure by the time of the framing.⁵² Thus, Kry argues that when the framing-era authorities that I quoted stated that Marian examinations of unavailable witnesses were admissible as evidence in criminal trials, those statements implicitly incorporated an in-the-presence or cross-examination rule as an aspect of Marian procedure itself.⁵³

Whether Kry’s historical analysis is actually the same as that which Justice Scalia advanced in *Crawford* is far from clear, however, because many of Justice Scalia’s statements appear to refer to admissibility rather than to any internal standard for Marian procedure. Justice Scalia stated the historical issue as whether “the *admissibility* of an unavailable witness’s pretrial examination depended on whether the defendant had had an opportunity to cross-examine him.”⁵⁴ Then, when discussing seventeenth and eighteenth-century law, Justice Scalia stated that “[t]he [Marian] statutes did not identify the circumstances under which [Marian] examinations were *admissible*,” and observed that those who claimed during that period that “no prior opportunity for cross-examination was required” for admitting Marian examinations had acknowledged that “the statutes were in derogation of the common law.”⁵⁵ For example, Justice Scalia noted that a leading authority on evidence had stated that Marian examinations were “*admissible* only ‘by Force ‘of the [Marian] Statute.’”⁵⁶ The implication in that statement is that Marian examinations were admissible even though they did *not* provide the opportunity for cross-examination that was usually a requisite for admissibility. Likewise, Justice Scalia later wrote that “to the extent Marian examinations were *admissible*, it

⁵¹ See Davies, *supra* note 2, at 143-52, 182-86.

⁵² *Id.* at 169-78.

⁵³ Kry, *supra* note 3, at 499-501.

⁵⁴ *Crawford*, 541 U.S. at 45 (emphasis added).

⁵⁵ *Id.* at 46 (emphasis added).

⁵⁶ *Id.* (emphasis altered) (quoting 1 GILBERT, EVIDENCE 215).

was only because the statutes *derogated* from the common law” but that “the statutory-derogation view” was “rejected” by 1791.⁵⁷ That statement also implies that Marian examinations had been admitted *despite* the absence of cross-examination in Marian procedure (that is, despite the way in which the statutes “derogated” common law), but that the English courts later rejected that special allowance for Marian examinations by making an opportunity for cross-examination a requisite for *admitting* even Marian examinations into evidence in a felony trial.

At least for purposes of assessing the validity of originalism as an approach to constitutional justification, it matters whether Mr. Kry is articulating the same analysis as that in *Crawford* or not. Justice Scalia’s originalist claims are not salvaged by demonstrating that Justice Scalia could have arrived at a historical conclusion by a route he did not take. Likewise, even if Kry’s analysis does parallel that in *Crawford*, it is unclear how Kry’s presentation of evidence that was never mentioned in *Crawford* can rehabilitate the absence of valid historical evidence in the *Crawford* opinion itself.

Most importantly, Kry’s historical conclusion is decidedly weaker than Justice Scalia’s. In *Crawford*, Justice Scalia repeatedly invoked “the Framers,” “the founding,” and “1791,”⁵⁸ and specifically asserted that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁵⁹ In other words, Justice Scalia asserted

⁵⁷ *Id.* at 54 n.5 (first emphasis added). Justice Scalia also based his claim regarding the “reject[ion]” of the “statutory derogation” on the three English cases decided in 1787, 1789, and 1791 that I discuss *infra* notes 175-217 and accompanying text. However, the issue in each of those cases was the *admissibility* of a witness’s examination.

Likewise, Justice Scalia described the issue in a key 1790 English decision in terms of whether the admissibility of Marian examinations was “a statutory exception to the common-law rule.” *Crawford*, 541 U.S. at 54-55 n.5.

⁵⁸ *Id.* (passim).

⁵⁹ *Id.* at 53-54. See also *id.* at 54 n.5 (asserting that Chief Justice Rehnquist was incorrect when he claimed that “English law’s treatment of testimonial statements was inconsistent at the time of the framing,” and that “by 1791 even the statutory-derogation view had been rejected with respect to [Marian] examinations”).

Kry suggests that I have overstated the originalist claim actually made in *Crawford*, because Justice Scalia’s opinion recognized “doubts” regarding the cross-examination rule; and Kry also claims that I have overstated the differences between his account and that in *Crawford*. See Kry, *supra* note 3, at 494 n.10, 555 n.287. However, I think Kry understates what *Crawford* actually claimed. Moreover, if

that a *settled rule* that Marian examinations were admissible only if there had been an opportunity for cross-examination was part of the original understanding of the Confrontation Clause. Although Kry may seem to endorse Justice Scalia's claim in rhetorical flourishes at the beginning⁶⁰ and end of his article,⁶¹ he does not actually defend that claim when he addresses the pre-framing evidence itself.

Rather, Kry describes the *English* historical evidence regarding cross-examination as "conflicting."⁶² Indeed, when Kry sums up the pre-framing English historical evidence, he asserts only "that prisoners would have been *routinely* present when witnesses were deposed at Marian committal hearings," "that presence was *widely viewed* as a procedural right by the time of the framing,"⁶³ or "that, by the framing, there was also an *emerging consensus* that presence was a procedural right,"⁶⁴ and "that many believed a prisoner had a right to cross-examine witnesses at his committal hearing, but that the point was *still disputed at the time of the framing*."⁶⁵ Likewise, although Kry asserts that a cross-examination rule emerged in England "at some point" (without stating a date),⁶⁶ the strongest summation he musters of the *English* pre-framing evidence is that it "suggests that, at the time of the framing, the right to cross-examine at a committal hearing was not firmly established, but nor was the absence of such a right firmly established. Rather, *there was disagreement . . .*"⁶⁷ Kry does not show that a cross-examination *rule* had even emerged in England as of 1789, let alone show that such a rule was part of the original Sixth Amendment.⁶⁸

Kry's conclusions decidedly do not amount to the settled cross-examination rule that Justice Scalia claimed in

Crawford had made only the weaker historical claims Kry now makes, it would hardly have presented a claim of original meaning.

⁶⁰ Kry, *supra* note 3, at 494 ("*Crawford* is well supported by the historical evidence.").

⁶¹ *Id.* at 555 ("*Crawford's* cross-examination rule is therefore on solid ground. If the opinion is to be faulted for anything, it is only for *understating* the importance of physical presence, not for overstating the importance of cross-examination.").

⁶² *Id.* at 542.

⁶³ *Id.* at 495 (emphasis added).

⁶⁴ *Id.* at 512 (emphasis added). See also *id.* at 553 ("[T]he admissibility of *ex parte* committal examinations was far from settled.").

⁶⁵ *Id.* at 495 (emphasis added). See also *id.* at 525.

⁶⁶ Kry, *supra* note 3, at 495.

⁶⁷ *Id.* at 541 (emphasis added).

⁶⁸ See *supra* notes 39-40 and accompanying text.

Crawford. Whatever one concludes about Kry's attacks on my article, they do not constitute a defense of the originalist cross-examination rule *Crawford* actually claimed. With that observation, let me nevertheless address Kry's own claim of an English framing-era in-the-presence practice or rule.

IV. THE SHORTCOMINGS OF KRY'S CLAIMS REGARDING PRE-FRAMING EVIDENCE

A claim of original meaning is, by definition, a claim in which the date of the framing is of the essence. Hence, although Kry tends to mix together pre-framing and post-framing materials, I think it is essential to keep them separate. I discuss his pre-framing claims in this Part, and reserve his post-framing claims for the next. I think the important issue is whether Kry has identified valid evidence of the American Framers' understanding of the Confrontation Clause *when it was framed*—and I think the fair conclusion is that he has not.

Kry does not contest my basic point—that the framing-era treatises and justice of the peace manuals that were widely used in framing-era America do not mention any in-the-presence or cross-examination standards for Marian witness examinations. Rather, he dismisses that consistent silence as a mere “negative inference.”⁶⁹ Instead, he offers two broad inferences of the must-have variety, and also offers a variety of evidence regarding English Marian practice to lend credence to those inferences. I begin by identifying the fallacies in Kry's inferences, and then reiterate the profound silence of the framing-era legal authorities before moving on to the specific evidence of English practice that Kry offers.

A. *The Invalidity of Kry's Must-Have Inferences*

Kry offers two inferences of the must-have variety to support his historical claims. One is that because testimony in the presence of the defendant and subject to cross-examination was a requirement in other procedural contexts, especially criminal trials, “consistency” would require that Marian procedure include similar features. The simple answer is that one cannot assume that Marian procedure, created by *statutory* authority, was subject to common-law norms. Rather, because

⁶⁹ Kry, *supra* note 3, at 500.

statutes trumped common law, Marian procedure was *sui generis*.

Moreover, sworn Marian examinations of unavailable witnesses were not the only form of admissible evidence that departed from the usual principles that evidence in a criminal trial had to be presented in the defendant's presence and subject to cross-examination. That was equally true of a murder victim's dying declaration.⁷⁰ Dying declarations were admissible because the victim's awareness of imminent death was thought to be the functional equivalent of an oath,⁷¹ and because such declarations often amounted to the "best evidence" available of the crime.⁷² The same was true of Marian witness examinations of unavailable witnesses; they were made under oath, and they too could provide important evidence, or even the best evidence, of the crime—evidence that would otherwise be unavailable.⁷³ Hence, there was no reason why Marian procedure should comport with trial procedure.⁷⁴

⁷⁰ There is no dispute that dying declarations were admissible under framing-era law. See, e.g., *Crawford*, 541 U.S. at 56 n.6 (existence of dying declaration exception "as general rule of hearsay law cannot be disputed"); Kry, *supra* note 3, at 546. See also *infra* note 73 (quoting statement by English judge in 1789 confirming admissibility of murder victim's dying declaration).

⁷¹ See 2 LEACH'S HAWKINS, *supra* note 4, at 619 n.10 (1787 ed.) (textual note added by editor).

⁷² See *id.* Thomas Leach added the section and note discussing the admissibility of a murder victim's dying declaration immediately after the section he added discussing the "best evidence" rule. See *id.*

⁷³ As Chief Baron Eyre stated in the 1789 ruling in *King v. Woodcock*, one of the cases cited in *Crawford*:

The most common and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two species which are admitted by law: The one is the dying declaration of a person who has received a fatal blow: the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of [the Marian statutes], which authorizes Magistrates to take such examinations, and directs that they shall be returned to the Court of Gaol Delivery. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact.

Leach (1st ed. 1789) 437, 439, 1 Leach (4th ed. 1815) 500, 501-02, 168 Eng. Rep. at 352-53 (Old Bailey 1789).

⁷⁴ Of course, although the grand jury was an important phase of the framing-era right to jury trial in felony cases, the defendant played no role, and was not permitted to cross-examine during that phase of the criminal trial. Hence, it is hardly the case that cross-examination was a feature of all phases of a criminal prosecution; rather, it was expected to be a component of the trial before the petit jury.

This is also true of Kry's second must-have inference. He notes that, although the Marian statutes did not say anything about the presence of the arrestee or about the arrestee having an opportunity for cross-examination during the taking of a witness's information about a felony, the statutes did indicate that witness examinations were to be taken before the justice of the peace either committed the arrestee to jail to await trial or bailed the arrestee.⁷⁵ Likewise, Kry infers that the statutory authority for examinations of the witnesses who brought the prisoner to the justice of the peace means that the prisoner "necessarily" would have been present when the witnesses were examined.⁷⁶

However, there is an obvious reason why the statute required the witness examination to be completed before committal or bail that does not depend upon the arrestee's presence when a witness examination was taken. A justice of the peace's decision to commit or bail an arrestee effectively marked the beginning of a formal prosecution. The warrant of committal that authorized jailing the arrestee to await trial ordered that the defendant not be released except "by due course of law"—that is, by court proceedings, usually trial.⁷⁷ Hence, it made sense that the Marian statutes would require a justice of the peace to confirm, prior to taking that serious step, that (1) there actually was proof that a felony had been committed, and (2) there were witnesses who were prepared to connect the defendant to the felony. Indeed, the treatises and manuals indicated that a justice should release an arrestee if these minimal thresholds for prosecution were not met, but also stated that a justice had no discretion to release a felony arrestee if these minimal thresholds were met.⁷⁸

⁷⁵ Kry, *supra* note 3, at 512.

⁷⁶ *Id.* at 523.

⁷⁷ See Davies, *Arrest*, *supra* note 20, at 395 n.521.

⁷⁸ See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 293 (1st ed. 1769). ("If upon this enquiry [the Marian post-arrest procedure] it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail . . ."). See also *infra* note 246 (citing framing-era American justice of the peace manuals for the same point).

As I have previously noted, the common *Bluebook* rule for citing the "starred" edition of Blackstone's *Commentaries* is inappropriate for historical commentary because that is the 1783 ninth London edition, the last that contains Blackstone's own changes. See Davies, *Arrest*, *supra* note 20, at 278 n.119. However, because Blackstone sometimes changed the contents, that edition may be different from the earlier editions, including the 1771-1772 American printing that was widely

However, a justice of the peace could ascertain whether these minimum committal standards were met simply by listening to the witnesses. Indeed, because a justice of the peace had no authority to try a felony charge, he was not supposed to assess the credibility of the witnesses, but simply to determine whether the proffered evidence supported the arrest.⁷⁹ Hence, the justice could perform the required task even if the constable had escorted the arrestee out of the justice's parlor to another place of temporary detention pending the justice's disposition—and surely some arrestees were ill-behaved enough to merit removal from the justice's parlor. The cryptic language of the Marian statutes and the absence of specific directions for taking witness examinations imply that the details of how the examinations were to be taken were simply left to the discretion of the justice of the peace.

In addition, it is important to recognize that a Marian witness examination was taken for a different purpose than that for which depositions were taken in civil lawsuits.⁸⁰ Depositions in civil lawsuits and equity proceedings were taken with the expectation that they would be admitted into evidence *as a substitute* for live trial testimony. That is, they were taken when it was anticipated that it would be too inconvenient, too

used in framing-era America. Hence, relying on the “star” edition can result in large historical errors. For an example, see *id.* at 292-300 (discussing the Supreme Court's revisionist interpretation of the original meaning of the term “Breach of the Peace” in the Speech and Debate Clause, U.S. CONST. art. 1, § 6, cl. 1, in *Williamson v. United States*, 207 U.S. 425, 435-46 (1908), in which the Court justified the result by erroneously treating a statement in a later edition of Blackstone's *Commentaries* as though it had been what Blackstone initially wrote in 1765, when Blackstone had taken the opposite position in the editions primarily used in America).

⁷⁹ Kry asserts, based on recent historical research, that English magistrates began to exercise broader discretion during the eighteenth century. Kry, *supra* note 3, at 523, 554. However, as far as I can determine, that change was not reflected in the treatises or justice of the peace manuals, including the justice of the peace manuals published in framing-era America. See *infra* notes 245-46 and accompanying text.

⁸⁰ To avoid confusion, I refer to Marian witness statements as “examinations” rather than “depositions” in this article because I think that use of the latter term tends to obscure the significant differences between Marian procedure and civil litigation depositions. Although Marian witness statements are often called “depositions” in modern historical works, and Kry consistently calls Marian witness examinations “depositions” in his article, as I did likewise in my 2002 article, that is not the usual framing-era label. The Marian statutes referred to taking the “information” of the witnesses. However, it is awkward to refer to Marian witness informations, and the term “informations” carries other baggage in the criminal context. Historical sources sometimes referred to Marian witness statements as “depositions” but more commonly called them “examinations” (the term the Marian statutes actually used for statements by the arrestee). For an example of a historical source that refers to Marian witness statements as both “depositions” and “examinations,” see *infra* note 82.

expensive, or otherwise impossible for a witness to attend the civil lawsuit trial.⁸¹ Because depositions in civil proceedings were taken to be used as trial evidence, they were subject to a cross-examination rule comparable to that which applied in trials: depositions could be readily admitted as a substitute for live testimony in civil lawsuits if, but only if, the opposing party had an opportunity to attend and cross-examine when the deposition was taken.⁸²

⁸¹ In the eighteenth century, depositions could be taken to be used as evidence in civil lawsuits and equity proceedings. See, e.g., 3 BLACKSTONE, *supra* note 78, at 383 (1st ed. 1768) (use of depositions in lawsuits); *id.* at 449 (use of depositions in equity proceedings). Depositions do not seem to have been taken for discovery as they are today, because modern discovery procedures had not yet been developed.

The expectation that depositions would be used as a substitute for live testimony in trials in civil lawsuits was the actual subject of a 1787 Letter of a Federal Farmer that was incorrectly quoted in *Crawford* as though it were a direct antecedent of the Confrontation Clause applicable to criminal trials. However, the letter was so heavily edited that the concern with the use of depositions as evidence in civil trials was obscured. Justice Scalia portrayed the Letter in *Crawford* as follows:

[A] prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of “written evidence” while objecting to the omission of a vicinage right: “Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken *ex parte*, and but very seldom leads to the proper discovery of truth.” The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Crawford, 541 U.S. at 49 (alterations in original) (citation omitted).

However, the quoted passage actually appeared in a passage that discussed the vicinage (that is, venue) aspect of “[t]he trials by jury in *civil* causes.” Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), *reprinted in* CONTEXTS OF THE CONSTITUTION: A DOCUMENTARY COLLECTION ON PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW 706, 710 (Neil H. Cogan ed., 1999) (emphasis added). The Federal Farmer stated that he did not place much weight on the need to be tried by one’s neighbors, but then wrote that it was important for trials in civil causes (that is, lawsuits) to be held in the vicinity for the convenience of obtaining oral testimony from witnesses so that it would not be necessary to resort to the use of depositions:

[T]he trial of facts in the neighbourhood is of great importance in other respects. Nothing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question. The common people can establish facts with much more ease with oral than written evidence; when trials of facts are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence, which to the common people is expensive and almost useless; it must be frequently taken *ex parte*, and but very seldom leads to the proper discovery of truth.

Id. Although this passage reflects the general importance attached to oral testimony and cross-examination, it did so while expressing concern about the expected use of depositions in civil cases, rather than in criminal trials.

⁸² See GILBERT, *supra* note 15, at 46-47, 48 (1754 ed.); *id.* at 61-62, 63-64 (1777 ed.).

In contrast, Marian witness examinations were *not* taken with an expectation that they would be offered as evidence of the defendant's guilt at trial.⁸³ Because a Marian witness examination was admissible only if the witness had become genuinely unavailable—strictly defined as death, serious illness, or interference by the defendant⁸⁴—there was little likelihood that any particular Marian examination would be admitted as evidence at trial. That was especially so because the pace of framing-era criminal prosecutions was considerably speedier than modern proceedings, so there was little likelihood that a witness would die or become seriously ill during the short period between the date of the Marian examination and the subsequent trial.⁸⁵

In the usual course of events, the witnesses who brought the arrestee to the justice of the peace and were examined under Marian procedure would also appear and testify in person at the subsequent trial. Indeed, the justice was supposed to assure that they would appear for trial by binding them to do so with a recognizance. Hence, *the expectation was that a felony defendant would have the opportunity to cross-examine the witnesses who had given Marian examinations during the course of the felony trial itself.* A Marian examination was not supposed to be a mini-trial.

The probable purpose of the requirement that the record of Marian witness examinations be forwarded to the trial court was simply to provide a means by which the trial judge could determine whether the witness had changed his or her story in

⁸³ As Kry notes, Marian examinations were not created to be a substitute for live testimony at criminal trials. See Kry, *supra* note 3, at 498 n.19 (citing JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 24-34 (1974) (“contending that the Marian draftsman did not intend to institute a system of written evidence”)).

⁸⁴ See 2 HAWKINS, *supra* note 4, at 429 (1771 ed.); 2 LEACH'S HAWKINS, *supra* note 4, at 605 (1787 ed.) (stating that a Marian witness examination was admissible as evidence if the witness (called an “Informer”) “is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner,” and also noting that “it is not sufficient to authorize the Reading such an Examination, to make Oath that the Prosecutors have used all their Endeavours to find the Witness, but cannot find him”), *quoted in* Davies, *supra* note 2, at 147, nn.137-38.

⁸⁵ For example, less than two months passed between the crime and the trial of the defendant in *King v. Radbourne*, one of the cases that Justice Scalia cited in *Crawford*. The attack that was prosecuted as a murder occurred on May 31, 1787 (the “27th year” of the reign of George III), and the trial was held “[a]t the Old Bailey in July Session 1787.” *King v. Radbourne*, 1 Leach (4th ed. 1815) 457, 168 Eng. Rep. 330 (Old Bailey 1787), *cited in* *Crawford*, 541 U.S. at 46-47. Although the victim of the attack did die in the interval in *Radbourne*, the dates in that case still illustrate the speed of late eighteenth-century prosecutions.

response to a bribe or threat.⁸⁶ To meet that purpose, as well as to test the validity of the charge on which the arrest had been made, the Marian witness examination was taken under oath and the witness was required to sign the written summary of his or her examination that was then prepared by the justice. However, there is no apparent reason why the arrestee's presence would have been necessary for that purpose.

In addition, it is not clear what purpose cross-examination would ordinarily have served.⁸⁷ As Kry observes, the written records of Marian witness examinations took the form of short summaries of what the witness swore to, but did not resemble a modern transcript.⁸⁸ As a result, it is not apparent how cross-examination would have been recorded. The bottom line is that Kry's must-have inferences simply do not hold up to close inspection.⁸⁹

The *sui generis* character of Marian procedure is also evident in what the framing-era legal authorities had to say about Marian procedure. In fact, there is more to say on that score than I previously presented.

⁸⁶ See Davies, *supra* note 2, at 129.

⁸⁷ Kry suggests that cross-examination became relevant when English magistrates began to exercise an extra-legal discretion as to whether felony charges should be dismissed. See Kry, *supra* note 3, at 523, 554-55 (noting that cross-examination in Marian witness examinations served no purpose until this development). He offers no evidence of whether American justices of the peace exercised similar discretion.

⁸⁸ See *id.* at 535-37 nn.189-92 and accompanying text.

⁸⁹ There are a number of features of arrest and committal procedures that seem to undercut an in-the-presence-of-the-arrestee rule. For one thing, many if not most felony arrests were made by warrant. See, e.g., Davies, *Fourth Amendment*, *supra* note 20, at 641. A sworn, signed record of the factual allegations made by the complainant usually was made when an arrest warrant was issued. See, e.g., 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 582 (Sollom Emlyn ed., 1736). Is it really likely that the justice retook the complainant's information as a witness after the arrest? Or is it more likely that the complainant's sworn pre-arrest statement became his Marian examination? If so, there was no apparent opportunity for the arrestee to cross-examine. As I note below, in 1807, the Attorney General of the United States stated that an affidavit for an arrest warrant could serve as a Marian witness examination. See *infra* note 302 and accompanying text.

Likewise, as I discuss below, the Marian procedure entries in framing-era justice of the peace manuals sometimes included material witness warrants, which would seem to pose some logistical problems for the examination being taken in the presence of the arrestee. See *infra* notes 103, 108-09 and accompanying text.

B. *The Evidence Against an In-the-Presence or Cross-Examination Rule in the Framing-Era Authorities*

In my previous article, because I perceived the originalist claim in *Crawford* as a claim regarding the admissibility of Marian witness examinations,⁹⁰ I noted that the framing-era legal authorities did not mention cross-examination in the passages discussing the admissibility of a Marian examination of an unavailable witness. In view of the argument that Kry now makes regarding Marian procedure itself, I should add that the silence also extends to the discussions of Marian procedure itself. The framing-era authorities do not mention either an in-the-presence or cross-examination rule in the passages in which they set out the requirements of a Marian witness examination. In fact, some of the framing-era authorities actually *contrasted* Marian procedure to depositions in civil lawsuits which were subject to a cross-examination procedure.

1. Framing-Era Descriptions of Marian Procedure

Let me begin with the descriptions of Marian procedure that appeared in the prominent framing-era treatises and then address the somewhat more detailed statements in the justice of the peace manuals.⁹¹ Like the absence of detail in the Marian statutes themselves, the absence of detail regarding the taking of Marian examinations in the treatises and manuals suggests that those details were simply left to the justice of the peace's discretion.

a. *Hale's Treatise*

Sir Matthew Hale had been one of the judges who ruled in 1666 that a coroner's Marian examination of an unavailable witness would be admissible in a criminal trial.⁹² In my previous article, I noted that Hale's later treatise, *The History of the Pleas of the Crown*, which was written in the late

⁹⁰ See *supra* notes 50-51 and accompanying text.

⁹¹ It does not appear that Sir Edward Coke discussed Marian committal procedure; neither *Crawford* nor Kry cites any statement by Coke, and I have not found any.

⁹² Kry, *supra* note 3, at 497.

seventeenth century but not published until 1736,⁹³ did not make cross-examination a condition of admissibility for a Marian examination of an unavailable witness.⁹⁴ Hale's treatise also said nothing about either the presence of the prisoner or an opportunity for cross-examination in its discussion of Marian procedure itself.⁹⁵

⁹³ See HALE, *supra* note 89. For bibliographic information, see Davies, *supra* note 2, at 130.

⁹⁴ Davies, *supra* note 2, at 129-32.

⁹⁵ The significance of how little Hale had to say about Marian witness examinations comes through only if one reads his entire description of Marian procedure. This is the most complete passage on that subject, with witness examinations being discussed in paragraphs numbered 2 and 3:

Previous to the commitment of felons, or such as are charged therewith, there are required three things, 1. The examination of the person accused, but without oath. 2. The farther information [beyond the complaint for the arrest warrant] of accusers and witnesses upon oath. 3. The binding over of the prosecutor and witnesses unto the next assizes or sessions of the peace [that is, the criminal trial courts], as the case requires.

1. The examination of the person accused, which ought not to be upon oath, and these examinations ought to be put in writing, and returned or certified to the next gaol-delivery or sessions of the peace, as the case shall require by [the Marian statutes] and being sworn by the justice or his clerk to be truly taken may be given in evidence against the offender.

And in order thereunto, if by some reasonable occasion the justice cannot at the return of the [arrest] warrant take the examination, he may by word of mouth command the constable or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination; and this detainer is justifiable by the constable, or any other person, without shewing the particular cause, for which he was to be examined, or any warrant *in scriptis*.

But the time of the detainer must be reasonable, therefore a justice cannot justify the detainer of such person sixteen or twenty days in order to such examination.

2. He must take information of the prosecutor or witnesses in writing upon oath, and return or certify them at the next sessions or gaol-delivery, and these being upon the trial sworn to be truly taken by the justice or his clerk, &c. may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.

3. Before he commit the prisoner he is to take surety [that is, bond] of the prosecutor to prefer his bill of indictment at the next gaol-delivery or sessions, and likewise to give evidence; but if he be not the accuser, but an unconcerned party, that can testify, the justice may bind him over to give evidence, and upon refusal in either case may commit the refuser to gaol.

1 HALE, *supra* note 89, at 585-86 (citations omitted). I submit there is no hint in this passage of any concern that the prisoner be present or have an opportunity to cross-examine when the witness examinations were taken. See also 1 *id.* at 372 (also discussing Marian procedure); 2 *id.* at 46, 51-52 (also discussing Marian procedure).

b. Hawkins's Treatise

Although Kry, like Justice Scalia in *Crawford*, tends to describe the rule of admissibility as “Hale’s,”⁹⁶ the most influential eighteenth-century treatise on criminal law and procedure was almost certainly Sergeant William Hawkins’s *Pleas of the Crown*, first published in the early eighteenth century and republished into the nineteenth.⁹⁷ In my previous article, I noted that when Hawkins discussed the admissibility of a Marian examination of an unavailable witness in his chapter on evidence, he stated that “it seems settled” that Marian examinations of unavailable witnesses were admissible in felony trials, but—like Hale—he made no mention of any in-the-presence requirement. The only conditions that Hawkins noted regarding admissibility were the genuine unavailability of the witness and the requirement that the justice who took the examination or his clerk attest that the record of the examination was accurate.⁹⁸

I should add here that Hawkins also never mentioned any in-the-presence or cross-examination rule when he discussed Marian committal and bail procedure itself in earlier entries in his treatise. Rather, Hawkins simply quoted the relevant portions of the Marian statutes and noted that a justice of the peace should not detain a prisoner for more than three days before examining him.⁹⁹ If Hawkins had actually understood that a Marian witness examination was invalid unless it was taken in the presence of the prisoner, would he not have advised justices of the peace of that requirement?

⁹⁶ Kry, like Justice Scalia in *Crawford*, tends to place more emphasis on Hale’s statements than on those by Hawkins and in later treatises. That treatment may create the appearance that the 1696 rulings in *Paine* and *Fenwick* altered “Hale’s” earlier rule of admissibility. However, the more significant point is that straightforward statements of the admissibility of Marian examinations of unavailable witnesses appeared in the eighteenth-century treatises by Hawkins, Chief Baron Geoffrey Gilbert, Francis Buller, and others, as well as in the eighteenth-century justice of the peace manuals, and those statements tend to show that *Paine* and *Fenwick* did not influence the understanding of Marian procedure. See Davies, *supra* note 2, at 143-52.

⁹⁷ See *supra* note 4.

⁹⁸ 2 HAWKINS, *supra* note 4, at 429 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 4, at 605 (1787 ed.), discussed in Davies, *supra* note 2, at 146-50.

⁹⁹ 2 HAWKINS, *supra* note 4, at 118-19 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 4, at 184-85 (1787 ed.) (discussing Marian committal procedure). See also 2 HAWKINS, *supra* note 4, at 49 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 4, at 79-80 (1787 ed.) (discussing coroners’ examinations). See also 2 HAWKINS, *supra* note 4, at 104-05 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 4, at 162-63 (1787 ed.) (discussing bailing arrestees).

c. Dalton's Justice of the Peace Manual

In addition to the treatises on criminal procedure, there was also a second category of framing-era legal authorities that were written or compiled to inform and guide the officials who were charged with committal and bail in felony arrests under the Marian statutes—what are now usually called justice of the peace manuals. The term “manual” is somewhat misleading because these works were often quite substantial.

One of the earlier justice of the peace manuals that was probably still in circulation to some degree in framing-era America was Michael Dalton's *The Country Justice*, initially published in 1618, with subsequent editions to 1742 (though the latest edition I have located is 1727).¹⁰⁰ As was often the case in later manuals, this work discussed Marian witness examinations in two entries, one dealing with Marian procedure itself, and one dealing with the admissibility of Marian witness examinations as evidence in felony trials. The first entry, titled “Felonies,” noted that the Marian statutes required justices of the peace to take the information of witnesses regarding a felony arrestee, reduce the material contents of that information to writing, and bind the witnesses to appear at trial, prior to either committing or bailing the arrestee. However, this entry does not mention any requirement that the arrestee be present for the witness examinations.¹⁰¹

The second of Dalton's entries, titled “Evidence against Felons,” contains similar statements about Marian procedure, but also makes two statements that seem to cut against any in-the-presence-of-the-prisoner requirement. One states that a justice of the peace can take and certify to the trial court the sworn “Accusation or Information by one that is decrepit or unable to travel”—that is, the justice can go to the witness. However, this statement does not mention arranging to take the arrestee along.¹⁰²

The other passage indicates that the justice of the peace can issue a warrant to a constable to bring in other persons

¹⁰⁰ MICHAEL DALTON, *THE COUNTRY JUSTICE* (1727 ed.). For bibliographic information, see 1 MAXWELL, *supra* note 4, at 227.

¹⁰¹ See DALTON, *supra* note 100, at 105-06.

¹⁰² See *id.* at 541. The entire passage reads: “Accusation or Information by one that is decrepit or unable to travel, is good, and may be taken by the Justice of the Peace on Oath, and certified at the next general Gaol-delivery, or Sessions of the Peace, as the Cause shall require.” *Id.*

who have been identified as having material information about a felony—that is, material witnesses. This passage also does not mention making arrangements for the arrestee to be present when these witnesses are found and brought in and when their examinations are taken.¹⁰³ Hence, it is fairly clear that there was no in-the-presence rule for Marian procedure in English law during the early eighteenth century.¹⁰⁴ Moreover, there is similar evidence in a later, and more important, English justice of the peace manual.

d. Burn's Justice of the Peace Manual

The leading eighteenth-century English justice of the peace manual, which Blackstone recommended to law students for the details of the role of that office in criminal procedure, was Richard Burn's *The Justice of the Peace, and Parish Officer*, first published in London in 1755 and republished in fourteen additional editions edited by Burn to 1785, and another fifteen thereafter to 1869.¹⁰⁵ Like Dalton, Burn discussed Marian witness examinations in two entries, one for "Examination" and one for "Evidence." The entry for "Examination" addressed Marian procedure itself and also provided relevant forms. Like Hawkins, Burn mostly just quoted or paraphrased the statutes; he said nothing about

¹⁰³ See *id.* at 542. The full passage begins by discussing the examinations of the persons "who bring" the arrestee, and then continues:

And if afterwards the said Justice shall hear of any other Persons that can inform any material Thing against the Prisoner to prove the Felony, whereof he is suspected; he may grant his Warrant for such Persons to come before him, and may also take their Information, &c. and may bind them to give Evidence against the Prisoner, for every one shall be admitted to give Evidence for the King.

Id. at 542.

¹⁰⁴ Note that these entries are inconsistent with, and thus cast doubt on, the implications that Kry and Crawford draw from the 1696 sources discussed *infra* notes 125-51 and accompanying text.

¹⁰⁵ RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* (1st ed. 1755) (two volumes). For bibliographic information, see RICHARD WHALLEY BRIDGMAN, *A SHORT VIEW OF LEGAL BIBLIOGRAPHY* 42-43 (photo. reprint n.d.) (1807); 1 MAXWELL, *supra* note 4, at 225-26. To show continuity, I also cite the 1764, 1776, 1785, and 1797 editions.

Blackstone recommended that students interested in criminal procedure consult "Dr Burn's *justice of the peace*; wherein [the student] will find every thing relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method." 1 BLACKSTONE, *supra* note 78, at 343 (1st ed. 1765).

taking the witness examinations in the presence of the prisoner or about cross-examination.¹⁰⁶

The forms that accompanied the “Examination” entry are also significant. Although a form was provided for “Information of a witness,” it simply tracked the prefatory format of the form for “Examination of a felon”—it did not include any statement that the prisoner was present when the examination was taken.¹⁰⁷ That silence is significant. If there had been an in-the-presence requirement, one would expect that a statement that the witness’s information was taken in the presence of the prisoner would have been made a boilerplate aspect of the form, but there was no such statement.

The “Examination” entry also contained a form for a warrant for a “material witness”—that is, for a warrant comparable to the one discussed by Dalton for a constable to go out and bring in a person who was thought to possess relevant information about the felony, so that the justice could examine that person and record his information under oath.¹⁰⁸ Because this warrant pertained to a person who was not among “those who brought” the prisoner to the justice at the time of arrest, its inclusion also undercuts any in-the-presence legal requirement for Marian witness examinations. If there had been such a rule, one would expect that Burn would have said something about the need to retrieve the defendant and bring him in at the same time as the material witness, but Burn did not say that. The material witness form still appears at least as late as the 1797 edition of Burn’s manual.¹⁰⁹

Burn’s manual is especially relevant because the justice of the peace manuals published in America prior to the framing borrowed heavily from it. The principal manuals reprinted his passages on Marian procedure as well as the accompanying forms for witness examinations and material witnesses.¹¹⁰

¹⁰⁶ 1 BURN, *supra* note 105, at 295-97 (1755 ed.) (discussing Marian procedure); 1 *id.* at 536-38 (1785 ed.) (same); 1 *id.* at 671-73 (1797 ed.) (same).

¹⁰⁷ 1 BURN, *supra* note 105, at 297 (1755 ed.) (setting out forms for examination of prisoner and information of witnesses); 1 *id.* at 538 (1785 ed.) (same); 1 *id.* at 673-74 (1797 ed.) (same).

¹⁰⁸ 1 BURN, *supra* note 105, at 298-99 (1755 ed.) (setting out form for material witness warrant); 1 *id.* at 539-40 (1785 ed.) (same).

¹⁰⁹ 1 BURN, *supra* note 105, at 675 (1797 ed.) (setting out same form for material witness warrant as in previous editions).

¹¹⁰ Several American manuals closely tracked Burn’s manual. See JOSEPH GREENLEAF, AN ABRIDGMENT OF BURN’S JUSTICE OF THE PEACE AND PARISH OFFICER 118 (Boston 1773) (reprinting Burn’s discussion of Marian procedure and forms); JOHN FAUCHERAUD GRIMKE, THE SOUTH-CAROLINA JUSTICE OF PEACE 199-202 (Phila. 1788)

The consistent silences in the framing-era authorities are powerful evidence of the “dog-that-did-not-bark-in-the-night” sort that there was no in-the-presence rule for Marian examinations. However, there is more evidence than silence. Several framing-era authorities juxtaposed Marian witness examinations to depositions in civil lawsuits which were subject to a cross-examination rule.

2. Contrasting Treatments of Marian Procedure and Civil Litigation Deposition Procedure

a. Gilbert’s Treatise

Chief Baron Geoffrey Gilbert authored a leading treatise, *The Law of Evidence*.¹¹¹ As I pointed out in my prior article, he contrasted Marian examinations to the cross-examination rule that applied in non-Marian depositions in a passage regarding the implications of the 1696 ruling in *King v. Paine*¹¹² by writing that the judges in that misdemeanor libel trial “would not allow the Examinations . . . to be given in Evidence, because *Paine* was not present to cross-examine [when the deposition at issue was taken], and *tho’ tis Evidence in Indictments for Felony in such Case*, by Force of [the Marian statutes], yet ‘tis not so in Informations for Misdemeanors . . .”¹¹³ In other words, a Marian witness examination was admissible as “Evidence” in a felony trial regardless of cross-examination, but a deposition was

(manual published anonymously but attributed to Judge Grimke; see Davies, *supra* note 2 at 185 n.256); THE CONDUCTOR GENERALIS 145-47 (printed by Hugh Gaine, N.Y. 1788) [hereinafter GAINÉ’S CONDUCTOR]; CONDUCTOR GENERALIS 177-78 (printed for Robert Hodge, N.Y. 1788) [hereinafter HODGE’S CONDUCTOR]; ELIPHALET LADD, BURN’S ABRIDGMENT, OR THE AMERICAN JUSTICE 156-58 (Dover, N.H. 1792) (reprinting Burn’s discussion of Marian procedure; however, this manual omits all forms). The other American manuals that did not track Burn as closely also included his forms for examination of a witness and for a material witness warrant. See RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 116 (Williamsburg 1774) (forms for “Information of A Witness” and “Summon For [Material] Witness”); JAMES DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 159 (New Bern, N.C. 1774) (“Summons for a Witness Against a Felon,” followed by a passage on the authority of a justice under the Marian statutes).

¹¹¹ GILBERT, *supra* note 15.

¹¹² See *infra* notes 125, 127-41 and accompanying text.

¹¹³ GILBERT, *supra* note 15, at 100 (1754 ed.) (emphasis added); *id.* at 139 (1777 ed.) (emphasis added), quoted in Davies, *supra* note 2, at 145.

In *Crawford*, Justice Scalia cited this passage for the point that Marian examinations of unavailable witnesses were “admissible only ‘by Force ‘of the [Marian] Statute,’” but he omitted the contrasting “though” aspect of the statement. *Crawford*, 541 U.S. at 46.

inadmissible in a misdemeanor trial (to which the Marian statutes did not apply) unless the defendant had had an opportunity to cross-examine the deponent. That statement appeared in later editions, including the 1788 American edition of Gilbert's treatise, and was still unaltered as late as the expanded and updated 1791 London edition.¹¹⁴

Gilbert also implicitly drew a contrast between civil lawsuit depositions and Marian witness examinations when he explicitly noted that an opportunity for cross-examination was required in the former, but made no comparable statement about the latter.¹¹⁵ Gilbert's contrasting treatment was also echoed in later works.

b. The Theory of Evidence

Another evidence treatise, *The Theory of Evidence*, was published anonymously in London in 1761.¹¹⁶ This treatise stated that a deposition could be admitted into evidence in a variety of civil proceedings if, but only if, the other party had been given an opportunity to cross-examine when the deposition was taken. However, when this treatise discussed the admissibility in felony trials of Marian witness examinations taken by coroners or justices of the peace, it simply stated that Marian witness examinations could be admitted in evidence if the witness had become unavailable. The contrasting treatment is especially evident because this treatise connected these two subjects with the disjunctive "yet":

It is a general Rule, that Depositions taken in a Court not of Record shall not be allowed in Evidence elsewhere. So it has been holden in Regard to Depositions in the Ecclesiastical Court, though the Witnesses were dead. So where there cannot be a cross Examination, as Depositions taken before Commissioners of Bankrupts, they shall not be read in Evidence, *yet* if the Witnesses examined on a Coroner's Inquest are dead, or beyond Sea, their Depositions may be read; for the Coroner is an Officer appointed on behalf of the Public, to make Inquiry about the Matters within his Jurisdiction; and therefore the Law will presume the Depositions

¹¹⁴ Davies, *supra* note 2, at 145-46.

¹¹⁵ Compare GILBERT, *supra* note 15, at 46-47, 48 (1754 ed.) (indicating that an opportunity for cross-examination was a requirement for a deposition in civil lawsuits), *with id.* at 100 (1754 ed.) (not mentioning cross-examination regarding Marian examinations).

¹¹⁶ HENRY BATHURST, *THE THEORY OF EVIDENCE* (Dublin 1761). There was no later edition of this work, which, though originally published anonymously, is now attributed to Henry Bathurst. See 1 MAXWELL, *supra* note 4, at 378.

before him to be fairly and impartially taken.—And by [the Marian statutes] Justices of the Peace shall examine of Persons brought before them for Felony, and of those who brought them, and certify such Examination to the next Gaol-Delivery; but the Examination of the Prisoner shall be without Oath, and the others upon Oath, and these Examinations shall be read against the Offender upon an Indictment, if the Witnesses be dead.¹¹⁷

The contents of *The Theory of Evidence*, including the above passage, were subsequently restated in a 1767 treatise, *An Introduction to the Law Relative to Trials at Nisi Prius*,¹¹⁸ which I quoted in my previous article.¹¹⁹ The quoted passage then appeared in later editions of the *Nisi Prius* treatise that were published as late as 1793, including a New York edition published in 1788.¹²⁰

c. Burn's Justice of the Peace Manual

Burn's leading English justice of the peace manual similarly contrasted Marian examinations in felony prosecutions with depositions in civil lawsuits. In addition to the description of Marian procedure noted above,¹²¹ Burn also discussed the admissibility of depositions in civil proceedings and the admissibility of Marian witness examinations of unavailable witnesses in a subpart of his entry for "Evidence" headed "Of written evidence." In that discussion, Burn also *contrasted* the rule that an opportunity for cross-examination was a condition for admitting a deposition in a civil lawsuit to the admissibility of Marian witness examinations of unavailable witnesses.

¹¹⁷ BATHURST, *supra* note 116, at 33-34 (emphasis added). Kry concedes that the "yet" in the quoted passage "arguably" applies to Marian committal examinations as well as to coroners' examinations, but suggests that it might apply only to coroners' examinations. See Kry, *supra* note 3, at 500 n.28.

¹¹⁸ HENRY BATHURST, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS (n.p. 1767). The incorporation of the contents of *The Theory of Evidence* into the *Nisi Prius* treatise and other later treatises was well known. See BRIDGMAN, *supra* note 105, at 230-31 (noting that the contents of *The Theory of Evidence* were "generally understood to have been engrafted on" the *Nisi Prius* treatise); 1 MAXWELL, *supra* note 4, at 378 (entry 1) (*The Theory of Evidence* incorporated into *An Introduction to the Law Relative to Trials at Nisi Prius*); 1 MAXWELL, *supra* note 4, at 335 (attributing the 1767 edition of the *Nisi Prius* treatise—first published anonymously—to Henry Bathurst and the 1772 edition to Francis Buller).

¹¹⁹ Davies, *supra* note 2, at 151 n.148 (quoting the passage in the text immediately after the "yet" cited *supra* text accompanying note 117).

¹²⁰ Davies, *supra* note 2, at 151 n.147.

¹²¹ See *supra* text accompanying note 106.

Beginning in the 1764 edition of his manual, Burn apparently combined the statements about the requirement of cross-examination in depositions in civil proceedings that preceded the “yet” in the passage from *The Theory of Evidence*, with the sections from Hawkins’s criminal procedure treatise that discussed the admissibility of a Marian witness examination of an unavailable witness in a felony trial. Burn joined these two subjects with the disjunctive “but”:

So [in civil matters] where there cannot be a cross-examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence.

But it seems to be settled, that [a Marian examination of an unavailable witness] may be given in evidence at the [felony] trial¹²²

Thus, Burn’s passage seems to indicate that cross-examination was a condition for the admission of depositions in the trial of civil lawsuits, “[b]ut” that it was not a requirement for the admission of Marian witness examinations in felony trials.

The contrasting treatment of these subjects in Burn’s manual is especially important because the passage quoted above was reprinted in several framing-era American justice of the peace journals.¹²³ Other American manuals simply discussed the admissibility of a Marian examination of an unavailable witness separately from the admissibility of civil depositions.¹²⁴ None mentioned either the presence of the prisoner or an opportunity for cross-examination as conditions for admitting a Marian examination of an unavailable witness.

3. Summary

The bottom line is that there were no statements in the framing-era authorities widely used in England and America—including the justice of the peace manuals that were intended

¹²² 1 BURN, *supra* note 105, at 336 (1764 ed.). Note that the material preceding “but” came from *The Theory of Evidence*, BATHURST, *supra* note 116, at 34, while the material following “but” came from Hawkins’s treatise, 2 HAWKINS, *supra* note 4, at 429 (1771 ed.). The same passage is repeated in subsequent editions of Burn’s manual. *See, e.g.*, 1 *id.* at 516 (1785 ed.); 1 *id.* at 645 (1797 ed.).

¹²³ *See, e.g.*, GREENLEAF, *supra* note 110, at 118; GRIMKE, *supra* note 110, at 184; LADD, *supra* note 110, at 131-32. *See* Davies, *supra* note 2, at 182-86.

¹²⁴ HODGE’S CONDUCTOR, *supra* note 110, at 168 (discussing the admissibility of Marian examinations of unavailable witnesses before very briefly touching on the admissibility of civil depositions); GAINES’S CONDUCTOR, *supra* note 110, at 137-38 (same).

to inform the very officials who administered Marian examinations—that stated any in-the-presence or cross-examination rule applicable to Marian witness examinations. Rather, the treatises and justice of the peace manuals contrasted the cross-examination standard for civil depositions to the absence of such a rule for Marian witness examinations.

Nevertheless, Kry discounts the published framing-era authorities that almost certainly informed the American Framers' understanding of Marian procedure. Instead, he discusses English sources and practices that either could not have informed the Framers' thinking, or were unlikely to have done so. Let me turn to these sources and practices.

C. *Kry's Pre-Framing Evidence for an In-the-Presence Practice*

Like *Crawford*, Kry relies heavily on reports of two 1696 cases. He also goes beyond *Crawford* by describing Marian practices in eighteenth-century London, and then invokes the same three English cases from 1787, 1789, and 1791 that *Crawford* heavily relied upon—that is, the three cases that were published too late to have come to the Framers' attention. I continue to doubt that any of this sheds much light on the original American understanding of the Confrontation Clause.

1. The 1696 Sources

Both *Crawford* and Kry rely heavily upon statements in two 1696 proceedings, the misdemeanor libel trial in *King v. Paine*,¹²⁵ and a single colloquy in the attainder proceeding for treason in Parliament in *Fenwick's Case*.¹²⁶ The first said nothing material, while the second was too obscure to have mattered.

a. Paine

Kry says that the 1696 ruling in *Paine* is “Professor Davies’ other line of authority.”¹²⁷ That is an odd way to put it. Justice Scalia asserted in *Crawford* that *Paine* had created an

¹²⁵ 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696), *discussed in Crawford*, 541 U.S. at 45-46.

¹²⁶ 13 How. St. Tr. 537 (H.C. 1696), *discussed in Crawford*, 541 U.S. at 45-46.

¹²⁷ Kry, *supra* note 3, at 505.

across-the-board common-law cross-examination rule.¹²⁸ I only responded, in criticizing that claim, that Justice Scalia had ignored the fundamental point that Marian procedure applied only to felony prosecutions, not to misdemeanor prosecutions.¹²⁹ Thus, the ruling in the misdemeanor trial in *Paine* was not about Marian witness examinations. Instead, because all five of the reports of *Paine* explicitly indicated that the ruling in that case did not affect the admissibility of a Marian witness examination, and seemed to affirm the admissibility of Marian examinations of absent witnesses, I concluded that *Paine* could not have stated a general cross-examination rule.¹³⁰ I also noted that the discussions of *Paine* that appeared in the framing-era treatises drew the same distinction between the deposition in that misdemeanor prosecution and Marian procedure in felonies.¹³¹ Hence, regardless of how one might tease out what *Paine* meant about the admissibility of non-Marian depositions in misdemeanor cases, there is no reason to think that a framing-era American would have viewed *Paine* as an authority that had any bearing on the admissibility of a Marian witness examination in a felony trial.

Indeed, as noted above, Gilbert (who was a contemporary of the *Paine* ruling¹³²) actually contrasted the inadmissibility of the deposition in that misdemeanor case with the admissibility of Marian examinations in felony trials when he wrote: “[T]ho’ tis Evidence in Indictments for Felony in such case by Force of [the Marian statutes], yet ‘tis not so in Informations for Misdemeanors.”¹³³ Kry concedes that the “more natural[]” reading of this passage is that cross-examination was not a condition for admitting Marian depositions in felony trials,¹³⁴ and that a similar interpretation

¹²⁸ 541 U.S. at 45, 46.

¹²⁹ See Davies, *supra* note 2, at 135-43. After reading Kry’s article, I wonder if I unnecessarily muddied the waters by speculating what *Paine* meant regarding the use of depositions in misdemeanor cases. See *id.* at 137-40. That really was beside the more basic point that *Paine* did not raise any doubt about the admissibility in a felony trial of a Marian witness examination of an unavailable witness. See *id.* at 140-42 (noting that all four versions of *Paine* that appear in the five reports indicated that the ruling against the admissibility of the deposition in the misdemeanor prosecution “had no effect on the rule that Marian [examinations] of unavailable witnesses were admissible in felony trials”).

¹³⁰ *Id.* at 140-43. See also *supra* note 40.

¹³¹ Davies, *supra* note 2, at 143-49.

¹³² Gilbert died in 1726. BRIDGMAN, *supra* note 105, at 132.

¹³³ See *supra* text accompanying note 113.

¹³⁴ Kry, *supra* note 3, at 510-11.

of *Paine* is also evident in English decisions announced in 1739 and 1790.¹³⁵ It seems likely that framing-era Americans also understood the “more natural[]” reading of Gilbert’s statement.

Nevertheless, Kry insists that *Paine* may have said something about Marian examinations. Although he concedes that the case is “ambiguous on its face,” Kry places weight on a variety of *post-framing* constructions of the case in English commentaries published in 1814 and 1816¹³⁶ and on statements about *Paine* in American state cases decided in 1835, 1842, and 1844.¹³⁷ On the basis of these post-framing constructions, he concludes that *Crawford’s* “interpretation [of *Paine*] cannot be dismissed as ‘fictional’ when that same interpretation was *ultimately* adopted as settled law.”¹³⁸ I disagree.

As I discuss below, legal historians have long recognized that commentators and judges frequently shoehorn old cases into new conceptions without admitting as much.¹³⁹ Indeed, Kry effectively concedes that *Paine* could not have been understood to create a cross-examination rule for Marian felony examinations during the eighteenth century when he concludes that there was only an “emerging consensus” regarding an in-the-presence rule “by the time of the framing” while a cross-examination rule was still a matter “of dispute” and emerged only “at some [later] point.”¹⁴⁰ Hence, *Paine* plainly was not regarded as having created a cross-examination rule for Marian examinations during the eighteenth century. Rather, that gloss was applied only after the 1789 framing.

The fact that later nineteenth-century English commentators and American judges subsequently “widely read” *Paine* so that it fit then-prevailing conceptions¹⁴¹ simply does not constitute evidence that *Paine* would have been understood that way in framing-era America. Nineteenth-century judicial interpretations of earlier cases can be every bit as fictional as contemporary judicial interpretations of prior doctrines. The

¹³⁵ *Id.* at 511 n.78 (discussing *King v. Westbeer*, 1 Leach 12, 12, 168 Eng. Rep. 108, 109 (K.B. 1789), and *King v. Eriswell*, 3 T.R. 707, 722-23, 100 Eng. Rep. 815, 823-24 (K.B. 1790)).

¹³⁶ *Id.* at 511.

¹³⁷ *Id.* at 509.

¹³⁸ *Id.* at 511 (emphasis added).

¹³⁹ See *infra* text accompanying notes 309-10. See also *supra* note 26 (discussing unacknowledged judicial relaxation of arrest standard); *infra* notes 317-19 and accompanying text (discussing unacknowledged judicial invention of hearsay exceptions).

¹⁴⁰ See *supra* text accompanying notes 66-67.

¹⁴¹ Kry, *supra* note 3, at 511.

important fact is that framing-era authorities consistently described *Paine* as simply indicating that Marian witness examinations constituted a distinct form of evidence subject to distinct rules.

b. Fenwick

Like Justice Scalia in *Crawford*, Kry also asserts that a colloquy that occurred during the 1696 attainder proceeding for treason in *Fenwick* indicated that Marian depositions had to be taken in the presence of the party.¹⁴² However, the mere fact that a statement was made sometime prior to the framing does not mean that framing-era Americans would have been familiar with the statement. One can safely assume that framing-era American lawyers and judges consulted the leading legal treatises and manuals. Conversely, it seems doubtful that they would have been conversant with the details of English treason trials or attainder proceedings that were reported at length in the State Trials case reports. Thus, I dismissed the *Fenwick* colloquy because it seemed improbable that the Framers would have been conversant with it.¹⁴³

Kry insists that I dismissed the *Fenwick* colloquy too quickly. He asserts that “[s]everal colonial libraries had copies of the State Trials,” that modern “scholars have assumed the Framers were familiar with their contents,” and that both Blackstone and Hawkins “discussed and cited” *Fenwick*.¹⁴⁴ Really?

Access to the State Trials set of reports, as well as to other specific sets of English case reports, was problematic in framing-era America. Law libraries were still privately owned, not public. Moreover, the State Trials set of reports was a multi-volume collection that grew from four volumes in 1719 to eleven in the fourth edition published over the period 1776-

¹⁴² *Crawford*, 541 U.S. at 45-46; Kry, *supra* note 3, at 501.

¹⁴³ Cf. Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209 (2005) (questioning the relevance of English treason trials to the American confrontation right). The ready availability of Howell’s 1816 edition of State Trials, complete with a comprehensive subject index, in modern law libraries may lead contemporary academics, lawyers, and judges to place undue emphasis on the State Trials as evidence of original meaning. For an early example of a false originalist claim based on Howell’s edition, see Davies, *Fourth Amendment*, *supra* note 20, at 726-27 (discussing Justice Bradley’s mistaken reliance on a report in State Trials for a novel claim in *Boyd v. United States*, 116 U.S. 616 (1886)).

¹⁴⁴ Kry, *supra* note 3, at 502 (emphasis added).

1781.¹⁴⁵ It was also an expensive set of reports.¹⁴⁶ Hence, because it is unclear that reports of treason trials or attainder proceedings in Parliament would have been of much practical value for American lawyers or judges, especially after 1775, it seems doubtful that many Americans obtained these reports prior to the framing.

Moreover, even if one had access to the set, finding material regarding a particular procedural point in the multiple volumes of the State Trials reports was no small feat because the indexes in the pre-framing editions were very limited.¹⁴⁷ Reading these accounts was also no small undertaking; *Fenwick's* attainder proceeding ran to ninety-six double-columned pages in the 1719 folio (large page) edition.¹⁴⁸

What about the references to *Fenwick* in Blackstone's and Hawkins's treatises that Kry refers to? They did mention *Fenwick* by name—but not for the point that was germane to the claim made by Kry or in *Crawford*. Because the English treason statutes required evidence of two witnesses for overt acts of treason, but the prosecutors could produce only one

¹⁴⁵ See 1 MAXWELL, *supra* note 4, at 369 (indicating that State Trials consisted of four volumes in the 1719 first edition, six in 1730, eight in 1735, ten in 1766, and eleven in Hargrave's edition published over the period 1776-1781). No further edition was published until Howell's edition, published 1809-1826. *Id.* at 370.

¹⁴⁶ See BRIDGMAN, *supra* note 105, at 312-13 (commenting that Hargrave undertook to republish the set in eleven volumes in 1776 because "this work ha[d] become very scarce, and s[old] at a high price"). It may also be significant that Hargrave's later edition was published during the years 1776-1781, the years of the Revolutionary War. See *supra* note 145.

¹⁴⁷ There were four eighteenth-century editions of State Trials (or Tryals); the first folio edition in 1719, a second edition in 1730, a third in 1742, and Francis Hargrave's fourth edition in 1776-1781. See 1 MAXWELL, *supra* note 4, at 369. Each edition had an alphabetical topical index at the end of the final volume (none of the indexes had numbered pages). However, the indexes were quite superficial. In all of the editions, the entries for "Depositions" and "Examination" refer the reader to the entry for "Evidence." In the "Evidence" entry, each of the indexes had a subentry for "Depositions of a Person absent read in Evidence in a capital Case" and each also had a subentry for the specific point in *Fenwick* that "No Evidence to be given in capital Cases but in the Prisoner's Presence," identifying the page discussing the presentation of evidence *at trial*, as discussed *infra* note 154 and accompanying text (discussing Hawkins's citation to page "277"). However, none of the "Evidence" entries in the alphabetical tables had a subentry that led to the colloquy regarding the deposition of a witness having been taken in the absence of the defendant that Mr. Kry and Justice Scalia rely upon. Thus, a framing-era reader would not have identified *Fenwick* as a case discussing that point by using the indexes.

It is easy to overlook these deficiencies when doing research today, because Howell's nineteenth-century edition of State Trials that is now commonly found on law library shelves does have a useful comprehensive subject index in which the colloquy in *Fenwick* can be identified—but that is only a post-framing development.

¹⁴⁸ See *The Tryal of Sir John Fenwick*, 4 St. Tr. (1719 ed.) 232, 232-328 (H.C. 1696).

living witness against Fenwick, they could not prosecute him for treason in the law courts. Instead, he was prosecuted in an attainder proceeding in Parliament, where the admission of evidence was decided by vote. Fenwick was convicted on the basis of one live witness and one deposition of another person. Thus, Blackstone and Hawkins both discussed *Fenwick* simply as a departure from the two-witness treason standard—but neither discussed the point that the deposition in question was taken in Fenwick’s absence.

Blackstone did not mention a deposition at all. He wrote only that “in Sir John Fenwick’s case, in king William’s time, where there was but one witness, an act of parliament was made on purpose to attain him of treason, and he was executed.”¹⁴⁹ Hawkins also discussed *Fenwick* simply as a departure from the two-witness rule. He mentioned that a deposition of a witness taken by a justice of the peace had been used as a substitute for a second live witness, but said nothing about whether the deposition was taken in the presence or absence of the prisoner.¹⁵⁰ Thus, neither Blackstone’s nor Hawkins’s passage would have alerted a framing-era American that the requisites of valid Marian examinations were discussed in *Fenwick*.¹⁵¹ That said, however, I concede that Kry

¹⁴⁹ 4 BLACKSTONE, *supra* note 78, at 351 (1st ed. 1769).

¹⁵⁰ Hawkins wrote:

[I]t was agreed in Sir *John Fenwick’s Case*, that the Information of a Witness taken upon Oath before a Justice of Peace, being joined with the Evidence of one other Witness only *viva voce*, could not in the ordinary Course of Justice, amount to sufficient Evidence within the [treason statute] which requires *two Witnesses* in High Treason; and therefore it was thought necessary to proceed in that Case by Bill of Attainder in Parliament, whose Power can be restrained by no Rules but those of natural Justice.

2 HAWKINS, *supra* note 4, at 430 (1771 ed.) (citation omitted) (emphasis added); 2 LEACH’S HAWKINS, *supra* note 4, at 606 (1787 ed.) (citation omitted) (emphasis added).

¹⁵¹ Like Blackstone and Hawkins, Capel Lofft also did not mention that Fenwick was absent when the deposition was taken when Lofft added a discussion of *Fenwick* to Gilbert’s evidence treatise in 1791. 2 GILBERT, *supra* note 15, at 895-97 (Capel Lofft ed., 1791) (discussing evidence in attainder proceedings in Parliament). Lofft commented that the admission of a deposition of an “absent Witness” as evidence during Fenwick’s attainder *trial* in Parliament deprived Fenwick of meeting the witness “face to face” and of “cross-examining” the witness. However, he did not mention Fenwick’s absence when the deposition was taken. *Id.* at 897.

Thus, the important point about Dean Wigmore’s claim, which Justice Scalia quoted in *Crawford*, that *Fenwick* “must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination,” *Crawford*, 541 U.S. at 46 (quoting 3 JOHN H. WIGMORE, EVIDENCE § 1364 (2d ed. 1923)), is that the salient abuse associated with *Fenwick* in the accounts by Blackstone, Hawkins, and Lofft was the admission of a deposition of a witness who was merely absent from a trial rather than dead, and the associated loss of Fenwick’s opportunity

does identify a citation to *Fenwick* in Hawkins's treatise that I overlooked, and it bears closer attention.

c. Hawkins's Margin Citation to "4 State Trials . . . 310"

At the outset of Hawkins's chapter on evidence in criminal cases, he wrote: "As to the nature of evidence, so far as it more particularly concerns criminal cases, having premised that it is a settled rule, That in cases of life no evidence is to be given against a prisoner but in his presence . . ." ¹⁵² When I read this passage, I assumed it referred simply to the "evidence" admitted at a felony trial. I assumed this because framing-era sources typically used the term "evidence" to refer to the proof offered at trial; hence, Marian witness examinations were not usually denoted as "evidence" unless they were admitted at trial. I did not notice that a citation in the margin next to the quoted passage (the eighteenth-century equivalent of a footnote) to "State Trials vol. 4 f. 277. 310" was a citation to *Fenwick*. ¹⁵³

The statements on page 277 do relate to presenting evidence in the prisoner's presence at trial. ¹⁵⁴ However, page 310 includes an argument that a witness's deposition should have been taken in the prisoner's presence. Specifically, there is an argument against the validity of "a Deposition of a Person that was absent [from trial], taken before a Justice of the Peace, when the Person accused, had no opportunity to interrogate him." ¹⁵⁵ This argument was not successful; the

to cross-examine the witnesses against him during Fenwick's attainder *trial* itself. In contrast, none of those accounts mentioned Fenwick's absence when the deposition at issue was taken.

¹⁵² 2 HAWKINS, *supra* note 4, at 428 (1771 ed.); 2 LEACH'S HAWKINS, *supra* note 4, at 602 (1787 ed.) (citation omitted). Of course, this passage presents serious problems for Justice Scalia's other originalist claim in *Crawford* to the effect that the Framers would not have objected to the admission in criminal trials of unsworn out-of-court statements involving "nontestimonial hearsay." See Davies, *Not the Framers' Design*, *supra* note 17.

¹⁵³ 2 HAWKINS, *supra* note 4, at 428 n.(a) (1721 ed.), *cited in* Kry, *supra* note 3, at 502 n.38. Hawkins's margin citation did not refer to *Fenwick* by name.

¹⁵⁴ The Tryal of Sir John Fenwick, 4 St. Tr. (1719 ed.) 232, 277 (H.C. 1696) (referring to the "Evidence" that was introduced when a man was "upon Tryal for his Life").

¹⁵⁵ Sir Christopher Musgrave, speaking on Fenwick's behalf during the attainder proceeding in the House of Commons, argued as follows:

It now will appear upon your Journals that you have caused to be read, a Deposition of a Person that was absent, taken before a Justice of Peace, when the Person accused, had no opportunity to interrogate him; and likewise that

House of Commons voted to admit the deposition, and also voted to condemn Fenwick.¹⁵⁶

What is the significance of Hawkins's margin citation to page 310? The cited passage in *Fenwick* does not refer to Marian authority as such.¹⁵⁷ Moreover, it seems unlikely that Hawkins meant to indicate that it was settled law that Marian witness examinations had to be conducted in the presence of the prisoner, because Hawkins had not mentioned any such requirement in the earlier sections of his treatise that had discussed Marian procedure itself.¹⁵⁸ Hence, it seems doubtful that the margin citation to page 310 in the report of *Fenwick* was meant to indicate that Marian witness examinations had to be taken in the presence of the arrestee.

Additionally, whatever Hawkins intended, there are reasons to discount the likelihood that Americans would have noticed the margin citation to *Fenwick*. For one thing, assessing the meaning of the margin citation was problematic insofar as it required access to the 1719 folio edition of State Trials reports—the page cite does not work for the later

you have heard a Witness as to what a Man swore in the Tryal of another Man: All this will appear upon your Books.

And truly, I would be glad to know if another Age may not be apt to think that you took these to make good the Defect of another Witness; and then I must appeal to you, if you have not admitted of a Testimony, which according to no Law is admitted.

They say you are not tied to the Rules of *Westminster-Hall* [the common-law courts], nor their Forms: Is there any Law in Being, that says a Judge may hear a Witness as to what was sworn upon the Tryal of another Person, to condemn him that was not Party to that Tryal. If there be no such Law, then the Rule is founded upon Justice and common Right, that nothing shall be brought against a Man when a Man was not a Party when the Oath was made, and he had no Opportunity to examine him.

Id. at 310. Note that Justice Scalia did not cite this passage in *Crawford*; rather, he cited a colloquy that Hawkins did not cite. 541 U.S. at 45-46.

¹⁵⁶ *Fenwick*, 4 St. Tr. at 310, 327.

¹⁵⁷ Hawkins discussed the admission of depositions in treason cases in a subsequent section to his discussion of the admissibility of Marian witness examinations. That latter section does not mention the Marian statutes (which did not apply to treason as such). The passage on depositions focused on the inadmissibility of depositions of *available* witnesses who could have been produced in person. See 2 HAWKINS, *supra* note 4, at 429-30 (1771 ed.) (Sections 6 and 9); 2 LEACH'S HAWKINS, *supra* note 4, at 605 (1787 ed.) (same).

¹⁵⁸ Hawkins's "premise[]" appeared in volume 2, chapter 46, 2 HAWKINS, *supra* note 4, at 428 (1771 ed.), but his discussions of Marian coroners' examinations, bail procedure, and committal procedure were in volume 2, chapters 9, 15, and 16, *id.* at 49, 104-05, 118-19. See also *supra* note 99 and accompanying text. Hence, there was no indication in Hawkins's treatise itself that the in-the-presence premise applied to Marian procedure.

editions. In fact, unless one has access to the 1719 edition, one cannot even identify the citation as one to *Fenwick* (Hawkins cited only the pages, not the case name). Perhaps because of the limited usefulness of Hawkins's citation, the framing-era justice of the peace manuals did not repeat Hawkins's page cites to *Fenwick*.

Burn's leading English justice of the peace manual repeated Hawkins's "premise[]" that evidence be taken in the presence of the prisoner, but not in either of the entries that discussed Marian examinations. Rather, Burn quoted that passage only in a later part of his entry on "Evidence" under the heading "*Of the manner of giving evidence*" which related to testimony at trial, and he omitted Hawkins's margin citation to *Fenwick*.¹⁵⁹

Framing-era American justice of the peace manuals followed Burn's presentation of Hawkins's in-the-presence premise—they also quoted Hawkins's passage in the discussion of trial testimony without the margin citation to *Fenwick*.¹⁶⁰ Hence, it seems unlikely that Hawkins's margin citation would have alerted American readers to the colloquy in *Fenwick* that was cited in *Crawford*.

In sum, it does not appear that either *Paine* or *Fenwick* would have led framing-era Americans to think that Marian procedure involved either an in-the-presence or cross-examination rule. What about English practice?

2. Eighteenth-Century English Practice

After discussing the 1696 sources, Kry turns to English Marian *practice* during the eighteenth century. Although the English historian James Fitzjames Stephen previously reported that the prisoner was not present during Marian witness examinations,¹⁶¹ and Justice Scalia endorsed that

¹⁵⁹ 1 BURN, *supra* note 105, at 293-94 (1755 ed.) (quoting Hawkins's passage but citing only "2 *Haw.* 248"); 1 *id.* at 533 (1785 ed.) (same); 1 *id.* at 668 (1797 ed.) (same).

¹⁶⁰ See, e.g., GREENLEAF, *supra* note 110, at 128 (quoting Hawkins's text but citing only "2 *Haw.* 428."); GRIMKE, *supra* note 110, at 197 (same); HODGE'S CONDUCTOR, *supra* note 110, at 174 (same); GAINES'S CONDUCTOR, *supra* note 110, at 144 (same); LADD, *supra* note 110, at 154 (same).

¹⁶¹ 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (London, MacMillan 1883) ("The prisoner had no right to be, and probably never was, present [at a Marian witness examination]."). I mentioned Stephen's assertion in my 2005 article but pointed out that he had presented no evidence to support it. See Davies, *supra* note 2, at 170.

account prior to *Crawford*,¹⁶² Kry indicates that Stephen's account was erroneous.¹⁶³ He reports that recent historical research, especially that by Professor John Beattie, has disclosed that during the eighteenth century, prisoners were routinely present for Marian examinations in London.¹⁶⁴ Kry first argues that Marian witness examinations were routinely taken in the presence of the arrestee.¹⁶⁵ He reports that "more than 80%" of a small sample of twenty-seven London Marian witness examinations from 1789 clearly reveal that the arrestee was present, and Kry interprets this to mean that the presence of the arrestee was a "near-universal" feature of London Marian procedure¹⁶⁶ (though Kry concedes that these Marian examinations "provide little evidence of cross-examination"¹⁶⁷).

I do not intend to quarrel with Kry's general description of the evolution of English Marian practice, which seems plausible. Rather, I identify three objections to treating Kry's description of English practice as though it were evidence of the original American understanding of the confrontation right: First, a routine practice is hardly the same as a legal rule, requirement, or right, and Kry does not establish that the routine practice became a legal rule or right even in England prior to the framing of the Confrontation Clause in 1789. Second, there is no basis to assume that English Marian practice—indeed, London practice—provides a window on American Marian practice. And third, Kry does not provide a plausible explanation as to how framing-era Americans would have been aware of English Marian practice in the absence of published accounts of that practice.

The important question regarding original meaning is not what English Marian practice *was*, but how framing-era Americans understood Marian procedure. The work of contemporary historians of English criminal justice is certainly

¹⁶² See *White v. Illinois*, 502 U.S. 346, 361 (1992) (Thomas, J., concurring) ("The prisoner had no right to be, and probably never was, present' [at a Marian witness examination]." (quoting 1 STEPHEN, *supra* note 161, at 221)). Justice Scalia joined Justice Thomas's concurring opinion. *Id.* at 358. Stephen's claim is not repeated in *Crawford*. However, neither is there a statement in *Crawford* that earlier reliance on that claim was misplaced.

¹⁶³ See Kry, *supra* note 3, at 516.

¹⁶⁴ *Id.* at 516 n.93, 527-28, 531.

¹⁶⁵ *Id.* at 512-16.

¹⁶⁶ *Id.* at 514-16.

¹⁶⁷ *Id.* at 535.

interesting in its own right, but it does not illuminate the original American understanding of the confrontation right.

3. "Routine" Practices Do Not Constitute Legal Rules

Although Kry at one point asserts that the prisoner would "necessarily" be present for Marian witness examinations,¹⁶⁸ he usually describes English practice in terms of what was "routinely" or "almost invariably" done.¹⁶⁹ For example, he states that "Marian examinations [in England] were *routinely* conducted in the prisoner's presence[,] . . . [and] by the framing, there was an *emerging consensus* that presence was also a procedural right."¹⁷⁰ However, "routinely" and "emerging consensus" do not connote a settled legal rule, requirement, or right.¹⁷¹ Kry labels the practice he describes as a "procedural right," but that is merely his own label; he does not identify any authoritative statement of such a "right" even in English law prior to 1789.

It may well be that the arrestee was often present, especially in London, when Marian witness examinations were taken. That practice, in turn, may have spawned an *issue* as to *whether* an arrestee should have a right to be present at such examinations. However, the only reference to the prisoner's presence at Marian examinations that I have located in any English publication that Americans could have been aware of at the time of the framing merely posed a *query* as to whether a Marian examination should be admissible if the defendant was not present when it was taken.¹⁷² That query would seem to

¹⁶⁸ *Id.* at 523.

¹⁶⁹ *See, e.g.*, Kry, *supra* note 3, at 495 (defendant "routinely present"); *id.* at 516 (defendant "almost invariably present" in London Marian procedure).

¹⁷⁰ *Id.* at 512 (emphasis added).

¹⁷¹ Although Kry indicates that the arrestee initially had no right to be present for the Marian examinations of witnesses, *id.* at 516 n.93, he quotes modern studies of English criminal procedure to the effect that presence and a cross-examination requirement were accepted "in its most general terms" in London "by 1790 or soon thereafter" or by "the end of the eighteenth century." *Id.* at 542 n.225. However, the significant point for the present inquiry is that none of those studies assert any legal *rules* to those effects by 1789.

¹⁷² *See* 4 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND 671 (9th ed. 1763) (stating, regarding Marian witness examinations, "that they may be read [if it is proved the witness is dead, or unable to travel, or kept away by the Prisoner]; but *Qu.* If the Defendant must not be present at the Time they are taken in order to make them good Evidence." ("Qu." being an abbreviation of "Quare" or "Query"). The "Advertisement" in the material at the front of this edition indicates that it was revised by "an eminent Barrister." No query appeared in the previous edition. *See* 4 *id.* at 676-77 (8th ed. 1754). The query was repeated without change in the tenth edition

confirm that there was no recognized in-the-presence “rule.” It would also seem to confirm that neither of the 1696 rulings in *Paine* or *Fenwick* had created any such “rule.”

Indeed, there is a glaringly large gap in the English legal authorities that Kry construes as evidence of an in-the-presence rule. Kry does not cite any such authority after the two 1696 sources discussed above until the 1787 ruling in *King v. Radbourne*,¹⁷³ the earliest of the three cases that Justice Scalia relied heavily upon in *Crawford*.¹⁷⁴ That gap strongly suggests that no in-the-presence rule or right was recognized in English Marian procedure during the eighteenth century. Moreover, it is not that clear what *Radbourne* stands for.

a. *The 1787 Ruling in Radbourne*

In the 1787 *Radbourne* case, a justice of the peace’s examination of a murder victim prior to her death was admitted in a trial in the Old Bailey, notwithstanding that it did not constitute a dying declaration, and notwithstanding that it was not taken in connection with Radbourne’s arrest.¹⁷⁵ The Twelve Judges then upheld that ruling. Radbourne was present for something in connection with the victim’s examination, but exactly what she was present for is uncertain because there are two different versions of the case report.¹⁷⁶

(described in the “Advertisement” as having been revised by “a Serjeant at Law”). See 4 *id.* at 642 (10th ed. 1772). However, that was the last edition published. See 1 MAXWELL, *supra* note 4, at 38.

Some of the relevant editions of Wood’s *Institutes* were imported by Americans, though apparently not in large numbers. A search of the online catalogs of public libraries in the United States reveals twenty-five copies of the 1763 edition and nineteen of the 1772 edition. I am indebted to my colleague Professor Sibyl Marshall for this information.

¹⁷³ The description of the evidentiary issue in *Radbourne* varies depending on which edition of Leach’s reports is consulted, as discussed in the text *infra* Part IV.C.3.a.

¹⁷⁴ *Crawford*, 541 U.S. at 46-47 (citing *King v. Radbourne*, 1 Leach (4th ed. 1815) 457, 459-61, 168 Eng. Rep. 330, 331-32 (Old Bailey 1787)).

¹⁷⁵ The victim’s examination in *Radbourne* was not a dying declaration because, at the time, the victim did not appreciate that she was dying. Additionally, the examination does not appear to have been taken in connection with Radbourne’s arrest or committal. The initial report lends that impression because it mentions that the victim’s examination was taken during the interval of several weeks that she lingered after the attack. *Radbourne*, Leach (1st ed. 1789) 399, 400 (Old Bailey and Twelve Judges 1787) [the first page is misnumbered “993”]. (According to the later 1800 version, the crime was committed on May 31st, but the examination was taken on June 9th. *Radbourne*, Leach (4th ed. 1815) at 459, 168 Eng. Rep. at 331.)

¹⁷⁶ Like everyone else, when I wrote my 2005 article on *Crawford*, I erroneously assumed that the reports of *Radbourne* in the various editions of Leach would be the same. However, Professor Robert Mosteller subsequently called my

A short report of *Radbourne* was initially published in the first edition of Thomas Leach's *Cases in Crown Law* in 1789¹⁷⁷ (though too late to have come to the American Framers' attention¹⁷⁸). That version was reprinted, with only a small change, in Leach's 1792 second edition.¹⁷⁹ However, the *Radbourne* report was substantially enlarged and altered in Leach's 1800 third edition.¹⁸⁰ This later version was then reprinted in Leach's 1815 fourth edition, which is now reprinted in the English Reports.¹⁸¹ Thus, the version of *Radbourne* cited in *Crawford* was not actually published until 1800.¹⁸²

There are several significant differences between the initial report and the 1800 version. One difference is that the 1789 report never mentioned the Marian statutes, but the 1800 version did.¹⁸³ Hence, it is not altogether clear that *Radbourne* addressed a Marian witness examination at all, particularly because the examination in *Radbourne* does not seem to have

attention to differing versions of another case in the various editions of Leach. Thus, I examined the *Radbourne* case report in the first edition of Leach's reports and discovered the difference. I also found the enlarged version in the 1800 third edition. However, I could not locate a copy of the second edition. When I brought the differences to Mr. Kry's attention, he succeeded in locating a copy of the second edition, and I am indebted to him for a copy of the relevant pages from the second edition.

¹⁷⁷ *Radbourne*, Leach (1st ed. 1789) at 399.

¹⁷⁸ See *supra* notes 23-25 and accompanying text.

¹⁷⁹ *Radbourne*, Leach (2d ed. 1792) 363 (Old Bailey and Twelve Judges 1787). The report in the second edition is the same as the first, except that the phrase "to [the victim] in the presence and hearing of the prisoner" was italicized in the second edition. *Id.* at 363.

¹⁸⁰ *Radbourne*, 2 Leach (3d ed. 1800) 512 (Old Bailey and Twelve Judges 1787).

¹⁸¹ *Radbourne*, 1 Leach (4th ed. 1815) 457, 168 Eng. Rep. 330 (Old Bailey and Twelve Judges 1787).

¹⁸² See *supra* note 13.

¹⁸³ The 1800 version, reprinted in Leach's 1815 edition and in the English Reports, does quote the prosecutor William Garrow as saying that the victim's statement "was admissible as an information taken by a regular magistrate, under the statutes of *Philip & Mary*; for it had been given in the presence and hearing of the prisoner, upon an oath lawfully administered." *Radbourne*, 2 Leach (3d ed. 1800) at 518, 168 Eng. Rep. at 332.

In contrast, there is no mention of the Marian statutes in the initial report of the case, which does not quote Garrow at all. See *Radbourne*, Leach (1st ed. 1789) 399 (Old Bailey 1787). Moreover, the absence of any mention of the Marian statutes in the first edition of Leach corresponds to the account of Garrow's statement about the examination in the Proceedings of the Old Bailey account of *Radbourne*, in which he makes no mention of the Marian statutes, but seems to suggest that the victim's examination should be admissible because Radbourne's failure to object to it when she heard it was proof of her guilt. See Trial of Henrietta Radbourne (Old Bailey July 1787), The Proceedings of the Old Bailey, Ref: t17870711-1, http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html.

been taken in the post-arrest window for Marian procedure defined in the 1789 and 1791 cases.¹⁸⁴ *Radbourne's* relevance to Marian procedure is also clouded because the defendant was charged with petty treason as well as murder, and the treason statutes, unlike the Marian statutes, explicitly required that all evidence be taken in the presence of the prisoner.¹⁸⁵

A second difference between the reports relates to exactly what happened. The 1800 version that Justice Scalia cited states that two magistrates “in the presence of the prisoner, *took down [the victim's] deposition,*” and “[t]he whole of this examination . . . was heard by the prisoner,” and “distinctly read over to her.”¹⁸⁶ Likewise, Kry cites the 1800 version when he writes that the examination “*was taken*” in the presence of the prisoner.¹⁸⁷

However the initial report published in 1789 indicated only that “[the victim] gave an information upon oath, before a Justice of the Peace, *which was read* deliberately over to her in the presence and hearing of the prisoner, then signed by her, and authenticated by the magistrate.”¹⁸⁸ The prosecuting attorney is quoted even in the later version as saying only that the examination was “given” in the prisoner’s presence,¹⁸⁹ a

¹⁸⁴ See *infra* note 197. There is a possibility that Thomas Leach may have purposely added the reference to the Marian statutes in the 1800 version as part of a campaign for a cross-examination rule. See *infra* note 191.

¹⁸⁵ The defendant servant was charged with petty treason because the victim was her mistress, and petty treason, as a form of treason, would have been subject to the explicit requirement in the treason statutes, unlike the Marian statutes, that all evidence be taken in the presence of the prisoner. See Davies, *supra* note 2, at 165.

¹⁸⁶ *Radbourne*, 2 Leach (3d ed. 1800) at 516; 1 Leach (4th ed. 1815) at 459, 168 Eng. Rep. at 331-32 (emphasis added).

¹⁸⁷ Kry, *supra* note 3, at 517 & n.101.

¹⁸⁸ *Radbourne*, Leach (1st ed. 1789) at 400 (emphasis added). The relevant passage in the 1789 version read as follows:

The deceased survived for several weeks the blows and wounds which were the cause of her death. During this interval, and before she was apprehensive of, or, from the evidence of the surgeon who attended her, had any reason to apprehend her approaching dissolution, she gave an information upon oath, before a Justice of the Peace, which was read deliberately over to her in the presence and hearing of the prisoner, then signed by her, and authenticated by the magistrate; and he was the only subscribing witness to it. This information, being regularly proved, was admitted in evidence against the prisoner [at trial] . . .

Id.

¹⁸⁹ 1 Leach (4th ed. 1815) at 461, 168 Eng. Rep. at 332.

somewhat ambiguous verb that also appears in the account in the Proceedings of the Old Bailey.¹⁹⁰

Although saying that an examination was “taken” in the prisoner’s presence might imply some room for prisoner participation, merely “reading” the already written-out record of a witness examination in the presence of a defendant would not. Whichever version is more accurate (which is not clear¹⁹¹), the emphasis in both is on the defendant’s having “heard” the examination; neither version indicates that Radbourne, the defendant, was allowed an active role in the victim’s examination.¹⁹² Thus, whatever *Radbourne* stood for, it did not involve cross-examination. There is also more than a little

¹⁹⁰ Trial of Henrietta Radbourne (Old Bailey July 1787), The Proceedings of the Old Bailey, Ref: t17870711-1, http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html. The report of *Radbourne* in the Proceedings of the Old Bailey quotes prosecuting barrister William Garrow as stating that the victim’s examination “was given in the presence of the prisoner; she heard it, she saw it sworn to, she saw the deceased subscribe to it; and she heard her solemnly call God to witness, that it was true,” and further, that the defendant revealed her guilt because she “did not object to it when [she] heard it.” *Id.* Garrow’s verb “was given” is ambiguous because it could refer either to the taking or reading of the examination. James Crofts, the magistrate who administered the examination of the victim, said “the prisoner was there at the time, and heard the whole of this account, it was afterwards distinctly read over to the prisoner in the presence of [the victim], it was signed by [the victim].” *Id.*

¹⁹¹ Some of the changes between the initial report of *Radbourne* and the 1800 version suggest the possibility that Thomas Leach, who was not an official reporter, may have been creatively campaigning for a cross-examination rule. For example, the initial report used the more traditional term “examination” when referring to the victim’s statement, while the 1800 version used the term “deposition,” which carried the baggage that Marian examinations were not really *sui generis*. See *supra* note 80. Likewise, it is curious that the change from “read” to “taken down” was not made promptly in the 1792 second edition. Instead, Leach italicized the phrase “in the presence and hearing of the prisoner” in that edition. *Radbourne*, Leach (2d ed. 1792) at 363. Why did he add that emphasis? (One possibility is that it was a reaction to Justice Buller’s 1790 comments in *Eriswell*, discussed *infra* text accompanying notes 223-27.) In addition, as discussed *supra* note 183, there was no mention of the Marian statutes in the 1789 report of *Radbourne*, and there is also none in the account in the Proceedings in the Old Bailey.

It may also be significant that Thomas Leach’s 1795 edition of Hawkins’s treatise was the first commentary to assert that a Marian deposition of a deceased witness was inadmissible unless it had been taken in the presence of the prisoner and the prisoner had an opportunity to cross-examine. See 4 LEACH’S HAWKINS, *supra* note 4, at 423 (1795 ed.) (basing a new section on *Woodcock* and *Dingler*, but not mentioning *Radbourne*). As Kry indicates, no other commentary seems to have mentioned “cross-examination” until 1816. See Kry, *supra* note 3, at 495 n.11. Leach seems to have been a bit ahead of his time.

¹⁹² Justice Buller, who participated in the Twelve Judges’ review of *Radbourne*, later made comments about *Radbourne* that seem to comport with the examination only having being read in the prisoner’s presence. See *infra* text accompanying note 223.

uncertainty as to what the later 1789 case that Kry discusses (and on which *Crawford* also heavily relied¹⁹³) stood for.

b. The 1789 Ruling in Woodcock

The 1789 Old Bailey ruling in *King v. Woodcock*¹⁹⁴ refused to admit the examination of a murder victim because the examination was not taken in connection with the defendant's arrest. Unfortunately, the report never says whether the defendant was arrested and committed before or after the examination.¹⁹⁵ The trial judge, Chief Baron Eyre (the chief judge of the Court of Exchequer), stated that the examination was not "of the *nature*" of a Marian examination because "[i]t was not taken, as the statute directs, in a case where the prisoner was brought before [the justice of the peace] in custody; the prisoner therefore had no opportunity of contradicting the facts it contains." He went on to state that the examination was not taken in the discharge of a justice of the peace's duty "by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a voluntary and extrajudicial act"—that is it was not within Marian authority. Thus, because the victim's examination was taken in "circumstances where the Justice was not authorized to administer an oath," Eyre ruled that the examination "cannot

¹⁹³ See *Crawford*, 541 U.S. at 46-47, 54 n.5.

¹⁹⁴ Leach (1st ed. 1789) 437; 1 Leach (4th ed. 1815) 500, 168 Eng. Rep. 352 (Old Bailey 1789). Unlike *Radbourne*, the version of the report of the 1789 ruling in *Woodcock* that now appears in the English Reports is essentially unchanged from that in Leach's first and second editions, except for the addition of a final sentence pertaining to the judge's leaving to the jury the question of whether the deceased victim's statement constituted a dying declaration. See *Woodcock*, 1 Leach (4th ed. 1815) at 504, 168 Eng. Rep. at 354.

However, there is other evidence that Leach apparently misunderstood the ruling in *Woodcock* when he published his first edition of *Cases in Crown Law* in 1789. The initial report of *Radbourne* in that volume contained a marginal note to *Woodcock* that erroneously indicated that the statement had been admitted in evidence even though it was not a dying declaration. *Radbourne*, Leach (1st ed. 1789) 399, 400 n.(a) (Old Bailey and Twelve Judges 1787). Actually, the jury's conviction of the defendant indicates that they must have decided the victim's statement was a dying declaration, and the text of the Leach's original note was deleted in the 1792 second edition report of *Radbourne*. I am indebted to Mr. Kry for a copy of the 1792 report.

¹⁹⁵ The justice went to the local poorhouse to take the victim's examination. The case report does not state when the defendant (her husband) was arrested in relation to the victim's examination, or whether her allegations were known when the defendant's own examination was recorded.

be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken.”¹⁹⁶

The thrust of Eyre’s statement seems to be that an examination of a deceased witness could be admissible under Marian authority only if it were taken in connection with the defendant’s arrest and committal. Indeed, the logic he expressed would seem to indicate that the victim’s examination would have been inadmissible as being outside Marian authority even if the prisoner had been present. (However, it is difficult to square Eyre’s logic with the admission of the victim examination in *Radbourne*—that is, assuming the latter had involved Marian authority.¹⁹⁷)

It may also be significant that Eyre referred only to the prisoner’s loss of an opportunity to “contradict,” rather than to a loss of an opportunity to cross-examine.¹⁹⁸ Eyre’s use of “contradict” suggests that his concern was that the defendant lost the opportunity to have his *response* to the victim’s allegation *recorded* for use at trial, rather than any opportunity for the defendant to cross-examine or otherwise participate in the victim’s examination.¹⁹⁹

Marian procedure did not call only for the justice of the peace to record the witness’s sworn information; in addition, the justice of the peace was required to record the “examination” of the prisoner as well. Unlike the witness examinations, the written record of the prisoner’s examination

¹⁹⁶ Leach (1st ed. 1789) at 440, 1 Leach (4th ed. 1815) 457, 502, 168 Eng. Rep. 330, 353 (Old Bailey 1787).

¹⁹⁷ The victim’s examination that was admitted in *Radbourne* does not seem to have been taken in connection with Radbourne’s arrest; hence, it does not seem to fit *Woodcock*’s definition of the scope of Marian authority. That calls into question whether *Radbourne* was actually understood to involve admission of a Marian examination. See *supra* notes 183-84 and accompanying text.

Note, too, that there is also a tension between *Woodcock* and the “material witness warrants” that were still appearing in the discussion of Marian procedure in Burn’s justice of the peace manual, discussed *supra* notes 108-10 and accompanying text. Those warrants seemed to imply a wider window for the exercise of Marian examination authority. These tensions suggest to me that Marian procedure was unsettled and undergoing change in England in 1789, not that it was settled as Kry suggests.

¹⁹⁸ I previously discussed the judge’s use of the term “contradict” rather than “cross-examine.” See Davies, *supra* note 2, at 167 n.196.

¹⁹⁹ Professor Langbein has described *Woodcock* as the first “judicial mention” of the loss of cross-examination as a ground for excluding hearsay statements, but he refers to a general statement of the reasons why hearsay statements were excluded from evidence, not to Eyre’s specific reference to the defendant’s loss of an opportunity to “contradict.” JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 238 (2003). I fear I previously misstated his view of *Woodcock*. See Davies, *supra* note 2, at 167 n.196.

was always admissible evidence in his trial and was routinely read to the jury.²⁰⁰ Hence, if the defendant failed to deny factual accusations at the time of his arrest—that is, failed to “contradict” them—the record of his examination could undercut the credibility of any denial he made for the first time later at trial, by which time he had had more time to arrange a story.²⁰¹ For example, according to the report of *Radbourne* in the Proceedings of the Old Bailey, the prosecutor Garrow argued that Radbourne’s guilt was shown by the fact that she did not object when she heard the victim’s accusations, and thus did not behave like an innocent person would have behaved.²⁰²

Thus, when Eyre referred to the loss of the defendant’s opportunity to “contradict” allegations, he may have meant that the victim’s statement had been taken after the defendant’s post-arrest examination had already been taken and recorded, so the defendant had no opportunity to have his contemporaneous denial of the victim’s allegations recorded for possible use later in his defense at trial.²⁰³ If that is what Eyre meant, his statement would not necessarily imply that the prisoner should have been present for the victim’s examination. Although the prisoner could have learned of the victim’s allegations by hearing the witness examination in person, the justice of the peace could also have informed the prisoner of the allegations when he took the prisoner’s examination separately—provided the victim’s examination had been taken before the prisoner’s.²⁰⁴

²⁰⁰ See, e.g., 2 HAWKINS, *supra* note 4, at 429, 431 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 4, at 603-04, 606-07 (1787 ed.).

²⁰¹ See *supra* note 190.

²⁰² The importance attached to an arrestee’s immediate denial of a charge is also evident in contemporary English procedure. See, e.g., Police and Criminal Evidence Act, 1984, c. 60 (Eng.) (directing English police to caution suspects at the start of an interrogation that “[i]t may harm your defense if you do not mention when questioned something which you later rely on in court”).

²⁰³ The fact that the *Dingler* ruling was based on *Woodcock* suggests that the scenario in *Woodcock* also involved a situation in which the victim’s examination was conducted after the defendant had already been arrested and committed. See *infra* text accompanying notes 212-13.

²⁰⁴ Kry suggests that the defendant in *Woodcock*

was not literally denied an opportunity to “contradict” the witness; he could have given a contradictory account at trial after the deposition was read. Implicit in the court’s holding is that the defendant was denied an opportunity to contradict the witness *at a time when the witness could be required to respond to the contradictions*—which is, in substance, an opportunity to cross-examine.

Thus, it is not clear that Eyre was actually referring to any departure from an in-the-presence Marian practice when he referred only to the loss of the defendant's opportunity to "contradict."²⁰⁵ As with *Radbourne*, we can only guess at critical aspects of *Woodcock*.

c. The 1791 Ruling in Dingler

The 1791 Old Bailey ruling in *King v. Dingler*,²⁰⁶ which *Crawford* and Kry both invoke as evidence,²⁰⁷ now turns out to be even more distant from the American framing than I suggested in my 2005 article. Because I could not locate a copy of Leach's 1792 second edition, in that article I assumed that *Dingler* would have been included in that edition, and simply noted that it could not have been published prior to even the ratification of the Sixth Amendment in 1791.²⁰⁸ However, Mr. Kry located a copy of the second edition and discovered that *Dingler* was not included in it.²⁰⁹ Instead, *Dingler* was never reported until Leach's third edition in 1800.²¹⁰

The delay in the publication of *Dingler* is significant because *Dingler* is the only one of the three cases cited by Justice Scalia in *Crawford* that actually mentions "cross-examin[ation]." Even there, that term appeared only in an argument by the defense counsel,²¹¹ not in a statement by the court.

Kry, *supra* note 3, at 532.

The response to his first point is that a denial at trial would not be as credible as a contemporaneous denial. See *supra* note 190. Kry's claim as to what is "implicit" in the court's holding ignores the various ways that a defendant could "contradict" allegations.

²⁰⁵ The interpretation I offer of Eyre's comments would also explain why Justice Ashhurst, who was also on the bench during *Woodcock*, did not object to a later statement made by Justice Buller to the effect that there was no in-the-presence requirement for Marian examinations. See *infra* text accompanying notes 229-30.

²⁰⁶ 2 Leach (4th ed. 1815) 561, 168 Eng. Rep. 383 (Old Bailey 1791).

²⁰⁷ *Crawford*, 541 U.S. at 46, 54 n.5; Kry, *supra* note 3, at 519-23.

²⁰⁸ Davies, *supra* note 2, at 157 n.164.

²⁰⁹ See Kry, *supra* note 3, at 519 n.107.

²¹⁰ *Dingler*, 2 Leach (3d ed. 1800) 638 (Old Bailey 1791). However, Leach did mention the still-unreported decision in *Dingler* in a passage he added in his 1795 edition of Hawkins's treatise. See *supra* note 191.

²¹¹ See *Dingler*, 2 Leach (4th ed. 1815) at 562, 168 Eng. Rep. at 383-84 (indicating that "cross-examination" was mentioned by "Garrow, for the prisoner"). Kry suggests that the fact that the counsel was William Garrow was significant because he was "the most famous criminal defense lawyer of his time" and if he thought cross-examination was a right, that indicates that others also would have thought that. Kry, *supra* note 3, at 533-34. However, Garrow could just as easily have been on the cutting edge of the argument. Professor Langbein also describes Garrow

Most of counsel's arguments dealt with the issue of whether the examination had been taken within the window of Marian post-arrest authority. The only statement attributed to the court was that the victim examination at issue was inadmissible "on the authority of [*Woodcock*]."²¹² Because the report in *Dingler* does clearly state that the defendant had already been committed to jail to await trial when the victim's examination was taken, it seems fairly clear that the victim's statement was inadmissible because it was taken outside of the window for the exercise of Marian authority created by a felony arrest.²¹³ Moreover, the court's treatment of *Woodcock* as the controlling authority in that setting would seem to imply that a similar situation had occurred in *Woodcock*, as I speculated above.

Radbourne, *Woodcock*, and *Dingler* indicate that Marian procedure in England was unsettled around the time of the American framing. *Woodcock* and *Dingler* also appear to indicate that English judges were beginning to take a more restrictive view of the post-arrest window for exercising Marian examination authority than had previously been the case. For example, the rulings in *Woodcock* and *Dingler* do seem to rule out taking examinations of material witnesses after the committal of the prisoner, even though forms for such warrants were still appearing in the justice of the peace manuals.²¹⁴

However, Kry insists that these cases reflect a settled in-the-presence rule for Marian examinations.²¹⁵ He even asserts that the 1789 ruling in *Woodcock* and the 1791 ruling in *Dingler* "simply confirm what [Marian] procedure already was."²¹⁶ However, that assertion seems to collide with Kry's

as a "dominant figure" in that period, but characterizes him as "the trickster." LANGBEIN, *supra* note 199, at 332.

²¹² 2 Leach (3d ed. 1800) at 641; 2 Leach (4th ed. 1815) at 563, 168 Eng. Rep. at 384.

²¹³ The report in *Dingler* indicates that the victim's examination was taken the day after the defendant was arrested and "committed . . . to take his trial at the next gaol delivery." 2 Leach (4th ed. 1815) at 561, 168 Eng. Rep. at 383.

²¹⁴ See *supra* notes 108-10 and accompanying text.

²¹⁵ Kry, *supra* note 3, at 535 (citing Leach's claims about *Woodcock* and *Dingler* in the passage Leach added to the 1795 edition of Hawkins's treatise, discussed *supra* note 191, and noting that "[l]ater treatises and cases that conditioned admissibility on an opportunity for cross-examination often similarly traced that requirement to *Woodcock* and *Dingler*").

²¹⁶ *Id.* at 522. He also notes that those rulings "do not purport to change Marian committal procedure in any way." *Id.* However, the absence of a statement of novelty would be significant only if one naively expects judges to announce what they are doing whenever they innovate.

own account of the evolution of Marian practice during the eighteenth century.²¹⁷ Indeed, if there was already a well-established in-the-presence legal rule for Marian witness examinations in 1789 or 1791, why did the justices of the peace who took the victims' examinations in *Woodcock* and *Dingler* think they were authorized to take witness examinations in the absence of the arrestee? It is one thing to say that *Woodcock* and *Dingler* indicate movement toward the creation of an in-the-presence rule; it is quite another to assume they merely announced the continuation of an existing doctrine that somehow had remained unstated.

d. The Statements of the King's Bench Judges in Eriswell

Kry's suggestion that the 1789 Old Bailey ruling in *Woodcock* reflected a settled in-the-presence rule is also undermined by statements that the judges of King's Bench made in the 1790 ruling in *King v. Inhabitants of Eriswell* ("*Eriswell*").²¹⁸ *Eriswell* was not a criminal case; it was a Crown suit charging a town's inhabitants with the care of a pauper who had become insane.²¹⁹ The issue was the admissibility of a sworn examination of the pauper taken by justices of the peace when the villagers of Eriswell were not represented.²²⁰ The topic of Marian examination procedure came up only indirectly as the judges discussed whether the pauper's sworn statement of residence constituted admissible evidence, but what the four judges of King's Bench said is significant because, by virtue of that court's jurisdiction, they had primacy in matters of

²¹⁷ See *supra* notes 34-35, 164-65 and accompanying text.

²¹⁸ 3 T.R. 707, 100 Eng. Rep. 815 (K.B. 1790). The report of this case in the Term Reports, as reprinted in the English Reports, appears to be the same, with one exception, to the report initially published in 1790 by Charles Durnford and Edward Hyde East under the title, *Reports of Cases Argued and Determined in the Court of King's Bench from Hilary Term, 29th George III. to Trinity Term, 30th George III* (London, A. Strahan & W. Woodfall). Durnford and East, the editors, added a footnote in the 1797 edition to the effect that a Marian witness examination was not admissible "unless the accused be present," even though a coroner's Marian examination was admissible regardless. *Eriswell*, 3 T.R. (1797 ed.) at 710 n.(c), 100 Eng. Rep. at 817 n.(c). No such footnote appears in the 1790 edition. See 3 T.R. (1790 ed.) at 710.

However, Kry cites the "case report" in *Eriswell* as having "expressly conditioned admissibility on either an opportunity to cross-examine or the prisoner's presence at the examination," but he refers only to the 1797 footnote that was added by the authors, not to any statement by the judges. See Kry, *supra* note 3, at 496 n.12 (citing *Eriswell*, 3 T. R. (1797 ed.) at 710 n.(c), 100 Eng. Rep. at 817 n.(c)).

²¹⁹ *Eriswell*, 3 T.R. at 707-08, 100 Eng. Rep. at 815-16.

²²⁰ *Id.* at 708, 100 Eng. Rep. at 816.

criminal law and procedure.²²¹ Indeed, Americans understood that rulings by the King's Bench were more authoritative than those in the Old Bailey itself.²²²

Two of the justices, Buller and Ashhurst, ruled that the deposition was admissible. In the course of the discussion, Justice Buller made the following statement about Marian examinations:

Where an act is judicially done, it is not necessary that the person to be affected by it should be present in order to make it evidence against him, and therefore depositions taken . . . in the absence of the prisoner must be read. So it was determined by all the Judges in *Radburn's case*, Mich[aelmas Term] 1787.²²³

In *Crawford*, Justice Scalia dismissed Buller's statement by noting that an 1826 English commentary had criticized Buller as misstating the fact that the deposition in *Radbourne* was taken in the prisoner's presence.²²⁴ Kry also asserts that *Radbourne* "squarely refutes [Buller's] position," and cites similar criticisms in 1801, 1802, and 1824 commentaries.²²⁵

However, Buller's view of *Radbourne* cannot be so readily dismissed because he had participated when the Twelve Judges reviewed Radbourne's conviction in December [Michaelmas Term] 1787.²²⁶ Moreover, his statement in *Eriswell* is not actually inconsistent with Leach's initial report

²²¹ There were four central or "superior" courts at Westminster in London: King's Bench, Common Pleas, Exchequer, and Chancery. Although judges from these central courts sometimes sat for trials in the Old Bailey, the felony trial court for London, the King's Bench had exclusive jurisdiction over criminal cases in the allocation of subject matter jurisdiction among the central courts. See 3 BLACKSTONE (1st ed. 1768), *supra* note 78, at 42.

²²² For example, in an 1807 Supreme Court argument, counsel cited statements from the King's Bench ruling in *Eriswell* but not from the Old Bailey rulings in *Woodcock* or *Dingler*. See *infra* text accompanying note 300.

²²³ *Eriswell*, 3 T.R. at 713-14, 100 Eng. Rep. at 819. Buller was also identified as the author of some editions of the treatise *An Introduction to the Law Relative to Trials at Nisi Prius*, discussed *supra* note 118.

²²⁴ *Crawford*, 541 U.S. at 54-55 n.5.

²²⁵ Kry, *supra* note 3, at 526. Kry also says that nineteenth-century commentators' negative reception of Buller's view suggests that "even around the time *Eriswell* was decided, the prevailing view in the legal community was that Buller's dictum had misstated the law." *Id.* at 527. However, the only evidence he offers for that assessment are statements by commentators that appeared years later in 1797 and 1801. See *id.* at 526-27. Do commentators have more to do with "the prevailing view" of criminal evidence doctrine than the judges of the King's Bench?

²²⁶ Buller was appointed to the Court of King's Bench in 1778. EDWARD FOSS, JUDGES OF ENGLAND 252-53 (1864; reprinted 1966). The report of *Radbourne* shows all of the Twelve Judges participated except Mansfield. *King v. Radbourne*, Leach (1st ed. 1789) 399, 401 (Old Bailey and Twelve Judges 1787).

of *Radbourne* to the effect that the examination was simply “read” in the defendant’s presence, rather than being “taken” in her presence, which could be how *Radbourne* was argued to the Twelve Judges. As noted above, the term “taken” did not appear until the 1800 version of *Radbourne*.²²⁷ Thus, the criticism of Buller seems to be based only on the revised 1800 version of *Radbourne*, which was not published until a decade after Buller made his statement in *Eriswell*.

Justice Ashhurst said nothing in *Eriswell* about Marian examinations, but simply expressed a reluctance to alter prior law and concurred with Buller’s remarks in a general way.²²⁸ His silence is noteworthy because he had been on the Old Bailey bench with Chief Baron Eyre during the trial in *Woodcock* a year earlier.²²⁹ The fact that Ashhurst did not take issue with Buller’s statement may indicate that *Woodcock* had not ruled that the prisoner had to be present at the taking of a Marian witness examination, but only had to have a chance to “contradict” witnesses’ allegations in his own examination.²³⁰

The other two King’s Bench justices who participated in *Eriswell* expressed the view that the pauper’s deposition should be inadmissible. The significant point for present purposes is that neither suggested that there was an in-the-presence rule in Marian examinations themselves. Justice Grose stated that

Before the [Marian statute], a deposition taken before the justice of the county where the murder was committed was not evidence, even though the party died or was unable to travel. Why? Because although the justice had jurisdiction to enquire into the fact, the common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross examine; and therefore that statute was made.²³¹

Note that Grose indicated that the Marian statute had been enacted to *permit* the admission of *ex parte* examinations.

²²⁷ See *supra* note 191.

²²⁸ *Eriswell*, 3 T.R. at 720-21, 100 Eng. Rep. at 822-23.

²²⁹ Unlike modern American trials, it was common for more than one judge to be on the bench during a criminal trial in the Old Bailey. See *King v. Woodcock*, 1 Leach (4th ed. 1815) 500, 500, 168 Eng. Rep. 352, 352 (Old Bailey 1789) (stating that “Woodcock was tried before Lord Chief Baron Eyre, present Mr. Justice Ashhurst, and Mr. Sergeant Adair, Recorder”).

²³⁰ See *supra* notes 198-205 and accompanying text.

²³¹ *Eriswell*, 3 T.R. at 710, 100 Eng. Rep. at 817 (emphasis added) (notes omitted). This was the point to which the authors of Term Reports addressed the footnote described *supra* note 218.

Additionally, Chief Justice Kenyon appears to have conceded that Marian witness examinations in felony cases constituted “exceptions” to the usual rules for admitting depositions.²³² Kry concedes that “Grose and Kenyon never clearly dispute[d Buller’s] premise,”²³³ but that is an understatement.

Kry admits that the statements of the King’s Bench judges in the 1790 ruling in *Eriswell* demonstrate that “[t]he [in-the-presence] rule articulated by *Radbourne*, *Woodcock*, and *Dingler* was not universally accepted.”²³⁴ However, how was it a “rule” if the judges of King’s Bench did not recognize it? The judges’ statements in *Eriswell* cut against the existence of any in-the-presence rule in Marian procedure as of 1790. In fact, Kry mentions that the judges made comments similar to those in *Eriswell* in another case in 1793.²³⁵

Remarkably, Kry nevertheless announces under the heading “Conclusion” that, “[a]t some point *before the framing*”—that is, 1789—the practice of “routinely conduct[ing Marian witness examinations] in the prisoner’s presence” had “hardened into a procedural right.”²³⁶ How can that be when the judges of King’s Bench apparently knew of no such rule in 1790 or 1793? As noted above, no such rule was stated in *any* of the treatises or justice of the peace manuals that had been published by 1789; the first claim of any such rule appears in Leach’s alterations of Hawkins’s treatise in 1795—six years after the framing—and it was based only on Leach’s own report of the 1789 ruling in *Woodcock* and the still unpublished 1791

²³² *Id.* at 722, 100 Eng. Rep. at 823. Kenyon said:

It has been said that there are cases where examinations [not taken in the presence of the party] are admitted, namely, before the coroner, and before magistrates in cases of felony. . . . Those exceptions alluded to are founded on the [Marian statutes]; and that they go no further is abundantly proved. . . . But, without stating the cases which occur on this head, I will do little more than to refer to the case of *The King v. Paine* in Salk. 281, & 5 Mod. 163. That was not loosely decided, but was the opinion of this Court assisted by the Court of Common Pleas. In Salkeld[’s report of that case] it is expressly said that the rule cannot be extended further than the particular case of felony. . . .

Id. at 722-23, 100 Eng. Rep. at 823-24.

²³³ Kry, *supra* note 3, at 525.

²³⁴ *Id.* at 524.

²³⁵ *Id.* at 526 n.137 (citing *King v. Ravenstone*, 5 T.R. 373, 374, 101 Eng. Rep. 209, 209 (K.B. 1793)).

²³⁶ *Id.* at 527 (emphasis added). Even more remarkably, Kry writes in the conclusion of his article that it is hard to say “[h]ow long before the framing” the “procedural right” to be present “hardened.” *Id.* at 554.

ruling in *Dingler*.²³⁷ Prior to 1795, the supposed rule is missing from the very authorities that were meant to instruct justices of the peace in taking Marian examinations.

The bottom line is that Kry's conclusion regarding a "hardened" in-the-presence *rule* outstrips his evidence.²³⁸ Likewise, his pre-framing evidence falls far short of *Crawford's* claim of a settled cross-examination rule. As noted above, all Kry claims about a right to cross-examine in Marian examinations is that, at the time of the 1789 framing, the "absence of such a right" was not "firmly established."²³⁹

Kry's English evidence indicates that the English (or London) bar was agitating for in-the-presence and cross-examination rules in 1789, but that the English bench was still resisting that demand. Indeed, one 1789 evidence commentary says precisely that.²⁴⁰ However, it is not clear whether this agitation had spread beyond London committal proceedings, and there is no evidence that Americans were aware of it.

²³⁷ See *supra* note 191.

²³⁸ Kry cites two English cases in addition to the cases discussed in the text. He asserts that the King's Bench held in 1761 "that testimony must be given in the prisoner's presence." Kry, *supra* note 3, at 545 (citing *King v. Vipont*, 2 Burr. 1163, 1165, 97 Eng. Rep. 767, 768 (K.B. 1761)). However, that case did not involve Marian practice because it did not involve a felony, and it appears that the justice of the peace who decided the case in a summary proceeding treated a single deposition as conclusive proof of the defendant's guilt, and in effect denied him a trial.

Kry also discusses *Ayrton v. Addington*, an unreported 1780 civil lawsuit, as an example of "attempted cross-examination at a committal hearing." *Id.* at 538. However, in that instance, the magistrate William Addington had refused to permit an attorney, Thomas Ayrton, to cross-examine a witness at a committal hearing because it was "not a trial but an examination of prisoners," and, when the attorney persisted, the magistrate had him removed from the hearing room. *Id.* at 537 (quoting *Ayrton v. Addington* (Dec. 7, 1780), in 2 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 1023, 1025-26 (1992)). The attorney then sued the magistrate and the jury gave a verdict for the attorney. *Id.* at 538. Kry suggests that the jury's approval of cross-examination is "[i]mplicit in the verdict," but that is far from clear; it seems likely that the attorney's removal was the gravamen of the lawsuit. *Id.*

Similarly, Kry cites London newspaper accounts of incidents in 1774 in which cross-examination was disallowed during a committal hearing, and in 1786 in which cross-examination was allowed. *Id.* at 538-39.

²³⁹ *Id.* at 541 (emphasis added).

²⁴⁰ See 1 JOHN MORGAN, *ESSAYS UPON THE LAW OF EVIDENCE, NEW TRIALS, SPECIAL VERDICTS, TRIALS AT BAR, AND REPLEADERS* 431 (London 1789) (stating that the admissibility of Marian examinations of unavailable witnesses "shews the propriety and justice of permitting a prisoner by himself, or counsel to cross-examine any witnesses produced against him, before the magistrate, though some justices have strenuously contended against the right").

4. London Marian Practices Do Not Illuminate American Marian Practices

A second objection to Kry's descriptions of English Marian practice is that there is no reason to assume that English practice, as opposed to published English doctrine, informed American Marian practice. Indeed, Kry primarily describes practice in London.²⁴¹ It makes sense that the high volume of arrests in London and its environs would have led to an unusual degree of institutionalization of felony committal hearings. As a result, "Newgate solicitors" may have found it worthwhile to hang around the London committal courtroom because of the high volume of potential business to be found there, and London magistrates may have accommodated them.²⁴² However, it seems unlikely that similar circumstances would have existed in rural England or even in smaller cities, where Marian committal hearings would not have been held on such a routinized basis.²⁴³ Hence, it is not clear that the urban Marian practice that Kry describes would even have been typical of the rest of England in 1789, much less America.

Additionally, Kry argues that cross-examination became relevant to English Marian practice only when London justices of the peace began to depart from the doctrinal rule by widely exercising extra-legal discretion to dismiss felony charges at Marian committal hearings if they concluded that evidence of the arrestee's guilt was weak.²⁴⁴ However, there is no evidence that American justices of the peace widely exercised similar discretion.²⁴⁵ Rather, the framing-era American justice of the

²⁴¹ There are references to London throughout Kry's descriptions of pre-framing, eighteenth-century English practice: e.g., Middlesex, Newgate (the prison adjacent to the Old Bailey), Bow Street, the Guildhall magistrates' court, etc.

²⁴² Kry notes that "Newgate solicitors" appeared in committal hearings in London, and suggests that shows there is "no substance" to my prior statement that arrestees would not have been represented by counsel at the time of a Marian committal proceeding. See Kry, *supra* note 3, at 530 n.154 (criticizing Davies, *supra* note 2, at 170). However, there is no apparent reason to assume that lawyers would have been as active in committal hearings outside of London or other large cities, and there is no apparent basis for assuming that lawyers would have been widely involved in American Marian committal practice.

²⁴³ For example, the Old Bailey had eight trial sessions a year, but outlying cities had only two assizes a year. See LANGBEIN, *supra* note 199, at 17.

²⁴⁴ Kry, *supra* note 3, at 528-29, 554-55 (noting that cross-examination in Marian examinations served no purpose without this development).

²⁴⁵ Kry does not offer any evidence as to how *American* justices of the peace conducted Marian examinations prior to 1789, other than noting a 1766 controversy in New York in which a magistrate did *not* permit cross-examination. *Id.* at 539.

peace manuals followed Burn's manual by stating the doctrinal rule that a justice of the peace had authority only to commit or bail, but not release, an arrestee at a Marian hearing.²⁴⁶ Hence, there is no evidence that there was any reason for cross-examination to emerge in American Marian practice. London practice simply does not amount to evidence of American practice.

5. How Would Americans Learn of London Marian Practice?

A third objection to Kry's account of English (London) practice is that framing-era Americans generally had no way to learn of English practices unless they were described in published sources.²⁴⁷ But no such published descriptions have been identified. Kry ignores this point when, in addition to describing London practice, he cites an unreported English case and London newspaper accounts of other cases.²⁴⁸ How could framing-era Americans possibly have learned of those? The crucial fact is that Kry does not identify any description of in-the-presence Marian practice in any pre-framing publication that would have been likely to come to the attention of Americans. Rather, as discussed above, the published descriptions of Marian procedure in framing-era authorities were either silent on such aspects or implied that they were not part of Marian procedure. How were framing-era Americans

²⁴⁶ Burn recited,

If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty; yet the justice shall not discharge him, but he must either be bailed or committed: for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial. *Dalt. c. 164.*

1 BURN, *supra* note 105, at 295 (1755 ed.); 1 *id.* at 536 (1785 ed.). American manuals repeated this statement. See GREENLEAF, *supra* note 110, at 131; GRIMKE, *supra* note 110, at 199; HODGE'S CONDUCTOR, *supra* note 110, at 178; GAINE'S CONDUCTOR, *supra* note 110, at 145; LADD, *supra* note 110, at 156. Starke's description of Virginia practice in the early 1770s suggests that justices of the peace did not exercise discretion to dismiss in the Marian hearing itself when witness examinations were taken; rather, Virginia created a unique "Court of Examination" that met five to ten days after the arrest and that court was given a "Power of Acquittal" if it deemed the evidence too weak to justify the prosecution. See STARKE, *supra* note 110, at 114-15.

²⁴⁷ This concern is not hypothetical. For example, the 1761 *Writs of Assistance Case* in Boston was adjourned for several months because no one could locate any published information as to how a writ of assistance was used for customs searches in England. See generally M. H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978).

²⁴⁸ See *supra* note 238.

supposed to have learned of the London Marian practice that Kry now describes?

The only answer Kry offers is that nine of the American Framers, primarily from the southern states, had studied at the Inns of Court in London along with a hundred or so other Americans.²⁴⁹ However, that is a bit too facile. One problem is timing: the data Kry cites refers to American lawyers who studied in London “between 1760 and 1775.”²⁵⁰ It makes sense that they studied prior to the outbreak of the Revolutionary War in 1775 and American independence in 1776, but 1760 to 1775 would be considerably too early even for the “emerging consensus” that by Kry’s account was only “hardening” into an in-the-presence rule “by the time of the framing” in 1789.²⁵¹

Moreover, it is hardly obvious that Americans who crossed the Atlantic for an expensive course of legal study would have devoted much of their attention to Marian committal proceedings, the lowest rung of English felony justice. In the stratified English legal community, the Inns of Court trained barristers, not lowly “Newgate solicitors.”²⁵² It seems likely that the Americans who traveled to London for legal studies and “personal contact with some of England’s leading lawyers and judges”²⁵³ would have directed their attention primarily to higher-status subjects like property, equity, legal actions, and civil procedure. Indeed, Blackstone’s *Commentaries* provide some indirect evidence—they were written for the student of English law but barely mentioned Marian procedure.²⁵⁴

²⁴⁹ Kry, *supra* note 3, at 522.

²⁵⁰ *Id.*

²⁵¹ See *supra* text accompanying note 236.

²⁵² Newgate was the infamous prison in London adjacent to the Old Bailey; “Newgate solicitors” would have been fairly low in the hierarchy of the English legal community.

²⁵³ Kry, *supra* note 3, at 522 (quoting 1 ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 33 (1965)).

²⁵⁴ Blackstone’s *Commentaries* were meant to provide such a study. He mentioned Marian witness examinations only once in the four volumes of the commentaries, at the beginning of chapter 22 on “Commitment and Bail” in criminal proceedings, but did not mention any requisites of such examinations—not even that they had to be under oath:

The justice, before whom such [arrested] prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute of 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him: which Mr. Lambard observes, was the first warrant given for the examination of a felon in English law. For, at the common law, *nemo*

The mere fact that some Americans attended the Inns of Court prior to 1775 is too frail a hook on which to hang American knowledge of unpublished English committal practices as of 1789. That hook is especially frail because, as I note below, post-framing American sources from 1794, and even 1807, do not reflect any awareness of *Radbourne*, *Woodcock*, or *Dingler*.²⁵⁵ The bottom line is that, even if Kry's description of English practice were accurate, he has not shown the relevance of that description to the Framers' design—and that is crucial for a claim of original meaning.

6. Coroners' Marian Examinations

In addition, there is one aspect of English Marian practice that plainly did not involve an in-the-presence or cross-examination rule in 1789—coroners' Marian witness examinations. The Marian statutes also provided for coroners to take sworn witness examinations in the course of investigating a suspicious death.²⁵⁶ Coroners conducted inquests on view of the body to determine whether a crime had been committed and, if so, who was the likely killer. Because no defendant was identified until the conclusion of the proceeding, it is patent that there could not have been either an in-the-presence or cross-examination rule for coroners' witness examinations. Yet, framing-era treatises and manuals affirmed the admissibility of coroners' examinations of unavailable witnesses in felony trials.²⁵⁷

tenebatur prodere seipsum; and his fault was not to be wrung out of himself, but rather discovered by other means, and other men. If upon this inquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise, he must either be committed to prison, or give bail

4 BLACKSTONE, *supra* note 78, at 293 (1st ed. 1769) (footnote omitted). Note that the focus of this passage is on the examination of the arrestee, but little is said of witness examinations themselves; note also that Blackstone stated such a low threshold for proceeding to commit or bail the arrestee that cross-examination would rarely have made any difference.

The 1791 lectures in law given by James Wilson (one of the Framers of the Constitution and one of the earliest justices of the Supreme Court) in Philadelphia do not seem to mention Marian witness examinations at all. *See* THE WORKS OF JAMES WILSON (Robert G. McCloskey ed., 1967).

²⁵⁵ *See infra* text following note 287 (no mention of the cases in 1794 North Carolina case), 293 (no mention of the cases in 1794 Virginia justice of the peace manual), 297 (no mention of the cases in 1807 Supreme Court argument).

²⁵⁶ *See* Davies, *supra* note 2, at 128.

²⁵⁷ *Id.* at 171-72.

In *Crawford*, Justice Scalia breezed past this inconvenient fact in one evasive footnote.²⁵⁸ Kry at least addresses the difficulty. Although he concedes that coroners' Marian examinations were admissible, and also concedes that the defendant need not even have been identified or present when such examinations occurred, he takes refuge in a palpable fiction—because coroners' inquests were open to the public, a potential defendant could have chosen to attend and could even have chosen to cross-examine the witnesses. Thus, the requirement of an “opportunity” for such was met and “those who failed to show up to cross-examine had simply neglected their rights.”²⁵⁹ In addition to offering this notion of constructive presence, Kry notes that American state cases in 1835, 1842, and 1844 began refusing to admit coroners' examinations in criminal trials.²⁶⁰

However, the significant fact for assessing the original understanding of the Confrontation Clause is that the framing-era treatises and justice of the peace manuals never suggested that either an in-the-presence rule or cross-examination rule applied to Marian coroners' examinations of witnesses, and they did not condition the admissibility of coroners' examinations of unavailable witnesses on the examination having been taken in the prisoner's presence or having been subject to cross-examination rules. Indeed, Kry cites English statements that indicate that no such conditions were placed on the admissibility of coroners' Marian examinations well after the 1789 framing.²⁶¹

7. Summary of Kry's Pre-Framing Evidence

In sum, I do not think Mr. Kry has presented historical evidence that sheds much light on the original American understanding of the Confrontation Clause. Rather, like

²⁵⁸ *Crawford*, 541 U.S. at 47 n.2 (suggesting “[t]here [was] some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes” but citing only post-framing sources as grounds for that “question”).

²⁵⁹ Kry, *supra* note 3, at 547.

²⁶⁰ *Id.* at 547 & n.253 (citing cases from 1835, 1842, 1844, and 1858).

²⁶¹ For example, Kry several times cites a 1797 footnote added to the *Eriswell* case report by the reporters of that volume to the effect that “Nor [are committal depositions admissible] since [the Marian statutes], unless the party accused be present, though an examination before a coroner is.” *Id.* at 496 n.12, 523 n.126, 527 n.143, 547 n.256 (citing *King v. Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790)). See *supra* note 218.

Crawford, he has focused on matters that are, at best, marginally relevant and often ambiguous, while he has downplayed or dismissed the treatises and manuals that provide the best evidence we have of the Framers' understanding of Marian procedure. Although Kry offers a description of the evolution of English Marian practice itself, he has paid little heed to the essential question of what Americans would have known about that practice, and when they would have known it. Indeed, he has not even shown that there was a settled English in-the-presence rule that Americans could have discovered in 1789, let alone the settled cross-examination rule asserted in *Crawford*.

V. KRY'S POST-FRAMING EVIDENCE

Kry suggests that because the pre-framing evidence is "conflicting," it is appropriate "to consider a broader range of historical evidence," including post-framing evidence.²⁶² He asserts that *post-framing* evidence is relevant and effectively assumes that later statements reveal earlier doctrine. Indeed, he asserts that "[w]hile the pre-framing evidence is ambiguous, the post-framing evidence is devastating."²⁶³

It certainly is true that post-framing sources are crucial to Kry's arguments. I invite the reader to perform an experiment: make a copy of Kry's article, black out all statements that are based on post-1789 sources as well as on *Radbourne*, *Woodcock*, and *Dingler*, the three cases that were published too late to have informed the American framing, and see what is left. Kry characterizes our disagreement over relevant evidence as "a question of timing."²⁶⁴ I think "time travel" would be more apt.

I do not deny that there might be instances in which post-framing statements could carry sufficient indicia of continuity with earlier doctrine to make it appropriate to treat them as evidence of original meaning. However, none of the post-framing sources that Kry offers fall into that category.²⁶⁵

²⁶² Kry, *supra* note 3, at 542.

²⁶³ *Id.* at 551.

²⁶⁴ *Id.* at 495.

²⁶⁵ An American case or statement from the immediate aftermath of the framing might constitute valid evidence of the original understanding *if* the case or statement exhibits some indicia of continuity. For example, if an American state case from the decade after the framing had said something like "As we have construed our

Rather, I think his post-framing evidence is essentially irrelevant for reconstructing the original American understanding of the Confrontation Clause. Let me briefly review the post-framing sources he relies upon, and then address the real issue—Kry’s assumption of judicial consistency over time.

A. *Kry’s Post-Framing English Evidence*

Kry argues that in English law, “admissibility [of Marian examinations] clearly became conditioned, at some point, on whether the defendant had an opportunity to cross-examine,” and cites as evidence seven post-framing English treatises, three post-framing English cases, and a post-framing footnote added to a case report by the reporters rather than the court.²⁶⁶ However, “at some point” does not amount to a claim about “the Framers’ design.”²⁶⁷ The critical fact is that these post-framing English sources that endorsed an in-the-presence or cross-examination rule cited no precedents or authorities between the 1696 rulings in *Paine* and *Fenwick* and the 1787, 1789, and 1791 decisions in *Radbourne*, *Woodcock*, and *Dingler* (the three cases that were published too late to have informed the framing of the Confrontation Clause). Moreover, it is noteworthy that a number of the commentaries that Kry cites were written by members of the London bar who probably were partisans in the campaign for recognition of in-the-presence and cross-examination rules in Marian procedure.²⁶⁸ Kry does not identify any English court ruling that endorsed those rules until 1814—twenty-five years after the 1789 framing of the Confrontation Clause.²⁶⁹ Thus, the post-framing statements Kry cites do not provide evidence that an in-the-presence or cross-examination rule was recognized in England prior to the American framing.²⁷⁰

statute for many years . . .,” one would have to give some weight to that as relevant evidence of the framing-era understanding. However, Kry cites no such case.

²⁶⁶ Kry, *supra* note 3, at 495 & nn.11-12.

²⁶⁷ *Crawford*, 541 U.S. at 68.

²⁶⁸ For example, Leonard MacNally authored one of the English treatises that Kry cites. See Kry, *supra* note 3, at 496 n.11 (citing LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* (Dublin 1802)). MacNally also appears as defense counsel in Kry’s account. See *id.* at 539 (referring to a cross-examination by “Mr. MacNally”). See also *supra* note 204.

²⁶⁹ See Kry, *supra* note 3, at 496 n.12.

²⁷⁰ I invite the reader to peruse the authorities set out in Kry, *supra* note 3, at 495 nn.11-12.

My 2005 article did not dispute or downplay the fact that a cross-examination rule was adopted in England in the decades after the American framing.²⁷¹ In fact, my 2005 article actually introduced some of the post-framing treatises and cases Kry now cites.²⁷² I simply noted the basic point that what was said in England *after* the framing does not constitute evidence of what the American Framers thought at the time of the framing.

B. *Kry's Post-Framing American Evidence*

Kry also cites several post-framing American statements in cases and commentaries. However, none of these statements constitute significant evidence that Americans understood in 1789 that a cross-examination rule was part of Marian procedure.

1. "Early" State Cases

Like Justice Scalia in *Crawford*, Kry also stresses post-framing American state cases. Although Justice Scalia invoked the authority of "numerous early state cases," two were plainly inapposite,²⁷³ and of the nine remaining, only one was decided prior to 1821.²⁷⁴ Kry omits the inapposite cases (unlike Justice Scalia who continues to include them²⁷⁵), but Kry has added further cases, reaching sixteen decided "between 1794 and

²⁷¹ Davies, *supra* note 2, at 173-78.

²⁷² For example, I initially identified the passage that Thomas Leach added to the 1795 edition of Hawkins's treatise. *See id.* at 173. That is the earliest English commentary that endorsed a cross-examination rule. *See* Kry, *supra* note 3, at 495 n.11. Likewise, I initially identified *King v. Smith*, Holt 614, 171 Eng. Rep. 357 (1817). *See* Davies, *supra* note 2, at 174 n.224; Kry, *supra* note 3, at 496 n.12. Justice Scalia did not cite either of these authorities in *Crawford*.

²⁷³ *Crawford*, 541 U.S. at 49-50 (citing, *inter alia*, *Finn v. Commonwealth*, 26 Va. 701, 708 (1827); *State v. Atkins*, 1 Tenn. 229 (Super. Ct. 1807) (*per curiam*)). These two cases are inapposite because they excluded oral testimony regarding testimony a deceased witness had given at a prior trial, rather than a written record of a Marian examination. As I previously explained, there was no transcript of the prior court testimony, so an oral account of it was deemed less reliable than a written record of a witness examination; hence, there was a settled rule against admitting oral accounts of prior testimony that had nothing to do with cross-examination. *See* Davies, *supra* note 2, at 180 n.235. Kry contends that these cases were offered for only a narrow point in *Crawford*. *See* Kry, *supra* note 3, at 546 n.246. However, they appear in *Crawford* as "cases to the same effect" as those that deal with cross-examination. *See Crawford*, 541 U.S. at 50.

²⁷⁴ *See Crawford*, 541 U.S. at 49-50 (citing two cases from the 1820s, two from the 1830s, two from the 1840s, and three from the 1850s).

²⁷⁵ *Davis v. Washington*, 547 U.S. ___, 126 S. Ct. 2266, 2275 n.3 (2006).

1858,” plus a “cf.” cite.²⁷⁶ However, Kry still identifies only three cases prior to the 1830s, and they constitute only limited evidence: the earliest is a 1794 case that did not actually involve the pertinent issue, and the other two are merely offspring of the 1794 case.

The earliest American case Kry cites is the 1794 North Carolina case, *State v. Webb*.²⁷⁷ I am chagrined that when I wrote my prior article, I did not notice that *Webb* did not actually deal with the pertinent issue.²⁷⁸ Although the cryptic one-paragraph statement by the court did refer to an in-the-presence standard and right to cross-examine for admitting a witness “deposition” as a matter of “natural justice,”²⁷⁹ Mr. Kry errs when he describes the case as involving a Marian examination of an “unavailable” witness.²⁸⁰ As noted above, the settled understanding, which was stated explicitly in the English treatises that the prosecutor offered as authority for admitting the witness deposition, was that a Marian deposition was admissible only if the witness was genuinely unavailable—that is, he could not attend the trial because he was dead, too ill to travel, or was kept away by the defendant.²⁸¹ However, it appears that the witness in *Webb* did not meet any of those criteria—he was merely in South Carolina.²⁸²

²⁷⁶ Kry, *supra* note 3, at 496 n.13. Kry also includes a “cf.” cite to an 1808 Kentucky bastardy case overruling a decision by a lower court to admit the complaint for an arrest “warrant” as evidence. *Id.*

²⁷⁷ 2 N.C. (1 Hayw.) 139 (Super. Ct. 1794), *discussed in Crawford*, 541 U.S. at 49; *cited in Kry*, *supra* note 3, at 496 n.13. *See also Kry*, *supra* note 3, at 548 (citing American cases “between 1794 and 1858”).

²⁷⁸ *See Davies*, *supra* note 2, at 181 (incorrectly stating that *Webb* offered support for Justice Scalia’s position).

²⁷⁹ *Webb*, 2 N.C. at 139 (“[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine . . .”).

²⁸⁰ Kry, *supra* note 3, at 502 (emphasis added) (stating that the prosecutor in *Webb* sought “to admit an unavailable witness’s deposition taken *ex parte*”). Justice Scalia said nothing about the availability of the witness in *Crawford*. *See* 541 U.S. at 49.

²⁸¹ The prosecutor cited passages in the treatises by Hale, Hawkins, and Buller. *Webb*, 2 N.C. at 139. Hale referred to witnesses who had died or were too ill to travel. *See* 2 HALE, *supra* note 89, at 52. Hawkins referred to witnesses who were dead, too ill to travel, or kept away by the defendant. *See supra* note 84. Buller referred to witnesses who were “dead.” *See supra* text accompanying note 117. *Cf. Kry*, *supra* note 3, at 553 (“Throughout the eighteenth century, it was settled law that a Marian deposition was admissible at trial if the witness was dead, too sick to travel, or kept away by the accused.”).

²⁸² *See Webb*, 2 N.C. at 139 (reporting the only description of the witness and deposition offered by the prosecutor: “the deposition of one Young, to whom [Webb] had sold the horse in South Carolina”).

Given that the witness who had been deposed did not meet any of the unavailability criteria, it is hardly surprising that the North Carolina judges found that the admissibility rule set out in the English treatises cited by the prosecutor was inapplicable.²⁸³ Instead, it appears that the North Carolina judges construed the state Marian statute as though it incorporated the common-law cross-examination standard that pertained to admitting depositions in civil cases. Indeed, the “natural justice” language that they used appears in a number of passages in pre-framing English authorities that pertain to the admissibility of “depositions” in civil lawsuits.²⁸⁴ It may also be significant that the North Carolina judges referred to the witness statement at issue as a “deposition,” rather than as an “examination,” the term that actually appears in the North Carolina Marian statute.²⁸⁵ Hence, the statements in *Webb* were not actually made in the context of resolving the admissibility of a Marian examination of a genuinely unavailable witness; rather, the context resembles that of a civil lawsuit deposition taken when it would merely be inconvenient for a witness to attend a trial.²⁸⁶

Nevertheless, *Webb* was later invoked as the relevant authority in the 1798 and 1821 cases that Kry cites, both of which involved the admissibility of a victim’s Marian examination that had been taken in the presence of the arrestee. The 1798 North Carolina case that Kry identifies, *State v. Moody*,²⁸⁷ was decided by the same court (and largely the same judges) that had decided *Webb* only four years earlier. Although the court ruled that the victim’s statement could not be admitted because it had not been properly sworn, one judge

²⁸³ See Kry, *supra* note 3, at 502-03 (noting that the prosecutor cited passages on the admissibility of Marian depositions of unavailable witnesses from “Hale, Hawkins, and Buller on which Davies relies”). Kry suggests that my interpretation of the issue is “implausible” because it would mean that the prosecutor made a “nonsensical” argument to the North Carolina court. *Id.* at 503 n.42. I suggest that inapt citations are not an uncommon feature of arguments made in the course of litigation.

²⁸⁴ See, e.g., GILBERT, *supra* note 15, at 62 (1756 ed.) (“tis against natural Justice” to admit a “Deposition” if the party “had not Liberty to cross-examine the Witnesses”).

²⁸⁵ See *supra* note 81. The language of the North Carolina Marian Statute is set out in Davies, *supra* note 2, at 181 n.239.

²⁸⁶ See *supra* notes 81-82.

²⁸⁷ 3 N.C. (2. Hayw.) 50 (1798).

did make a statement that appears to have reiterated the in-the-presence standard previously announced in *Webb*.²⁸⁸

It should also be noted that the North Carolina cases appear to have announced a homegrown doctrine. Although Kry writes that *Webb* “essentially replicated the reasoning of *Woodcock* and *Dingler*,”²⁸⁹ the important fact is that *Webb* did not refer to the English reports of *Radbourne* or *Woodcock* (and *Dingler* had not yet been published). Thus, *Webb* suggests that Americans either did not immediately become familiar with Leach’s reports of Old Bailey cases when they were published sometime in late 1789, or did not regard them as authoritative.

The next case chronologically that *Crawford* cited, and that Kry cites, is the 1821 Tennessee ruling in *Johnston v. State*, which admitted a witness examination taken in the defendant’s presence.²⁹⁰ However, *Johnston* is also an offspring of *Webb*. The Tennessee judges regarded the 1715 North Carolina Marian statute as having been absorbed into Tennessee law (presumably because Tennessee was created from North Carolina territory), and thus treated *Webb* as a pertinent construction of that statute. As a result, the three pre-1830 cases Kry cites all really boil down to one decision, the 1794 decision in *Webb*.

Kry then also cites two state cases from the 1830s, five from the 1840s, and five from the 1850s. However, those cases are hardly proximate to the framing in 1789. Even by the

²⁸⁸ *Moody* involved the admissibility of a statement a murder victim had made on the day after the attack; however, because he died six or seven weeks later, the court concluded that the statement was not admissible as a dying declaration. *Id.* at 50-51. Judge John Haywood then raised the possibility that the statement would be admissible as a Marian examination of an unavailable witness:

[I]t may be a question whether [the victim’s statement] may not be received as an examination taken on oath before a justice of the peace, pursuant to the act of Assembly prescribed for such depositions in cases of felony [that is, the North Carolina Marian statute]; when regularly taken pursuant to the act, and the witness afterwards dies, it may be read in evidence; more especially if the party to be affected by that testimony were present at the examination, as the prisoner was in the present case.

Id. The deposition was not admitted, however, because there was a question as to whether it was properly sworn. *See id.* at 51. It is unclear if Haywood was on the bench of North Carolina Superior Court (that is, the state supreme court) when *Webb* was decided in the “September Term, 1794” because he was elected to the court in 1794. I agree with Kry that Judge Haywood’s “more especially” phrasing probably meant “more specifically” in 1798. *See Kry, supra* note 3, at 496 n.13.

²⁸⁹ *See Kry, supra* note 3, at 534.

²⁹⁰ 10 Tenn. (2 Yer.) 51, 52-53 (1821), *cited in Crawford*, 541 U.S. at 50. *See also Kry, supra* note 3, at 496 n.12.

1820s, American courts could have begun inventing new understandings of the confrontation right, or—because the nineteenth-century English treatises that Kry cites were circulating in America by the 1820s—the nineteenth-century American cases he cites may have simply imported the new English understanding of Marian procedure.²⁹¹

2. Other Post-Framing American Sources

Kry discusses three additional American statements. One involved a 1766 complaint about the denial of cross-examination in a committal proceeding in colonial New York.²⁹² Although it is true that there was a complaint, the fact that the court refused to allow cross-examination would appear to indicate the absence of a legally recognized right.²⁹³ The other two statements are from 1794 and 1807.

In 1794, William Waller Hening criticized the admissibility of Marian witness examinations of unavailable witnesses when he wrote his justice of the peace manual, *The New Virginia Justice*. Specifically, Hening objected that “[t]he doctrine laid down in the books” regarding the admissibility of Marian examinations of deceased or otherwise unavailable witnesses was liable to the objection that “the accused party has not the same advantage of cross examination, which he would possess before a court, with the assistance of counsel.”²⁹⁴ Kry stresses Hening’s use of the word “same” and reads this to mean that the accused was entitled to cross-examine the witness on his own during a Marian examination.²⁹⁵ Even by that literal reading, however, Hening would have referred only

²⁹¹ See Davies, *supra* note 2, at 180 n.234. See also Kry, *supra* note 3, at 495 n.11 (citing several American printings of English commentaries). The 1821 Tennessee decision in *Johnston* cited the evidence treatise by Phillipps that Kry cites. See *Johnston v. State*, 10 Tenn. (2 Yer.) 58 (1821); Kry, *supra* note 3, at 495 n.11 (citing S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE (1814)). For example, in 1824, Nathaniel Dane cited “M’Nally” (that is, MacNally’s evidence treatise; see Kry, *supra* note 3, at 495 n.11), *Radbourne*, *Woodcock*, and *Dingler* when discussing the admissibility of Marian witness examinations. See 3 NATHANIEL DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 372-73 (1824). Interestingly, Dane attributed an in-the-presence rule to *Radbourne*, but did not actually mention an opportunity for cross-examination.

²⁹² Kry, *supra* note 3, at 539.

²⁹³ See Davies, *supra* note 2, at 188 n.269.

²⁹⁴ WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 147 (entered for publication 1794, printed in Richmond 1795). The passage is quoted in Davies, *supra* note 2, at 187.

²⁹⁵ Kry, *supra* note 3, at 535.

to a minimal opportunity for cross-examination. Moreover, I do not think it is clear that Kry's reading is correct. Hening's statement could also be read idiomatically as a complaint that the accused lacked both the opportunity to cross-examine and the assistance of counsel that he would have enjoyed during a trial.

It is also worth noting that Hening made no mention in 1794 of *Radbourne* or *Woodcock*, five years after the reports of those cases were initially published in Leach's reports of Old Bailey cases (*Dingler* still had not been published). In fact, although Hening did cite some English case reports published in London contemporaneously with the framing, he did not cite Leach's reports at all.²⁹⁶ Thus, Hening's reference to the rule of admissibility "laid down in the books" seems to confirm that he was not aware of any alteration of earlier doctrine regarding the admissibility of Marian examinations of unavailable witnesses.

The other post-framing American statement that Kry invokes is a question posed by Chief Justice John Marshall during the 1807 arguments in *Ex Parte Bollman*, a proceeding related to the Burr conspiracy.²⁹⁷ Bollman had been arrested as a conspirator and sought a writ of habeas corpus in the Supreme Court. An issue arose as to whether an affidavit by General Wilkerson, made after Bollman's arrest for treason, could be admitted as evidence to determine whether there was probable cause to support the arrest warrant issued for Bollman.²⁹⁸ The Court requested that the attorneys present authorities on the issue.²⁹⁹

At the next Court session, Bollman's attorney, Francis Scott Key, cited statements from the King's Bench ruling in *Eriswell* as authority that an "extrajudicial" affidavit is

²⁹⁶ At least one of the 1795 printings of Hening's manual includes a list of the legal authorities cited in the manual among the opening, unnumbered pages. Hening did not include Leach's *Cases in Crown Law* but he did include the "Term Reports" of King's Bench rulings. There are several citations to the third volume of those reports that was published in 1790 (the volume in which *Eriswell* was reported; see *supra* note 232). See, e.g., HENING, *supra* note 294, at 176, 178 (citing "3 Term Rep. 590," "3 Term Rep. 27"). The fact that Hening cited recent reports of King's Bench cases but not Old Bailey cases suggests that Americans in 1794 still accorded significance to decisions in the King's Bench itself but may have been less interested in trial rulings in the Old Bailey.

²⁹⁷ *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

²⁹⁸ *Id.* at 110-11, 123-24.

²⁹⁹ *Id.* at 123.

inadmissible.³⁰⁰ (Notably, he did not cite the Old Bailey rulings in *Woodcock* or *Dingler*—again suggesting that Americans were not consulting Leach’s reports.) As Kry notes, Chief Justice Marshall then asked:

If a person makes an affidavit before a magistrate to obtain a warrant of arrest, such affidavit must necessarily be *ex parte*. But how is it on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in the presence of the prisoner?³⁰¹

However, Attorney General Caesar Rodney responded that the *ex parte* affidavit for the arrest warrant would suffice to commit the arrestee unless the prisoner demonstrated his innocence in his own examination.³⁰² Thus, the Attorney General apparently believed an *ex parte* warrant affidavit could serve as a Marian witness examination for purposes of committing an arrestee³⁰³—which suggests that was sometimes the practice. There was no further discussion of the point, and Marshall subsequently ruled that Wilkerson’s affidavit was admissible in the habeas corpus proceeding, stating that “[s]uch an affidavit seems admissible on the principle that before the accused is put upon his trial all the proceedings are *ex parte*”³⁰⁴—a statement that would seem to leave room for *ex parte* witness examinations.

Kry correctly notes that Attorney General Rodney conceded that General Wilkerson’s affidavit would be inadmissible at trial, but that simply reflects the point that Wilkerson (like the deponent in *Webb*) did not meet any of the unavailability criteria. Wilkerson was not dead; he just was not in Washington.³⁰⁵ Thus, neither Hening’s statement nor the

³⁰⁰ *Id.* at 124.

³⁰¹ *Id.*, quoted in Kry, *supra* note 3, at 513.

³⁰² *Id.* (“The first affidavit [for the arrest warrant] would be sufficient, unless disproved or explained by the prisoner on his examination.”).

³⁰³ I suggested that possibility, *supra* text accompanying note 89.

³⁰⁴ *Bollman*, 8 U.S. (4 Cranch) at 129.

³⁰⁵ Kry correctly notes that it was understood that General Wilkerson’s affidavit would not have been admissible evidence at trial. Kry, *supra* note 3, at 513 n.81. However, he ignores the point that Wilkerson did not qualify as an unavailable witness, which explains why his affidavit could not be admissible in a trial. I call attention to the hypothetical discussion between Marshall and Attorney General Rodney regarding committal proceedings in which Rodney asserted that an *ex parte* arrest warrant affidavit could suffice to commit a prisoner—that is, could serve as a Marian examination. There is no indication in *Bollman* that Rodney’s general statement to that effect was challenged by anyone.

colloquy in *Bollman* provide evidence of a cross-examination rule in America in the aftermath of the framing.

The bottom line is that Kry has not identified any post-framing American sources that reveal a *framing-era* in-the-presence rule, let alone a cross-examination rule. Rather, the sources he identifies tend to show that there was a significant lag between the publication of *Radbourne*, *Woodcock*, and *Dingler* in London, and American awareness of those English developments.

C. Kry's Assumption of Continuity

Mr. Kry, however, insists that it is valid to treat post-framing statements as evidence of pre-framing understandings, apparently because one can assume a high degree of consistency in judicial rulings over time. He bases this apparent assumption not on historical methodology, but on a misplaced application of contract law doctrine.³⁰⁶ Additionally, he notes that "*Crawford's* reliance on post-framing authorities is hardly novel," that "Justices Scalia and Thomas also routinely rely on post-framing English authorities" in construing constitutional provisions,³⁰⁷ and that justices have been citing cases from Leach's *Crown Cases* since the late nineteenth century.³⁰⁸ However, errors do not cease to be errors simply because they are repeated.

Kry's assumption of continuity simply conflates two very different things: one is an interpretive posture that judges assume when they purport to look to history to justify a preferred result; the other is authentic legal history derived

³⁰⁶ Kry argues "[t]hat subsequent history is relevant to original meaning [because s]ubsequent conduct in conformity with a particular interpretation of a contract is evidence of the parties' intent; no less is true of the Constitution." Kry, *supra* note 3, at 548-49. There is a significant difference between a contract ruling and constitutional law. Contract law resorts to such fictions when there is no better way to construe a contract and it is necessary to do so because the contract has to be construed to settle a dispute. However, as I noted above, it is not necessary to base a constitutional interpretation on original meaning because it is only one of a variety of approaches to constitutional justification. Hence, when there is no direct evidence of original meaning, originalism should not be resorted to. *See supra* text accompanying note 48.

³⁰⁷ Kry, *supra* note 3, at 549-50.

³⁰⁸ *Id.* at 550-51. Kry notes that the Court cited *Radbourne* in *Mattox v. United States*, 156 U.S. 237, 240 (1894). *Id.* at 551. However, that opinion cited *Radbourne* only regarding the content of English law, not the original meaning of the Confrontation Clause. Likewise, other Supreme Court opinions cited cases in Leach when discussing criminal law doctrine in criminal cases, rather than constitutional interpretation.

from valid evidence. What legal history actually teaches is that judges have been fudging older precedents since the beginning of judging.³⁰⁹ The English legal historian Frederic Maitland put it this way:

[The] process by which old principles and old phrases are charged with a new content is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding.³¹⁰

The reality of “perversion[s] and misunderstanding[s]” in later interpretations of earlier doctrines cautions that authentic legal history depends upon enforcing a strong distinction between historical evidence and judicial revisionism. One cannot take judicial interpretations of cases offered several decades or more after a case was decided as evidence of the original meaning of the earlier case; neither can one take subsequent interpretations of a constitutional provision as valid evidence of the original understanding of the provision. There is too much likelihood that the post-framing treatments will involve either deliberate or unintentional adjustments or distortions.

Indeed, a large contradiction lurks in Kry's account. On the one hand, the story he tells of English Marian practices is a story of legal “*evol[ution]*”³¹¹: an in-the-presence practice “hardened into a procedural right” to be present,³¹² and “at some point,” that led to a cross-examination rule.³¹³ However, he then tells us that we can treat nineteenth-century commentaries and cases as evidence of eighteenth-century understandings, apparently because we can assume constancy of doctrinal content over time. Legal history endorses only the evolutionary claim.

The unfounded assumption of continuity that Kry ultimately relies upon in claiming that post-framing statements prove framing-era understandings is a common defect in originalist claims. Practitioners of originalism, including Justices Scalia and Thomas, tend to describe our

³⁰⁹ See *supra* note 26 (discussing judicial alteration of arrest law and the transference of the law of arrest from “due process of law” in the Fifth Amendment to the Fourth Amendment).

³¹⁰ Maitland, *supra* note 42.

³¹¹ Kry, *supra* note 3, at 553 (stating that Marian practice was “evolving”).

³¹² *Id.* at 554.

³¹³ *Id.* at 495.

constitutional history as though it has been continuous and stable, at least until recently. That is a profoundly false picture. As I have discussed on other occasions, the past really is a foreign country—far more foreign than originalists are either able to see, or willing to admit.³¹⁴ Indeed, once the overall foreignness of framing-era doctrine is recognized, it is fairly obvious that any attempt to apply a specific historical rule to a modern issue will always involve *selective* originalism at best; that is, originalists always choose to ignore far more framing-era law than they invoke.³¹⁵

For present purposes, one example of doctrinal discontinuity is particularly pertinent. As noted above, the other prong of *Crawford*'s originalist scheme limits the scope of the confrontation right and allows the admission of unsworn "nontestimonial" hearsay in criminal trials.³¹⁶ In the course of proposing that limitation, Justices Thomas and Scalia, as well as commentators, have assumed that the hearsay exceptions that now give rise to much of the current controversy over the application of the confrontation right were commonplace at the time of the framing.³¹⁷ However, the historical sources present a very different picture. The framing-era treatises, which defined "hearsay" as unsworn, out-of-court statements, indicate

³¹⁴ See Davies, *Arrest*, *supra* note 20, at 419-35; Davies, *Fourth Amendment*, *supra* note 20, at 744-50; Davies, *supra* note 2, at 210-17.

³¹⁵ As I previously noted, the issue in *Crawford*, the admission of a wife's statement against her husband, would not have arisen in framing-era law because there was a settled rule that a spouse's statement could not be admitted against the other spouse. See Davies, *supra* note 2, at 110 n.18. Indeed, James Wilson, one of the early justices of the Supreme Court who was also active in the debates that preceded the adoption of the Bill of Rights, observed in his 1790-1791 law lectures in Philadelphia that a married couple were considered to be "but one person in the law" and that "if they were permitted to give testimony against one another, another maxim of the law would be violated—No one is obliged to accuse himself." 2 THE WORKS OF JAMES WILSON 602 (Robert G. McCloskey ed., 1967) (reprinting Wilson's 1790-1791 lectures). Thus, Wilson appears to have understood that the admission of the wife's statement at issue in *Crawford* would have violated the couple's Fifth Amendment right against self-incrimination. However, Justice Scalia's *Crawford* opinion ignored these aspects of framing-era law when he characterized the issue in *Crawford* in terms of the Confrontation Clause of the Sixth Amendment.

See also Davies, *Fourth Amendment*, *supra* note 20, at 742-48. See also *supra* notes 13, 26.

³¹⁶ See *supra* text accompanying notes 5-9.

³¹⁷ See, e.g., *White v. Illinois*, 502 U.S. 346, 362 (1992) (Thomas, J., concurring) ("[T]here appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation."); AKHIL R. AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 94 (1997) ("At common law, the traditional hearsay 'rule' was notoriously unruly, recognizing countless exceptions to its basic preference for live testimony.").

that there was a virtually complete ban against the admission of hearsay statements as evidence of a defendant's guilt (the only exception being the dying declaration of a murder victim).³¹⁸ Thus, for example, the hearsay evidence involving statements a crime victim made to a 911 operator which the justices found to be admissible in *Davis* would have been inadmissible in 1789.³¹⁹

The rigorous ban against hearsay evidence regarding the defendant's guilt that was part of framing-era law is obscure today because the nineteenth-century judges and commentators who invented the variety of modern hearsay "exceptions" that now permit admission of hearsay statements as evidence did not call attention to the novelty of their creations. Those judges and commentators also do not seem to have paid much heed to the confrontation right when they made those innovations. So much for judicial consistency over time.

The core of Kry's complaint against my article is that my criticisms of *Crawford's* originalist claims "rest[] critically on [Davies'] premise that all English sources published after 1789 and all American sources published more than a few years after 1789 are irrelevant to original meaning; relax either of those two constraints and [Davies'] argument unravels."³²⁰ I do not object to that as a general summary—if one relaxes either of those two constraints, it is unlikely one is addressing the historical original meaning. However, I prefer to state the

³¹⁸ As I document in a forthcoming article, the only two forms of out-of-court statements that were admissible as evidence of the defendant's guilt were dying declarations of murder victims and the written records of Marian examinations of witnesses who had become unavailable prior to trial. Both of these involved genuinely unavailable witnesses and either an oath, in the instance of Marian examinations of witnesses, or conditions that were thought to provide assurances of truthfulness comparable to an oath, in the instance of dying declarations of murder victims. *Davies, Not the Framers' Design, supra* note 17. Compare the statement of Chief Baron Eyre in the 1789 *Woodcock* case, *supra* note 73.

At the time of the framing, hearsay statements—that is, all *unsworn* out-of-court statements—were not admissible as direct evidence of a defendant's guilt but could be admitted only for the limited purposes of either corroborating that a witness who testified at trial had previously given the same account in out-of-court statements (or of impeaching the trial testimony) or generally establishing the existence of a conspiracy, but not the defendant's personal involvement in it. *See Davies, Not the Framers' Design, supra* note 17. There were some additional exceptions that permitted hearsay statements to be admitted with regard to certain specific issues that might arise in civil lawsuits, but those exceptions were not recognized in criminal evidence doctrine and also were not pertinent to criminal matters. *See id.*

³¹⁹ *See Davies, Not the Framers' Design, supra* note 17.

³²⁰ Kry, *supra* note 3, at 555. *See also id.* at 494.

criterion directly: claims of original meaning should be based on the legal authorities that were actually widely used by framing-era Americans. If those sources do not clearly reveal a settled understanding, originalist claims should not be made. The fact that Kry has not identified significant evidence that meets that criterion confirms that no claim regarding an originalist Marian cross-examination rule should have been made in *Crawford*.

VI. THE UNTESTED CHARACTER OF JUDICIAL-CHAMBERS ORIGINALISM

Although Kry has addressed only one of my two criticisms of *Crawford*'s originalist claims,³²¹ he complains that my “fictional originalism” label is “objectionable” and also complains about my use of *Crawford* as a vehicle for a broader criticism of originalism.³²² I do not shirk from the “fictional originalism” label (which I have used before to criticize similarly ungrounded claims of original meaning³²³), or from the broader aim of my article.³²⁴ Claims that purport to reflect the Framers’ design but are not grounded in valid historical evidence *should* be regarded as fiction. Mr. Kry, like Justices Scalia and Thomas, treats evidence that amounts to mere traditionalism (that was the rule during the nineteenth century) as though that suffices to support a normatively privileged claim regarding “original meaning.” These two sorts of claims should not be interchangeable.

A final general defect in originalism should be noted in closing—the absence of any procedure for testing originalist

³²¹ As noted above, Kry has not undertaken to defend the other major “originalist” claim in *Crawford*, which I also criticized—the fictional claim that the Framers would have limited the confrontation right to “testimonial” out-of-court statements, but would not have applied it to “nontestimonial hearsay.” See *supra* notes 16-19 and accompanying text.

³²² Kry, *supra* note 3, at 555.

³²³ See, e.g., Davies, *Arrest*, *supra* note 20 (characterizing as “fictional originalism” Justice Souter’s claims about framing-era arrest law in *Atwater v. Lago Vista*, 532 U.S. 318 (2001)).

³²⁴ My purpose was not to oppose the cross-examination rule as a feature of current procedure, which I view positively, but rather to point out the fictional character of the originalist rationale that Justice Scalia presented for it. See Davies, *supra* note 2, at 106-07 (stating that the claims of original meaning in *Crawford* “provide the latest installment of fictional originalism”); *id.* at 206-15 (“*Crawford* offers a paradigmatic illustration of the defects of an originalist approach to criminal procedure.”). For additional examples of fictional originalist claims in recent Supreme Court criminal procedure opinions, see, for example, Davies, *Arrest*, *supra* note 20, at 262-66.

historical claims *before* they become enshrined in United States Reports. The usual processes of briefing and oral argument in the Supreme Court are not adequate. Few attorneys are familiar enough with the historical materials to deal with them effectively. Moreover, the page limitations on briefs are too confined to set out historical sources, and oral argument is far too awkward a forum.³²⁵

The typical result is judicial-chambers originalism: *after* the outcome of the case has been decided in the justices' conference, the assigned justice (assuming he or she has originalist inclinations) and his or her law clerks root out historical materials and create an originalist account to justify the already-made decision, based largely on historical sources never even mentioned in the briefs.³²⁶ The accounts produced in this way are invariably superficial and too often simply wrong.

The most significant feature of the controversy over the historical evidence between Kry and me may be its timing—we are debating the historical evidence only *after* Justice Scalia announced his originalist rationale. No one had any prior opportunity to cross-examine *Crawford's* fictional originalism.

³²⁵ I have previously argued that a similar procedural deficit exists with regard to the Supreme Court's use of empirical research materials. See Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 687-88 (1983).

³²⁶ See Davies, *Arrest*, *supra* note 20, at 270-74, 418-19.