

Journal of Law and Policy

Volume 15

Issue 2

SYMPOSIUM:

Crawford and Beyond: Revisited in Dialogue

Article 2

2008

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

Thomas Y. Davies

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. & Pol'y (2007).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol15/iss2/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**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**

*Thomas Y. Davies**

INTRODUCTION

According to proponents, an originalist approach to constitutional interpretation injects discipline into constitutional decision-making.¹ At least in criminal procedure, this claim is

* E.E. Overton Distinguished Professor of Law and Alumni Distinguished Service Professor of Law, University of Tennessee College of Law. This article is a revised version of the author’s presentation for the symposium, Crawford and Beyond: Revisited in Dialogue, held at Brooklyn Law School, September 29, 2006 (originally titled “Originalist Alchemy: Applying the Crawford-Davis Testimonial/Nontestimonial Distinction Despite the Framing-Era General Ban against Hearsay Evidence”).

The author thanks Professor Robert Pitler for inviting him to participate in the symposium and also for a series of e-mail and phone exchanges in which Professor Pitler’s comments and queries spurred the author’s thinking on this topic. Additionally, the author thanks Professor Ronald Carlson, Professor Clifford Fishman, Professor Otis Stephens, Mr. Anthony Franze, and Mr. Robert Kry for their comments on drafts for this article. Of course, the opinions expressed and any errors are solely the responsibility of the author.

In this article, passages from the historical sources are quoted with the original spellings, capitalizations, and punctuation, but in modern typeface. However, in some instances shorter passages quoted in the text have been altered to follow modern capitalization conventions.

¹ Originalists also assert that the original understanding of a

unrealistic. Instead, the originalist claims that have appeared in recent criminal procedure decisions have usually reflected the ideological proclivities of the justices who made them, but have rarely resembled the historical legal doctrines that actually shaped the Framers' understanding.²

The divergence between originalist claims and historical doctrine has been particularly apparent in two recent decisions that construed the Sixth Amendment Confrontation Clause³ with regard to the admission of hearsay evidence in criminal trials. In the 2004 decision *Crawford v. Washington*,⁴ and again in the 2006 decision *Davis v. Washington*,⁵ Justice Scalia asserted in opinions for the Court that "the Framers' design"⁶ for the scope of the confrontation right was that the right should regulate the admission as evidence in criminal trials of only "testimonial" out-of-court statements, but not apply at all to less formal, "nontestimonial" hearsay evidence.

As a practical matter, it seems likely that the narrow scope accorded to the confrontation right in *Crawford* will allow prosecutors considerable room to use hearsay evidence in criminal cases rather than produce the person who made the out-

constitutional provision is entitled to heightened normative status as the content that was actually adopted. Given that stance, it is appropriate that claims of original meaning should be made only if there is clear historical evidence supporting the claim. See Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule"; A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 571-73 (2007).

² See, e.g., 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, 252-66 (2002) (identifying examples of fictional originalist claims).

³ In relevant part, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. That provision explicates an aspect of the provision in the Constitution that provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2, cl. 3.

⁴ 541 U.S. 36 (2004).

⁵ 126 S.Ct. 2266 (2006)

⁶ *Crawford*, 541 U.S. at 68.

NOT THE FRAMERS' DESIGN

351

of-court statement as a trial witness, even when the person who made the hearsay statement is readily available to be called. Thus, the *Crawford* formulation of the limited scope of the right appears to mean that criminal defendants will often be deprived of meeting face to face the available declarant who made the out-of-court statement and will also be deprived of cross-examining the declarant in the view of the jury. Is that outcome really consistent with the framing-era doctrine that shaped the Framers' understanding of the confrontation right?

Plainly not. Although Justice Scalia endorsed formulating the Confrontation Clause to permit "only those [hearsay] exceptions established at the time of the founding,"⁷ he did not follow through on identifying such exceptions in *Crawford* or *Davis*.⁸ If he had actually canvassed the framing-era evidence authorities, he would have discovered that framing-era evidence doctrine imposed a virtually total ban against using unsworn hearsay evidence to prove a criminal defendant's guilt.⁹ Although

⁷ *Id.* at 54.

⁸ The absence of historical evidence regarding the claims in *Crawford* about the scope of the confrontation right may not be immediately apparent because Justice Scalia did mention a few of the relevant authorities when he discussed the so-called "cross-examination rule" that *Crawford* construed as the substantive content of the confrontation right regarding the admission of testimonial hearsay in criminal trials. See *Crawford*, 541 U.S. at 42-50. However, Justice Scalia did not discuss the framing-era authorities when he discussed the limitation of the scope of the confrontation right to testimonial, rather than nontestimonial, hearsay. See *id.* at 50-53.

⁹ I refer to "unsworn hearsay" for clarity, although that usage is actually redundant in framing-era parlance, because hearsay was defined simply as an unsworn out-of-court statement by someone other than the defendant. See, e.g., *infra* text accompanying notes 124, 137, 144. One difficulty in writing about the historical evolution of hearsay doctrine is that the doctrinal definition of hearsay has changed over time.

Today, hearsay is typically defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801 (c). For a discussion of the features of that definition, see, e.g., JONES ON EVIDENCE: CIVIL AND CRIMINAL §§ 24:2-24:31 (Clifford S. Fishman ed., 7th ed. 2000). However, the eighteenth-century legal authorities did not include the qualification that the statement be offered "for the truth of the matter

framing-era law did permit some hearsay evidence to be admitted regarding certain specific issues in civil lawsuit trials, those exceptions were not understood to apply to criminal trials. Instead, as of 1789, a dying declaration of a murder victim was the only kind of unsworn out-of-court statement that could be admitted in a criminal trial to prove the guilt of the defendant. Otherwise, the hearsay “exceptions” that now constitute a prominent feature of criminal evidence law had not yet been invented. Instead, nineteenth-century judges invented the hearsay exceptions that now apply to criminal trials only after the framing. Hence, it is clear that the Framers did not design the Confrontation Clause so as to accommodate the admission of unsworn hearsay statements.

Indeed, the framing-era authorities indicate that admission of hearsay statements would have violated basic principles of common-law criminal evidence. In particular, the framing-era sources indicate that the confrontation right itself prohibited the use of hearsay statements as evidence of the defendant’s guilt. The condemnations of hearsay that appeared in prominent and widely used framing-era authorities typically recognized that the admission of a hearsay statement would deprive the defendant of the opportunity to cross-examine the speaker in the presence of the trial jury, and that opportunity to cross-examine was understood to be a salient aspect of the confrontation right. Thus, the framing-era sources actually suggest that the Framers would not have approved of the hearsay exceptions that were later invented because the Framers would have perceived such exceptions to violate a defendant’s confrontation right.

Hence, *Crawford*’s testimonial formulation of the scope of the confrontation right does not reflect “the Framers’ design.” Rather, *Crawford*’s permissive allowance of unsworn hearsay is inconsistent with the basic premises that shaped the Framers’ understanding of the right. Thus, whatever might be said for or

asserted.” Rather, the historical authorities cited in this article simply defined hearsay to include any unsworn out-of-court statement. I speculate that the offered-for-the-truth qualification was added to the definition of hearsay when the “*res gestae*” concept was developed during the nineteenth century. See *infra* note 279.

NOT THE FRAMERS' DESIGN

353

against *Crawford's* formulation as a matter of contemporary constitutional policy, the fictional character of the historical claims made in that opinion constitute further evidence that originalism is a defective approach to constitutional decision-making.

OVERVIEW OF THIS ARTICLE

This article documents the fictional character of *Crawford's* historical claim that the scope of the original Confrontation Clause reached only testimonial but not nontestimonial hearsay statements.¹⁰ Part I briefly reviews the originalist claims in *Crawford* and *Davis*, calling particular attention to the point that Justice Scalia did not base his originalist claim regarding the limited scope of the confrontation right on direct evidence of the treatment of hearsay statements in the framing-era legal authorities, but rather based it only on “reasonable inference[s]” that he drew from the general history of the right and from the use of the term “witnesses” in the text of the Clause. I argue, however, that the validity of his “reasonable inference[s]” actually depends upon whether framing-era law recognized exceptions to the ban against hearsay that would have permitted

¹⁰ I have previously criticized the originalist claims made in *Crawford* about the scope of the confrontation right in Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOKLYN L. REV. 105, 189-206 (2005).

In my previous article, I argued that there was no historical basis for *Crawford's* distinction between “testimonial” and “nontestimonial” hearsay, but I accepted the view, evident in some recent historical commentary, that hearsay exceptions were still “embryonic” at the time the Bill of Rights was framed. *See id.* at 196-200. However, further research on framing-era doctrine indicates that the hearsay exceptions that are now pertinent to criminal trials were not merely underdeveloped but virtually non-existent at the time of the framing. Hence, the criticisms in my prior article actually understated the fictional character of *Crawford's* originalist claims about the testimonial scope of the original Confrontation Clause. The fictional character of the Court's justification for restricting the scope of the right is significant because it increasingly appears that the restriction of the confrontation right to only “testimonial” but not “nontestimonial” hearsay will be the more important aspect of *Crawford's* originalist formulation. *See infra* note 291.

the admission of unsworn, informal hearsay statements.

Part II examines the framing-era legal authorities to explicate how framing-era law actually treated the admissibility of out-of-court statements. According to those authorities, the only two kinds of out-of-court statements that constituted admissible criminal evidence involved either a *sworn* statement of an *unavailable* witness (in the case of a Marian witness examination of a deceased witness) or a *functionally sworn* statement of an *unavailable* witness (in the case of a dying declaration of a murder victim). However, those authorities did not identify any exceptions to the ban against using *unsworn* out-of-court statements, or even sworn statements of *available* witnesses, as evidence of the defendant's guilt. Indeed, the framing-era authorities did not treat the ban against hearsay and the confrontation right as being analytically independent of one another. Rather, those authorities treated the defendant's right to cross-examine—that is, the confrontation right—as one of the principles that required the ban against the use of hearsay statements to prove a defendant's guilt. Hence, *Crawford's* insistence on defining the scope of the confrontation right without regard to the law of evidence at the time of the framing is itself a departure from the Framers' understanding of the right.

Next, Part III closely examines the few historical cases that were discussed in *Davis*, and argues that what judges actually ruled in those cases is consistent with the description of historical evidence doctrine set out in Part II, rather than with the testimonial formulation of the confrontation right set out in *Crawford*. In particular, I note that the two cases that were identified in *Davis* for excluding an out-of-court statement both did so on the ground that the statement was not properly sworn, not because the statement was "testimonial" rather than "nontestimonial" in character. Additionally, a prominent framing-era source indicates that the only case identified in *Crawford* or *Davis* that might appear to admit a nontestimonial hearsay statement under an "excited utterance" or "*res gestae*" exception actually involved a very different consideration. The bottom line is that neither *Crawford* nor *Davis* identified a single

NOT THE FRAMERS' DESIGN

355

example of a framing-era case that actually admitted unsworn hearsay as evidence of a criminal defendant's guilt.

The contrast between the ban against admitting unsworn hearsay evidence of a defendant's guilt during the framing era and the variety of exceptions that now frequently permit use of hearsay evidence in criminal trials poses an obvious question: when and why did post-framing judges invent the current hearsay exceptions? Part IV offers additional evidence that the current hearsay exceptions post-date the framing, and speculates as to some of the reasons why nineteenth-century judges departed from the original confrontation right by allowing the use of hearsay evidence.

Finally, the article concludes by arguing, as I have on prior occasions, that originalism is a fundamentally flawed approach to constitutional interpretation in criminal procedure issues because originalists fail to grasp—or to admit—the degree to which legal doctrine and legal institutions have changed since the framing.¹¹

¹¹ For clarity, let me stress that I am not an originalist and do not criticize Justice Scalia's formulation of the original Confrontation Clause to advocate an alternative originalist program for criminal procedure. Rather, I do not think it is either feasible or desirable to return to the original conception of that Clause or the other criminal procedure provisions in the Bill of Rights. See, e.g., Davies, *supra* note 10, at 206-17; 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, 1043-1045 (2003) [hereinafter, "Davies, *Fifth Amendment*"]; Davies, *supra* note 2 at 436-37; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 740-750 (1999) [hereinafter "Davies, *Fourth Amendment*"].

My point is simply that a Justice should not invoke "the Framers' design" as an elevated normative justification for criminal procedure rulings unless there is actually clear evidence of the original meaning in the authentic framing-era sources. Fictional originalist claims cannot provide legitimate justifications for constitutional rulings.

I. THE ORIGINALIST CLAIMS ABOUT THE SCOPE OF THE
CONFRONTATION CLAUSE IN *CRAWFORD* AND *DAVIS*

In modern doctrine, the relationship between the allowance of hearsay evidence and the confrontation right presents a conundrum: how can the admission of hearsay evidence in criminal trials be justified given that the defendant can neither meet the out-of-court declarant face-to-face nor cross examine the out-of-court declarant in the view of the jury? The Supreme Court previously recognized that conundrum when it stated that “a literal reading of the Confrontation Clause would ‘abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme.’”¹²

In *Crawford*, Justice Scalia purported to solve the conundrum by reference to “the Framers’ design” for a testimonial confrontation right. In *Davis*, Justice Scalia then repeated the same originalist formulation when he undertook to explain the testimonial boundary of the cross-examination right announced in *Crawford*. The most significant feature of the originalist claims about the testimonial scope of the confrontation right in these two cases is that Justice Scalia did not base his formulation of “the Framers’ design” on “direct evidence” of the common-law confrontation right as it was understood in 1789, but instead only drew “reasonable inference[s]” about the scope of the right.¹³

A. *Crawford’s Testimonial Formulation of “the Framers’
Design”*

Writing for the Court in 2004 in *Crawford*, Justice Scalia construed the confrontation right to be fairly strict in substance,

¹² *Maryland v. Craig*, 497 U.S. 836, 848 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)). Note, however, that the term “long” in the passage quoted in the text does not precisely identify how far back in time the implied ban against hearsay exceptions had been rejected as being “too extreme.”

¹³ See *infra* note 47.

NOT THE FRAMERS' DESIGN

357

but narrow in scope. With regard to the substance of the right, Justice Scalia asserted that the Framers intended to limit the use of out-of-court statements according to a “cross-examination rule”: that is, the Clause would bar the use of an out-of-court statement in a criminal trial unless (1) the declarant was unavailable to testify at trial and (2) the defendant had had a prior opportunity to cross examine the declarant.¹⁴ (I have previously criticized *Crawford*'s originalist claims regarding the cross-examination rule, but I do not address that aspect further in this article.¹⁵)

In contrast to the relatively strict substance accorded the confrontation right,¹⁶ Justice Scalia announced a narrow conception of the *scope* of the right. Justice Scalia described the use as evidence in criminal trials of formal out-of-court statements such as *ex parte* depositions as the “principal evil” targeted by the Clause¹⁷ and as the “core concern” addressed in the Clause.¹⁸ Thus, he asserted that the regulation of this type of hearsay, which he labeled “testimonial” hearsay, was the Framers’ “primary object.”¹⁹ Moreover, he asserted that, because the Framers were “focused” on testimonial hearsay,²⁰ the Framers could not have intended for the Confrontation Clause to impede the admissibility of informal, “nontestimonial hearsay” at all. On that basis, the Court’s opinion in *Crawford* strongly suggested that the admissibility of nontestimonial hearsay statements does not implicate a constitutional standard but rather should be determined only by the (usually state) law

¹⁴ *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

¹⁵ See *infra* note 120.

¹⁶ I describe *Crawford*'s cross-examination rule as a “relatively strict” standard because the requirement of an opportunity to cross-examine *prior* to trial is not actually equivalent to an opportunity to cross-examine *in the presence of the trial jury*. However, the latter was the historical understanding of the confrontation right. See, e.g., *infra* note 23, quoting the Supreme Court’s earlier iteration of the historical standard.

¹⁷ *Crawford*, 541 U.S. at 50.

¹⁸ *Id.* at 51, 60.

¹⁹ *Id.* at 53.

²⁰ *Id.* at 51.

of hearsay evidence itself.²¹ (Although these statements about the scope of the right took the form of dicta in *Crawford*, the Court subsequently adopted that formulation as law in *Davis*.²²)

1. *The Road to Crawford's Testimonial Formulation*

Justice Scalia's *Crawford* opinion did not invent the narrowed, testimonial formulation of the scope of the confrontation right. A number of prior Supreme Court opinions had asserted that the Framers had been primarily concerned with preventing trial by *ex parte* deposition.²³ However, the Court deviated from that view in the 1980 ruling *Ohio v. Roberts*,²⁴ under which it more or less merged confrontation analysis with hearsay analysis.²⁵ Subsequently, the *Roberts* formulation was

²¹ *Id.* at 68.

²² In *Crawford*, Justice Scalia concluded that that case did not present a vehicle for authoritatively ruling on the scope of the right because the hearsay statement at issue was so obviously "testimonial" that it would be subject to the confrontation right under any construction of the scope of the Confrontation Clause, and thus the issue of the scope of the right was not properly before the Court. 541 U.S. at 53. However, because the two cases decided in *Davis* presented closer questions regarding the applicability of the right, the *Davis* opinion clearly ruled that the scope of the confrontation right is limited to testimonial hearsay statements. *Davis v. Washington*, 126 S.Ct. 2266, 2274-76 (2006).

²³ For example, in 1895, the Supreme Court stated that:

The primary object of [the Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895).

²⁴ 448 U.S. 56 (1980).

²⁵ See e.g., Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L.

NOT THE FRAMERS' DESIGN

359

widely criticized as robbing the confrontation right of any independent substance.²⁶

Perhaps to place a restrictive view of the confrontation right on a firmer constitutional footing, the Justice Department proposed a narrow, purportedly textualist construction of the scope of the Confrontation Clause in a 1992 amicus brief in *White v. Illinois*.²⁷ In response, Justice Thomas endorsed limiting the scope of the confrontation right to what he termed “testimonial materials” in a concurring opinion in *White*, which Justice Scalia joined.²⁸ Thereafter, several commentators also endorsed proposals to limit the scope of the right with regard to hearsay evidence.²⁹ Of course, Justice Scalia’s *Crawford* opinion limited the scope of the right in a similar fashion, but the originalist rationale he offered for his “testimonial” formulation

REV. 2409, 2409-10 (2005) (noting that, prior to *Crawford*, the Supreme Court had “tended to equate the Confrontation Clause with the hearsay exceptions that are found in the Federal Rules of Evidence”); Richard D. Friedman, *Confrontation, the Search for Basic Principles*, 86 GEO. L. J. 1011, 1014-22 (1998) (discussing confrontation rulings under *Roberts* and its progeny and concluding that in those rulings “the Supreme Court has tended to conform the Confrontation Clause to prevailing hearsay doctrine”).

²⁶ See e.g., Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 575 (1988) (concluding that the *Roberts* approach made the Confrontation Clause “a mere vestigial appendix of hearsay doctrine”); David E. Seidelson, *The Confrontation Clause, the Right Against Self-Incrimination and the Supreme Court: A Critique and Some Modest Proposals*, 20 DUQ. L. REV. 429, 433 (1982) (concluding that the *Roberts* approach made the Confrontation Clause “nothing more than a ‘constitutional hearsay rule’ subject to many exceptions”).

²⁷ Brief for the United States as Amicus Curiae Supporting Respondent at 17-29, *White v. Illinois*, 502 U.S. 346 (1992) (arguing that the term “witnesses” in the Confrontation Clause indicates that it should apply only to those persons who provide in-court testimony or the functional equivalent in the form of affidavits, depositions, confessions, etc).

²⁸ *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in the judgment).

²⁹ See, e.g., Friedman, *supra* note 25; Akhil R. Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641 (1996), *reprinted in* AKHIL R. AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 125-131 (1997) [hereinafter “AMAR, CRIMINAL PROCEDURE”].

differed significantly from that presented in prior proposals.

The previous proponents of a testimonial construction who took an originalist approach had assumed that framing-era law recognized hearsay exceptions and, thus, that the Framers must have framed the confrontation right to allow for such exceptions.³⁰ For example, when Justice Thomas endorsed limiting the Confrontation Clause to only testimonial hearsay statements in *White*, he rested that proposal on an assumption that hearsay exceptions already existed during the framing era: “there is 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.”³¹ However, although Justice Thomas *assumed* that the framing-era confrontation right was analytically independent of hearsay analysis, he did not actually identify any hearsay exceptions that had emerged by the date of the framing.

Similarly, when Professor Amar advocated a restriction of the confrontation right to testimonial hearsay statements, he also premised that proposal on the *assumption* that “surely all hearsay cannot be unconstitutional [because a]t common law, the traditional hearsay ‘rule’ was notoriously unruly, recognizing countless exceptions to its basic preference for live testimony.” However, like Justice Thomas, Amar also provided no examples of those “countless exceptions.”³²

Perhaps because the testimonial formulation of the confrontation right seemed to depend upon the purported existence of framing-era criminal hearsay exceptions, the Solicitor General’s amicus brief in *Crawford* undertook to document such exceptions. However the listing offered in that

³⁰ Although Professor Friedman’s article did briefly describe the early history of the confrontation right to the middle of the seventeenth century, it did not address the relationship between the confrontation right and hearsay evidence at the time of the framing. See Friedman, *supra* note 25, at 1022-25.

³¹ 502 U.S. 346, 346 (1992) (Thomas, J., joined by Scalia, J., concurring).

³² AMAR, CRIMINAL PROCEDURE, *supra* note 29, at 94.

NOT THE FRAMERS' DESIGN

361

brief distorted historical doctrine.³³ Moreover, Chief Justice

³³ The text of the amicus brief of the United States asserted that:

The hearsay rule [] is a feature of evidence law applicable to all litigants in both civil and criminal proceedings. The “appreciation of the impropriety of using hearsay statements” took increasing hold in England during the 17th century; and by the early 18th century, the general prohibition against admitting hearsay declarations “received a fairly constant enforcement.” 5 J. Wigmore [Evidence], §1364, at 18 [Chadbourne rev. ed. 1974]. *From the outset, however the hearsay rule was subject to well recognized (and enduring) exceptions.*

Brief of the United States as Amicus Curiae Supporting Respondent at 12-13, *Crawford v. Washington*, 541 U.S. 36 (2004) (emphasis added). In an accompanying footnote, the amicus brief asserted the following specific exceptions:

At least the following exceptions had taken shape by the late 18th century: dying declarations, regularly kept records, co-conspirator declarations, evidence of pedigree and family history, and various kinds of reputation evidence. See *Patton v. Freeman*, 1 N.J.L. 113,115 (N.J. 1791) (co-conspirator declarations); 5 J. Wigmore, [Evidence], § 1430, at 275 [Chadbourne rev. ed. 1974] (dying declarations); *id.* § 1518, at 426-428 (regularly kept records); *id.* § 1476, at 350 (declarations against interest by deceased persons); *id.* § 1476, at 352-358 (statements of fact against penal interest); *id.* § 1480, at 363 (pedigree and family history); *id.* § 1580, at 544 (reputation evidence); 3 J. Wigmore, *supra*, § 735, at 78-84 (past recollection recorded). See also 3 W. Blackstone, *Commentaries on the Law of England* 368 (1768).

Id. at 13 n. 5 (repeating claims about framing-era hearsay exceptions previously made in Brief of the United States as Amicus Curiae Supporting Respondent at 24 n. 14, *White v. Illinois*, 502 U.S. 346 (1992)).

These passages distorted the law of hearsay in 1789 in a variety of ways. To begin with, the amicus brief erred in suggesting that historical hearsay exceptions applied equally in civil and criminal trials. To the contrary, the confrontation right incorporated in the Sixth Amendment pertained to *criminal* trials and it was understood at the time of the framing that the hearsay exceptions allowed in trials of civil lawsuits did *not* apply to evidence in criminal trials. See *infra* note 162 and accompanying text. Hence, civil hearsay exceptions had no bearing on the confrontation right.

Likewise, the brief's suggestion that Blackstone endorsed hearsay exceptions was overstated. Blackstone actually indicated that hearsay

exceptions that applied in civil lawsuit trials were quite limited, but did not mention hearsay being admissible in criminal trials at all. The passage cited in the amicus brief, which appeared in Blackstone's discussion of civil lawsuits, the subject of volume three of his *Commentaries*, actually stated:

So no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as proof of any general customs, or matters of common tradition or repute) the courts admit of hearsay evidence, or an account of what persons deceased have declared in their lifetime: *but such evidence will not be received of particular facts.*

3 BLACKSTONE, *supra*, at 368 (emphasis added). That is hardly a ringing endorsement of hearsay exceptions even in civil trials.

Additionally, the only historical hearsay exception identified in the Solicitor General's amicus brief that was actually pertinent to evidence in *criminal* trials was that for dying declarations; however, even that exception was limited to the declaration of a "murder victim." See *infra* text accompanying notes 147-154. The other exceptions the brief mentioned that might appear to be pertinent to criminal trials actually were not recognized in framing-era sources. For example, the citation in the amicus brief of the 1791 New Jersey decision in *Patton v. Freeman* as authority for a "co-conspirator declarations" exception was misleading. *Patton* was a civil damages lawsuit for fraud, not a criminal case; the court prefaced its rulings by noting that the case was "a civil action" involving "the interests of the plaintiff in a civil suit." The case simply did not address admissible criminal evidence. As I explain below, at the time of the framing, statements of co-conspirators could sometimes be admitted to prove the general existence of a conspiracy but could not be admitted to prove the defendant's personal involvement in it. See *infra* note 126.

There is also no basis for the assertion in the Solicitor General's brief that framing-era sources recognized an exception for "statements against penal interest." Instead, the passage by Wigmore cited in the amicus brief as authority for that exception actually claimed only that a broad exception for "declarations of facts against interest" (presumably in civil trials) emerged "from 1800 to about 1830"—that is, *after* the framing—and noted that the exception was subsequently limited "to exclude the statement of a fact subjecting the declarant to a criminal liability, and [was] confined to statements of facts against either pecuniary or property interest." 5 Wigmore, *supra*, §1476, at 350-51. Likewise, the Wigmore passage cited by the amicus brief as authority for this claim ("§1476, at 352-358") actually sets out nineteenth-century American state cases that addressed this issue and usually ruled "the confession" (that is, the statement against penal interest) *inadmissible*.

The reference in the amicus brief to an exception for "regularly kept

Rehnquist effectively threw cold water on that listing when he quoted what a prominent framing-era evidence authority had actually written on the subject of hearsay.

2. Chief Justice Rehnquist's Historical Observation

In a concurring opinion in *Crawford*, Chief Justice Rehnquist opposed replacing the *Roberts* approach with the testimonial formulation adopted by the majority. In setting out his opposition, the Chief Justice pointed out that Justice Scalia's testimonial formulation actually had no roots in framing-era law. In particular, the Chief Justice quoted a statement in the leading framing-era evidence treatise to the effect that "hearsay is no evidence" and correctly interpreted that to mean that unsworn out-of-court statements, made by anyone other than the accused, were generally not considered substantive evidence upon which a criminal conviction could be based.³⁴ Thus, the Chief Justice concluded that "unsworn testimonial [hearsay] statements were treated no differently at common law than were nontestimonial [hearsay] statements."³⁵ Rather, the historical sources indicated that there was a general bar against the admission of unsworn

records" was also exaggerated. Even in civil lawsuit trials, there was no broad exception for "regularly kept records" during the framing era; rather, there was only a narrow allowance for the admission of the "shop book" of a tradesman in a lawsuit over non-payment for goods. So far as I can determine, no framing-era authority suggested that the narrow "shop-book" exception was relevant to a criminal trial. See *infra* note 43.

In sum, except for the "dying declaration" exception, there was no substance to the historical claims the Solicitor General's amicus brief made regarding supposed framing-era criminal hearsay exceptions.

³⁴ *Crawford v. Washington*, 541 U.S. 36, 69-70, n. 2 (2004) (quoting GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 152 (3d ed. 1769) and also citing *King v. Brasier*, 1 Leach 199, 200, 168 Eng. Rep. 202 (Twelve Judges, 1779). For a discussion of Gilbert's treatise, see *infra* notes 135-139 and accompanying text, The passage Chief Justice Rehnquist quoted in *Crawford* is set out *infra* text accompanying note 137. For a discussion of *Brasier*, see *infra* notes 217-239 and accompanying text.

³⁵ *Crawford*, 541 U.S. at 71.

hearsay statements in a criminal trial.³⁶

Nevertheless, Chief Justice Rehnquist did not consistently adhere to the implications of the framing-era doctrine that “[h]earsay is no evidence.” Rather, in later statements in his concurring opinion he suggested that there had “always” been hearsay exceptions, but did not identify them.³⁷ Even so, the

³⁶ The phrase “general bar” is actually Justice Scalia’s interpretation of Chief Justice Rehnquist’s position, but I think it is an accurate summation. *See id.* at 52 n. 3.

³⁷ Chief Justice Rehnquist undertook to discredit the historical pedigree of the testimonial formulation while defending the previous formulation of the confrontation right in *Roberts*. His opinion initially conceded that *neither* the *Roberts* formulation nor Justice Scalia’s testimonial formulation was consistent with framing-era law. *Id.* at 69 (“The Court’s distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine”).

However, in a subsequent passage, the Chief Justice ignored the implication of the framing-era rule that he had quoted to the effect that “hearsay is no evidence” and instead asserted that “[b]etween 1700 and 1800 the rules regarding the admissibility of out-of-court statements were still being developed [so] there were always exceptions to the general rule of exclusion [of out-of-court statements], and it is not clear . . . that the Framers categorically wanted to eliminate further ones.” *Id.* at 73 (citing modern historical commentaries previously cited *id.* at 69 n. 1, including, among others, JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 238-39 (2003) [hereinafter, “LANGBEIN, ADVERSARY TRIAL”]; 5 JOHN H. WIGMORE, *EVIDENCE* § 1364, 17, 19-20, 19, n. 33 (Chadbourne rev. ed. 1974); T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 *IOWA L. REV.* 499, 534-35 (1999); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 *U. ILL. L. REV.* 691, 738-46; Stephan Landsman, *Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *CORNELL L. REV.* 497, 506 (1990), and John H. Langbein, *Criminal Trial before the Lawyers*, 45 *U. CHI. L. REV.* 263, 291-293 (1978)). Notably, however, the Chief Justice did *not* identify any framing-era authority that actually identified hearsay exceptions under which unsworn out-of-court statements could be admitted to prove a *criminal defendant’s* guilt. Rather, the Chief Justice’s statement that modern histories show that “there were always exceptions” to the exclusion of hearsay statements was too broad insofar as it failed to distinguish between civil and criminal evidence. To the extent that general statements in the modern commentaries the Chief Justice cited might appear to indicate that there were legally recognized hearsay

NOT THE FRAMERS' DESIGN

365

Chief Justice's quotation of historical doctrine undercut the previous originalist assumption that there must have been framing-era hearsay exceptions, and thus undermined the previous originalist testimonial formulations of the confrontation right.

3. Justice Scalia's Historical Assertions

Like the Chief Justice, Justice Scalia also made inconsistent statements in *Crawford* regarding framing-era hearsay exceptions. At one point, Justice Scalia wrote that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."³⁸ Shortly thereafter, he followed the Chief Justice in asserting that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence³⁹ and also asserted that "[s]everal [hearsay exceptions] had become well established by 1791."⁴⁰ In that context, Justice Scalia specifically asserted that hearsay exceptions had existed for "business records" and for "statements in furtherance of a conspiracy."⁴¹ However, Justice

exceptions that applied in framing-era *criminal* trials (other than dying declarations of murder victims) those statements were overbroad and incorrect, as the review of framing-era authorities set out in Part II of this article demonstrates.

³⁸ *Crawford*, 541 U.S. at 54 (citing *Mattox v. United States*, 156 U.S. 237, 243 (1895); cf. *State v. Houser* 26 Mo. 431, 433-35 (1858)).

³⁹ *Id.* at 56 (quoting *id.* at 73 (Rehnquist, C.J., concurring)).

⁴⁰ *Crawford v. Washington*, 541 U.S. 36, 56 (2004) (citing 3 WIGMORE §1397, at 101 (2d ed. 1923); Brief for the United States as Amicus Curiae at 13, n. 5, *Crawford v. Washington*, 541 U.S. 36 (2004)).

⁴¹ After quoting Chief Justice Rehnquist's assertion that "[t]here were always exceptions to the general rule of exclusion" of hearsay evidence, Justice Scalia wrote:

Several [hearsay exceptions] had become well established by 1791. See 3 Wigmore [EVIDENCE] §1397, at 101 [2d ed. 1923]; Brief for the United States as Amicus Curiae 13 n. 5. Most of the hearsay examples covered statements that by their nature were not testimonial—for example business records or statements in furtherance of a conspiracy. We do not infer that

Scalia offered no significant support for those historical claims. The general statements he cited as evidence that there had been relevant hearsay exceptions in 1791 were overgeneralized or insubstantial,⁴² and the specific examples he offered were overblown: even in civil lawsuits, framing-era sources did not recognize anything like the modern “business records” exception,⁴³ and framing-era sources consistently stated that a

the Framers thought exceptions would apply even to prior testimony.

541 U.S. at 56.

⁴² Justice Scalia cited a passage by Dean Wigmore and the amicus brief of the United States as authority for his general claim that “several [hearsay exceptions] had become well established by 1791.” See 541 U.S. at 56 (passage quoted *supra* preceding note). However, neither of those sources constituted valid support for that claim.

The passage from Wigmore that Justice Scalia cited merely made a broad assertion that there were “a number of well established [hearsay exceptions] at the time of the earliest [American state] constitutions,” but did not actually identify any such exception. See 3 Wigmore, *supra*, § 1397, at 101 [2d ed. 1923], cited 541 U.S., at 56. Notably, Wigmore’s discussion did not distinguish between hearsay exceptions relevant to civil lawsuit trials and those relevant to criminal trials. Hence, his statement was too general to indicate that there had been hearsay exceptions applicable to *criminal* trials.

Additionally, the listing of purported framing-era hearsay exceptions in the amicus brief of the United States was insubstantial and erroneous, as described *supra* note 33.

⁴³ Contrary to Justice Scalia’s suggestion, even in civil lawsuits there was no broad framing-era hearsay exception for “business records.” Rather, framing-era authorities recognized only that the “shop-book” of a merchant could be admitted as evidence to prove delivery of goods in civil lawsuits, in lieu of live testimony, provided two conditions were met: (1) the action for payment was brought within a year of the transaction, and (2) the clerk who regularly entered the accounts had died, and his handwriting in the book could be identified. Even in that circumstance, however, framing-era authorities referred to shop-book evidence as “written evidence” rather than as “hearsay.”

For example, in 1767, a leading treatise on evidence in trials in civil lawsuits stated the following in a discussion of written evidence:

Before we conclude with written Evidence, it is proper to take Notice of [the statute] 7 *Jac. c. 12*, which enacts, That the Shop-book of a Tradesman shall not be Evidence after a Year. However, it is not Evidence of itself within the Year, without

NOT THE FRAMERS' DESIGN

367

co-conspirator's unsworn statement was *not* admissible to prove a criminal defendant's personal guilt.⁴⁴

Notwithstanding these assertions, at other points in *Crawford*, Justice Scalia seemed to question whether there had been framing-era hearsay exceptions that could be relevant to criminal trials. For example, he expressed a note of skepticism

some Circumstances to make it so. As if it be proved that the Servant who wrote it is dead, and that it is his Hand-Writing, and that he was accustomed to make the entries.

BATHURST, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 265-66 (1767) ("nisi prius" refers to trial jurisdiction).

In 1768, Blackstone essentially repeated Bathurst's description of the conditions for admitting shop-book entries into evidence in his discussion of evidence in civil lawsuits:

So too, books of account, or shop-books, are not allowed of themselves to be given in evidence for the owner; but a servant who made the entry may have recourse to them to refresh his memory: and, if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence: for as tradesmen are often under a necessity of giving credit without any note or writing, this is therefore, when accompanied with such other collateral proofs of fairness and regularity, the best evidence that can then be produced However, this dangerous species of evidence is not carried so far in England as abroad; [because] the statute 7 Jac. I c. 12, (the penners of which seem to have imagined that the books of themselves were evidence at common law) confines this species of proof to such transactions as happened within one year before the action brought; unless between merchant and merchant in the usual intercourse of trade. For accounts of so recent a date, if erroneous, may more easily be unravelled and adjusted.

3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368-69 (1st ed. 1768) (citing "Law of *nisi prius*. 266").

A 1791 revision of a leading evidence treatise still gave essentially the same treatment of shop-book evidence. See 1 GEOFFREY GILBERT, LAW OF EVIDENCE 206-08 (Capel Lofft ed. 1791) (discussion appearing in Part II, "Of Written Evidence, Private"; Chapter I, Section VII "Of Secondary Evidence"; Title II, "Tradesmen's Books"). Lofft added this section when he expanded Gilbert's treatise in 1791; no similar discussion of shop-book evidence had appeared in earlier editions of Gilbert's evidence treatise.

⁴⁴ See *infra* note 126 and accompanying text.

as to whether there had been a framing-era “excited utterance” exception,⁴⁵ and he noted that a commentary on the Confrontation Clause had previously concluded that the exception for dying declarations “was the *only* recognized criminal hearsay exception at common law.”⁴⁶

In still another passage, Justice Scalia seemed to adopt the position that it did not really matter what hearsay exceptions did or did not exist at the time of the framing. In a footnote responding to the Chief Justice, Justice Scalia asserted that the absence of “direct evidence” regarding the Framers’ view of the admissibility of unsworn hearsay evidence was not a problem for originalist analysis because the Framers’ design for the application of the confrontation right to hearsay exceptions *that had not existed* at the time the Sixth Amendment was adopted could nevertheless be “estimated” by making “reasonable inference[s].”⁴⁷

⁴⁵ *Crawford v. Washington*, 541 U.S. 36, 58 n. 8 (2004) (suggesting that the historical spontaneous declaration hearsay exception was narrow “to the extent the hearsay exception for spontaneous declarations existed at all”).

⁴⁶ *Id.* at 56 n. 6 (quoting FRANCIS HELLER, *THE SIXTH AMENDMENT* 105 (1951) (emphasis in *Crawford*). I concur with Professor Heller’s conclusion on this point, as indicated in Part II of this article.

⁴⁷ Justice Scalia wrote:

. . . even if, as [the Chief Justice] claims, a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements a moot point, that would merely *change our focus from direct evidence of original meaning of the Sixth Amendment to reasonable inference*. [. . .] Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly admissible unsworn testimony) involves some degree of estimation—what The Chief Justice calls use of a “proxy”—but that is hardly a reason not to make the estimation as accurate as possible. Even if, as The Chief Justice mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

Crawford, 541 U.S. at 52 n. 3 (emphasis added).

NOT THE FRAMERS' DESIGN

369

4. Justice Scalia's "Reasonable Inferences"

In the text of his opinion, Justice Scalia offered two inferences regarding the Framers' design for the confrontation right, one based on the language of the Confrontation Clause, and one based on the general history of the right. With regard to the text, Justice Scalia asserted that a distinction between testimonial and nontestimonial hearsay statements was implied by the use of the term "witnesses" in the Confrontation Clause. Drawing selectively on the definitions in a historical dictionary, he asserted that the use of "witnesses" in the text of the Confrontation Clause implied that the Framers were concerned only with statements that amounted to "testify[ing]," and thus inferred that "witnesses" revealed the Framers were concerned only with regulating "testimonial" statements, but not with the admission of more casual, nontestimonial hearsay statements.⁴⁸

However, Justice Scalia's textual analysis was unduly selective insofar as he ignored other definitions of "witness."⁴⁹ Additionally, he ignored a pertinent feature of historical usage—it does not appear that framing-era sources even used "testimonial" as an adjective, let alone as a designation for a category of hearsay.⁵⁰ Thus, there is no reason to think that the

⁴⁸ *Id.* at 51-53. Compare with *White v. Illinois*, 502 U.S. 346, 366 (1992) (Thomas, J., joined by Scalia, J., concurring); Friedman, *supra* note 25, at 1025-1026; AMAR, *CRIMINAL PROCEDURE*, *supra* note 29, at 94.

⁴⁹ I have previously noted that Justice Scalia selectively discussed only one of the definitions of the verb "witness" but ignored broader definitions of the noun "witness" that appeared in the same dictionary. See Davies, *supra* note 10, at 193-94. For a more thorough criticism of this aspect of *Crawford*, see Randolph N. Jonakait, "Witnesses" in the Confrontation Clause: *Crawford v. Washington*, Noah Webster, and Compulsory Process, 79 *TEMPLE L. REV.* 155 (2006).

⁵⁰ Examination of framing-era sources indicates that the adjective "testimonial" was not used to describe a category of legal evidence during that period. In fact, those sources make it doubtful that "testimonial" was even used as an adjective during that period.

The only definitions of "Testimonial" that appear in early dictionaries treat it only as a noun indicating a writing that a person could produce to confirm their good character or conduct. Samuel Johnson defined

Framers conceived of the category of “testimonial hearsay.” Indeed, the restrictive concept of a “testimonial” statement that

“TESTIMONIAL” only as a noun meaning “A writing produced by any one as an evidence for himself.” 2 A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed. 1755) (pages unnumbered). Likewise, Noah Webster defined “TESTIMONIAL” only as a noun meaning

“[a] writing or certificate in favor of one’s good character or good conduct. *Testimonials* are required on many occasions. A person must have *testimonials* of his learning and good conduct, before he can obtain a license to preach. *Testimonials* are to be signed by persons of known respectability of character.”

2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster ed. 1828) (pages unnumbered). Justice Scalia quoted a definition of “TESTIFY” that appears on the same page of this dictionary in *Crawford*, 541 U.S. at 51, but did not discuss the definition of “TESTIMONIAL” that appeared almost immediately below “TESTIFY.”

Likewise, word-searches of the digital versions of the framing-era treatises on evidence law do not reveal any usage of the term “testimonial.” Word searches of the framing-era treatises and manuals on criminal procedure reveal only a single usage: they use the word “testimonial” only when quoting the statute of 39 Eliz. c. 17, which used “testimonial” as a synonym for a military “pass.” See e.g., 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 691 (1736) (quoting the statute as making a felony “[i]dle or wandering soldiers coming from sea not having a testimonial under the hand of a justice of the peace, setting down the time and place of his landing, place of his landing and birth, and limiting a time a time for his passage thither”); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 116 (1719) (same); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (1st ed. 1769) (describing 39 Eliz. c. 17 as requiring soldiers to have “a testimonial or pass from a justice of the peace”). In light of framing-era usage, there is no reason to think the Framers used or even conceived of the term “testimonial” hearsay.

In fact, Simon Greenleaf still did not use the term “testimonial” at all in the early editions of his leading nineteenth-century American evidence treatise. See SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (1st ed., three volumes published 1842, 1846, 1853). In the 1857 and 1892 editions, Greenleaf did use the term “testimonial,” but only as the name for a document. See 1 *id.* at 623 n. 1 (8th ed. 1857) (referring to a South Carolina statute regulating use of any “foreign testimonial, probate, certificate, &c” as evidence); 1 *id.* at 632-33 n. 17 (15th ed. 1892) (same). However, Greenleaf did use “testimonial” in a broader sense in his 1899 edition, as discussed *infra* note immediately following.

NOT THE FRAMERS' DESIGN

371

Justice Thomas introduced in *White*, and that Justice Scalia employed in *Crawford*, appears to have been unprecedented. When the term “testimonial” came into use as an adjective in evidence discourse, it simply referred to any statement in which the words of the speaker communicated information.⁵¹

The same narrow usage of “testimonial” as a term for a document is evident in LEXIS and WESTLAW searches of nineteenth-century Supreme Court case reports: in seventeen reports either the justices or counsel used the term “testimonial” as a noun referring to a record or certificate, while in one counsel used “testimonial” as an adjective in arguing that because a “verbal sale” of slaves was “null” under Louisiana law, “testimonial proof” of the sale instead of written evidence “shall not be admitted.” *Zacharie v. Franklin*, 37 U.S. 151, 157 (1838). In that instance, “testimonial proof” obviously referred simply to oral testimony as opposed to written evidence.

⁵¹ In the 1899 edition of his evidence treatise, Simon Greenleaf began to use “testimonial” in two ways that had not appeared in earlier editions. First, he subdivided all evidence into either “testimonial” or “circumstantial” evidence, and thus used “testimonial” to refer to all evidence in which “the *factum probandum*” [that is, the fact to be proved] is “directly attested by those who speak from their own actual and personal knowledge of its existence” as opposed to a fact “to be inferred from other facts, satisfactorily proved.” See 1 GREENLEAF, *supra* note 50, at 24 (16th ed. 1899). This notion of “testimonial evidence” appears throughout this edition. For example, Greenleaf used “testimonial” in this broad sense of a witness’s statement based on personal knowledge when he wrote in a later passage that “the vital and determinative” reason for “rejecting hearsay assertions” was “the desirability of testing all testimonial assertions by the oath and by cross-examination.” 1 *id.* at 184.

Additionally, Greenleaf also used “testimonial” in a slightly narrower sense when he wrote that the hearsay rule barred only “testimonial assertions” but not testimony about “utterances” when “the very fact in question is whether such things were written or spoken.” 1 *id.* at 185. His point appears to be the equivalent of the modern notion that an out-of-court statement is hearsay only if it is offered “to prove the truth of the matter asserted.” See *supra* note 9. However, Greenleaf clearly did not use “testimonial” in the restrictive sense that *Crawford* does because he treated *all* statements that asserted any fact as “testimonial” assertions: “when the assertion of A that fact *x* exists because A says that it does, A’s utterance is offered testimonially, *i.e.* as if A were a witness to fact *x*, and the Hearsay rule here requires that A’s assertions, to be receivable, must be made under oath and subject to cross examination.” 1 *id.*

In contrast to *Crawford*, modern Fifth Amendment self-incrimination

Justice Scalia also drew a second inference from the general history of the confrontation right. Like opinions in some earlier Supreme Court confrontation cases, he asserted that the general history revealed a “focus” on regulating the admission of out-of-court statements of a formal, testimonial nature such as *ex parte* depositions, and inferred that this “focus” meant that the Framers would have been concerned only with regulating the admission of similar testimonial hearsay, but would not have been at all concerned with the admission of less formal, nontestimonial hearsay statements.⁵²

Notably, however, Justice Scalia’s historical assertions regarding “the Framers’ design” were based only on these inferences rather than on actual historical evidence. Although he endorsed defining the scope of the confrontation right according to “those [hearsay] exceptions established at the time of the founding,”⁵³ he did not actually follow through and canvas the framing-era legal authorities to determine whether criminal hearsay exceptions existed during that period. Thus, the claim he made in *Crawford* about “the Framers’ design” for the scope of the confrontation right was not actually historical; rather, Justice Scalia’s originalist claim was essentially hypothetical.

Indeed, instead of delineating what hearsay exceptions did—or did not—exist at the time of the framing, Justice Scalia made several statements that implied that the original understanding of the confrontation right was disconnected from the Framers’ understanding of the treatment of hearsay in the law of evidence,⁵⁴ and then drew his “reasonable inference[s]” to

doctrine also defines “testimonial” statements or actions broadly, in much the same way that Greenleaf did, to include any statement or act in which the speaker or actor communicates information possessed by the speaker or actor, in contradistinction to utterances or actions that reveal only physical attributes. *See, e.g.*, *Schmerber v. California*, 384 U.S. 757 (1966); *Doe v. United States*, 487 U.S. 201 (1988); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

⁵² *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004). Compare, *e.g.*, the statement set out *supra* text accompanying note 20.

⁵³ *See supra* text accompanying note 38.

⁵⁴ Several statements in *Crawford* reveal an assumption that the content of the Confrontation Clause was always understood to be independent of the

NOT THE FRAMERS' DESIGN

373

predict how the Framers would have dealt with unsworn hearsay evidence *regardless* of whether framing-era law had permitted the admission of any such evidence.

B. “*The Framers’ Design*” in *Davis*

Although *Crawford* asserted that “the Framers’ design” was to limit the confrontation right solely to testimonial hearsay, but not to nontestimonial hearsay, the *Crawford* opinion shed little light on the boundary between the two.⁵⁵ The Court undertook to provide guidance on the boundary between testimonial and nontestimonial hearsay in the 2006 rulings in *Davis* and the companion case, *Hammon v. Indiana*.⁵⁶ Justice Scalia again wrote for the Court.⁵⁷

law of the evidence. For example, Justice Scalia stated that the Framers did not intend “to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence.” 541 U.S. at 61. He also stated that the application of the confrontation right to out-of-court statements introduced at trial should not depend upon “the law of evidence for the time being.” *Id.* at 50-51.

The assumption evident in those claims—that is, the assumption that the Framers of the Sixth Amendment anticipated that the law of evidence would be unstable—is dubious as a historical matter. Justice Scalia offered no historical evidence of any such expectation, and I know of none. Rather, because there had been no significant change in the strict doctrinal ban against admitting hearsay evidence during the prior century, as I discuss below in Part II, it does not appear that the Framers had any reason to anticipate any change in the ban against hearsay or the creation of hearsay exceptions.

⁵⁵ *Crawford* did identify some modern examples of hearsay statements that would always be “testimonial”: accomplice confessions, plea allocutions by accomplices, grand jury testimony, prior trial testimony, preliminary hearing testimony, and police interrogations. 541 U.S. at 64, 68.

⁵⁶ The companion case was *Hammon v. Indiana*, 126 S. Ct. 1457, No. 05-5705 (2006), *reported in Davis*, 126 S.Ct. at 2272 (2006).

⁵⁷ Justice Thomas concurred in part and dissented in part in *Davis*. In accord with his concurring opinion in *White*, Justice Thomas would have limited the “testimonial” hearsay to only quite formal statements such as depositions or affidavits. *Davis*, 126 S.Ct. at 2281-84. Thus, he dissented from the ruling that the statements made during the police interview in *Hammon* were “testimonial” and subject to the confrontation right. *Id.* at 2285. Because Justice Thomas’s application of the testimonial/nontestimonial

In the companion decision in *Hammon*, the Court held that an out-of-court statement that a victim of domestic abuse made during a police interview that immediately followed an episode of domestic violence was testimonial in character because the statement was taken “primarily” for use in a prosecution; thus, the admission of that statement through the testimony of another witness, when the declarant herself was available but did not testify at trial, violated the defendant’s right under the Confrontation Clause.⁵⁸

However, in *Davis* itself, the Court found that a hearsay statement identifying an attacker in a recording of a 911 call was not testimonial in character because it was made during an episode of domestic violence and thus was not made primarily for use in a prosecution. On that basis, the Court concluded that the statement identifying the attacker that was made in that call, by a victim who was available but nevertheless did not testify at Davis’s trial, was not subject to the Confrontation Clause at all.⁵⁹ Hence, the statement was deemed admissible simply because it complied with Washington state law regarding admission of hearsay evidence.

In the course of his opinion in *Davis*, Justice Scalia essentially repeated the hypothetical originalist claims he had previously made in *Crawford* and added an additional inference. Specifically, Justice Scalia asserted—in the negative—that “We are not aware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not clearly involve testimony as thus defined [in *Crawford*],”⁶⁰ and cited twelve state cases, all but one of which

hearsay distinction was more extreme than Justice Scalia’s, the historical criticisms that I direct to Justice Scalia’s claims all apply with as much force to Justice Thomas’s more restricted treatment of the confrontation right. Hence, I generally do not discuss Justice Thomas’s position. *But see infra* note 121.

⁵⁸ *Davis*, 126 S.Ct. at 2272-73, 2278-79.

⁵⁹ *Id.* at 2270-72, 2276-78.

⁶⁰ *Davis*, 126 S.Ct. at 2274. Along a similar vein, Justice Scalia asserted that:

Most of the American cases applying the Confrontation Clause

NOT THE FRAMERS' DESIGN

375

were decided in the nineteenth century.⁶¹ Notably, however, *Davis* still did not identify endorsements of criminal hearsay exceptions in framing-era sources.

In fact, the briefing in *Davis* actually revealed the absence of such exceptions. Because *Crawford* had cast the testimonial scope of the confrontation right as though it were a historical matter, one can safely assume that the lawyers who briefed those cases for the parties, the Solicitor General's office, and the other amici, diligently searched for historical examples of the inadmissibility of testimonial hearsay or the admissibility of nontestimonial hearsay.⁶² However, the results were rather paltry and one-sided.⁶³

or its state constitutional or common-law counterparts involved testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath—which invites the argument that the scope of the Clause is limited to that very formal category.

Id. at 2275-76. However, this statement followed a recitation of Supreme Court decisions dating from 1879 to 1970, which are plainly too distant from 1789 to constitute valid evidence of the original understanding of the Confrontation Clause.

⁶¹ *Davis*, 126 S.Ct. at 2274-75 n. 3.

⁶² See e.g., *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1979) (opinion for the Court by Scalia, J.) (berating counsel for failing to brief framing-era common-law doctrine relevant to the issue).

⁶³ In some respects counsel found too much insofar as they identified English sources that were not available in framing-era America. In particular, several of the parties and amici cited accounts of eighteenth-century English trials in the Old Bailey in London that were published in the Old Bailey Sessions Papers (hereinafter "OBSP"). That material is now also available on-line as "Proceedings of the Old Bailey." For examples, see *infra* notes 71, 237.

However, those trial accounts, which were published as pamphlets at the end of each of the eight sessions of the Old Bailey held each year, were written for a general readership rather than to record legal rulings per se. As a result, the thoroughness of the accounts varies and accounts often omitted legal aspects and rulings made during the trials. Hence, although individual cases in the Old Bailey Sessions Papers were occasionally referred to in English cases or in post-framing treatises, those publications did not have the status of legal authorities in their own right. For a description of the OBSP accounts, see LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 180-90.

The briefs did identify two late eighteenth-century English cases that excluded out-of-court statements that might now be labeled testimonial hearsay. The cases included the 1779 English ruling in *King v. Brasier*⁶⁴ and the 1791 ruling in *King v. Dingler*.⁶⁵ Even on that side of the search, the results were sparse insofar as both cases had previously been identified in *Crawford*.⁶⁶ Moreover, the reports of those cases were published too late to have informed the Framers' understanding of the confrontation right when the Confrontation Clause was framed in mid-1789.⁶⁷ *Brasier* was initially published in London in late 1789, shortly after the framing,⁶⁸ while *Dingler* was not published until 1800.⁶⁹

So far as I can determine, there is no reason to think that the OBSP accounts were available in framing-era America. Hence, although these accounts provide a treasure-trove of information for historians currently interested in historical English legal practices, they do not seem to be pertinent evidence of the original meaning of American constitutional protections.

⁶⁴ 1 Leach 199, 168 Eng. Rep. 202 (Twelve Judges 1779).

⁶⁵ 2 Leach 561, 168 Eng. Rep. 383 (Old Bailey, 1791).

⁶⁶ *Crawford v. Washington*, 541 U.S. 36, 46, 69-70 (2004).

⁶⁷ See Davies, *supra* note 10, at 160.

⁶⁸ *Brasier* was reported in the first edition of Leach's Cases in Crown Law that was published in 1789. See Leach (first ed. 1789) 346. However, that volume could not have been published prior to May 1789 because it reports a case from April 1789. See Davies, *supra* note 10, at 160. In addition, there was at least a six-month delay between the publication of the second edition of Leach's Cases in Crown Law in 1792, and the last case reported in that volume which was decided in the summer of 1791. See Davies, *supra* note 1, at 564 n. 23. Assuming that the delay in the publication of the second edition was fairly typical, it is likely that the first edition would not have been published until near the end of 1789. *Id.* I am indebted to Mr. Robert Kry for the information as to the date of the final case that appeared in the second edition.

As I explain below, the initial account of the trial ruling in *Brasier* was substantially altered and corrected in later editions, and the version cited in *Crawford* and *Davis* was not published until 1815. See *infra* note 217 and accompanying text.

⁶⁹ The 1791 ruling in *Dingler* occurred subsequent to the date of the final case reported in Leach's 1792 second edition, and it was not reported in that edition. However, Leach's 1792 edition did mention *Dingler* in a

NOT THE FRAMERS' DESIGN

377

Even putting this objection aside, however, the noteworthy aspect of the two cases was that neither described the excluded statements as “testimonial.” In fact, neither even described the excluded statements as “hearsay.” Hence, as discussed in more detail below, neither case provided historical support for *Crawford*'s restriction of the scope of the confrontation right to testimonial out-of-court statements.⁷⁰

Even more significantly, the briefs in *Davis* did not identify a single valid example of a pre-framing published case report or treatise that endorsed the admission of any unsworn out-of-court statement that could now be deemed to be “nontestimonial hearsay.”⁷¹ Thus, counsel did not locate any historical evidence

marginal note at the end of the report of *King v. Woodcock*, Leach (1792 ed.) 397, 401 n. (a) (Old Bailey 1789). In *Woodcock*, the court first concluded that the examination of a deceased victim was not admissible as a Marian witness examination, but left it to the jury to decide whether the deceased was sufficiently under the apprehension of death for her statement to be admissible as a dying declaration. The marginal note read: “(a) Same point: *Dingler's Case* at O[ld] B[ailey] September Session 1791; and by Mr. J[ustice] Gould [the presiding trial judge] was decided accordingly upon the authority of this case [that is, *Woodcock*].” Note, however, that there was some ambiguity in the note as to which of the two rulings in *Woodcock* was the “same point” ruled on in *Dingler*.

No report of *Dingler* was published until Leach's 1800 third edition—eleven years after the framing of the Sixth Amendment. Because I did not have access to a copy of Leach's second edition when I wrote my previous article on *Crawford*, I simply assumed that *Dingler* probably appeared in the 1792 second edition. See Davies, *supra* note 10, at 157. That turns out not to have been the case. I am indebted to Mr. Robert Kry for the information about the contents of the second edition.

⁷⁰ For a more detailed discussion of these points, see *infra* notes 208-239 and accompanying text.

⁷¹ It may initially appear that such cases were found in the Old Bailey Sessions Papers. The Solicitor General's brief in *Davis* cited two 1755 cases in the Old Bailey Sessions Papers that purportedly permitted the admission into evidence of statements that victims of assaults made to other persons after the assault. See Brief of the United States as Amicus Curiae Supporting Respondent at 25 n.4, *Davis v. Washington*, 126 S. Ct. 2266 (2006).

However, Petitioner's Reply Brief in *Hammon*, at 7, pointed out that these two 1755 cases actually involved murder trials, and thus may very well have involved dying declarations. As explained below, dying declarations

for that half of *Crawford's* testimonial/nontestimonial distinction. Put another way, no one identified any situation in which the Framers would have had any occasion to consider whether the Confrontation Clause would allow admission of "nontestimonial hearsay." Moreover, the absence of historical cases that admitted unsworn hearsay is important because it undermines the logic of Justice Scalia's "reasonable inference[s]" about "the Framers' design" for the scope of the confrontation right.

C. Why the Absence of Framing-era Hearsay Exceptions Is Important

As noted above, Justice Scalia based his claim that the confrontation right was limited to testimonial hearsay only on "reasonable inference[s]," not on direct evidence from framing-era legal authorities. He did not undertake to identify evidence of hearsay exceptions in framing-era legal sources, but instead proceeded as though the existence or nonexistence of such exceptions did not matter. However, that treatment ignored the degree to which the logical validity of the "reasonable

were not viewed as unsworn hearsay, but were deemed to be admissible evidence under the theory that the awareness of imminent death was the functional equivalent of an oath. *See infra* notes 151-153 and accompanying text.

It also should be noted that the Solicitor General's Brief was grossly inconsistent in citing the cases from the Old Bailey Sessions Papers because only a few pages earlier it had objected to Petitioner's citation of aspects of the 1787 trial in *King v. Radbourne* that were reported only in "The Proceedings of the Old Bailey." Brief of the United States as Amicus Curiae at 22-23, *Davis v. Washington*, 126 S.Ct. 2266 (2006). However, as discussed *supra* note 54, the latter is simply the title of the on-line version of the Old Bailey Sessions Papers that the Solicitor General's brief cited itself! Note, for example, that the internet citations given for both sources in the U.S. amicus brief are the same.

Actually, none of the Old Bailey trial accounts in these sources constitute valid evidence of the Framers' understanding of the Confrontation Clause because there is no evidence that these informal, uncollected reports, which were published in London at the end of each of the eight sessions each year, were available to any significant degree in framing-era America. *See supra* note 63.

NOT THE FRAMERS' DESIGN

379

inference[s]" drawn in *Crawford* was contingent upon there having been significant criminal hearsay exceptions in framing-era law.

Consider the inference that Justice Scalia drew in *Davis* from the observation that the early American cases that invoked the Confrontation Clause or the common-law right to confrontation involved statements that would now be deemed testimonial statements.⁷² He suggested that this pattern in the early cases, as well as in later Supreme Court opinions, indicated that the scope of the Confrontation Clause was limited to formal testimonial hearsay.⁷³ However, the significance of the sample consisting of twelve "early" cases that he cited is dubious for a variety of reasons,⁷⁴ not the least of which is that most of the cases were hardly "early" in the sense of being proximate in time to the framing era.⁷⁵

Additionally, as a logical matter, no implication can be

⁷² *Davis*, 126 S. Ct. at 2274 & n. 3.

⁷³ *Id.* at 2274-76. *See supra* notes 60, 61 and accompanying text.

⁷⁴ One deficiency is that reported cases, usually from state supreme courts, hardly provide a valid sample of the issues litigated in the trial courts. Another is that the determination of whether an "early" case involved the "common-law counterpart" of the Confrontation Clause is a matter of judgment. Rulings that now appear to involve hearsay were not always described as such, and some "early" state cases that may have involved the admission of informal hearsay did not record the ground of the objection to evidence. *See e.g.*, *Commonwealth v. M'Pike*, 57 Mass. (3 Cush.) 181 (1849). In that case, the defendant objected to the admission of a second-hand report of what a deceased victim had said. It would appear to have been an objection to hearsay, but there is no indication in the case report of the ground on which that objection was based. *Id.* at 182. Did the defendant complain that his confrontation right was violated, or his right to cross-examination? There is no way to know.

⁷⁵ The "early" state cases that Justice Scalia cited in *Davis* were generally the same as those he had previously cited in *Crawford*. *Compare Davis*, 126 S.Ct. at 2274-75 n. 3, *with Crawford*, 541 U.S. at 49-50. Only one of those twelve cases was decided prior to 1800; most are from the 1830s, 1840s, and 1850s. Hence, they are too far removed from the framing to constitute plausible evidence of the Framers' understanding. *See Davies, supra* note 10, at 179-82. Moreover, two of the cited cases did not actually involve confrontation issues. *See Davies, supra* note 1, at 626 n. 273.

drawn from a pattern of cases that involved only formal sorts of out-of-court statements unless there had been framing-era hearsay exceptions under which informal as well as formal out-of-court statements could have been admitted at trials. Litigation and case reports tend to reflect unsettled or active issues. There were active issues regarding the boundaries of admissible formal, sworn out-of-court statements, so it is not surprising to find cases litigating those issues.⁷⁶ If there had been recognized hearsay exceptions that applied to informal, unsworn statements, one would expect that they would also have given rise to issues regarding the admission of informal hearsay statements. Thus, if there had been recognized criminal hearsay exceptions, a pattern in which confrontation litigation occurred only regarding formal, sworn out-of-court statements, but not informal hearsay statements, might indicate that the confrontation right was not understood to apply to informal, nontestimonial hearsay statements.

However, how could one logically infer that the Framers would not have applied the Confrontation Clause to “nontestimonial hearsay” if framing-era law did not yet recognize any exceptions under which informal, unsworn hearsay could arguably have constituted admissible evidence in criminal trials in any event?⁷⁷ If framing-era law permitted the

⁷⁶ See, e.g., *infra* notes 211-214 and accompanying text (discussing the window during which sworn Marian witness examinations could be properly taken); *infra* note 285 (discussing the admissibility of a deceased witness’s testimony at a prior trial).

⁷⁷ The amicus brief filed by the Solicitor General’s office in *Davis* contains a claim that exposes the same difficulty:

[A] casual remark to a neighbor, offered to prove the truth of the assertion, *presumably would have been excludable as hearsay at the time of the framing of the Confrontation Clause*. But as *Crawford* establishes, because that statement is not testimonial, its introduction does not implicate the core concerns of the Confrontation Clause.

Brief of the United States as Amicus Curiae Supporting Respondent at 23, *Davis v. Washington*, 126 S.Ct. 2266 (2006). However, if casual hearsay was *inadmissible* anyway in 1789, what basis would there be for defining the “core concerns of the Confrontation Clause” to reach only testimonial

NOT THE FRAMERS' DESIGN

381

admission of only some forms of *sworn* out-of-court statements, but strictly excluded *unsworn* hearsay statements, that prohibition itself would completely explain the pattern that Justice Scalia claimed—without shedding any light on the Framers' understanding of the scope of the confrontation right itself.

Indeed, if framing-era evidence doctrine had made an oath a necessary requisite for admissible criminal trial evidence, one would expect that a lawyer with even a minimal understanding of criminal evidence would not have attempted to proffer an unsworn out-of-court hearsay statement as evidence in a criminal trial. Hence, one would not expect that much discussion of how the confrontation right applied to statements that could now be termed unsworn, nontestimonial hearsay would have occurred in framing-era criminal trials. Thus, an absence of recognized hearsay exceptions applicable to unsworn hearsay at the time of the framing would completely explain why the “early” (but post-framing) confrontation cases that Justice Scalia identified involved only formal, sworn out-of-court statements. Indeed, if that were the case, his “reasonable inference” would amount only to a false dichotomy.

The logic of the two “reasonable inference[s]” that Justice Scalia drew in *Crawford* is equally contingent on the existence of framing-era hearsay exceptions that would have allowed the admission of unsworn, informal hearsay. The apparent “focus” on formal and usually sworn out-of-court statements in the famous early English treason cases that gave rise to the confrontation right might shed light on the understanding of the scope of that right *if* informal, unsworn out-of-court statements had also been admissible. In that case, the application of the right to the one, but not the other, would illuminate the right's scope. However, if informal, unsworn hearsay had always been inadmissible simply as a matter of evidence doctrine, that would not be the case.⁷⁸

hearsay?

⁷⁸ In *Crawford*, Justice Scalia pointed to the admission of Cobham's unsworn letter in Raleigh's trial as though that “paradigmatic confrontation violation” disproved Chief Justice Rehnquist's suggestion that the oath was a

Likewise, the inference Justice Scalia drew to the effect that the use of the term “witnesses” in the Confrontation Clause denoted a concern with only formal, “testimonial” statements, was also contingent on the nature of the statements that were potentially admissible under framing-era evidence doctrine. If informal, unsworn hearsay statements were always inadmissible in criminal trials, and only persons who possessed direct personal knowledge of relevant facts could be admitted to testify in trials, then persons who could offer only second-hand, hearsay information could not have been admitted as “witnesses.” Thus, the absence of hearsay exceptions would also suffice to explain why the Framers were content to address only “witnesses” in the Confrontation Clause.⁷⁹ The Framers cannot be expected to have drafted the Confrontation Clause to take account of a scenario—the admission of unsworn hearsay statements—if they had no reason to think that scenario could ever occur.

Hence, the “reasonable inference[s]” that Justice Scalia drew

salient requirement for admission of an out-of-court statement in framing-era evidence law. 541 U.S. at 52 (emphasis added). However, that use of an unsworn out-of-court statement was probably unusual even in the treason trials, and that “violation” of the confrontation right in Raleigh’s 1603 trial is hardly evidence of the content of the law of evidence almost two centuries later in 1789. (Somewhat inconsistently, Justice Scalia brushed aside a 1739 case cited by the Chief Justice on the ground that it was decided too early to reflect the law at the time of the framing. *See id.* at 54 n. 5.) Criminal evidence standards obviously were raised subsequent to Raleigh’s trial to prevent recurrences of the abuses associated with that and similar trials. *See infra* note 111.

⁷⁹ It is hardly surprising that the Framers addressed the confrontation right to “witnesses,” given that witnesses are the source of the evidence presented at criminal trials. However, as I explain below, the “best evidence” principle in framing-era evidence law restricted the persons who could be admitted to testify at trial as witnesses to those who possessed direct personal knowledge of the facts, but that standard excluded persons who had only second-hand, hearsay information. *See infra* notes 114-115, 137, 262 and accompanying text. Thus, to the extent that modern doctrine permits hearsay testimony, it alters the original understanding of “witness.” Indeed, a person in the position of the 911 operator in *Davis* could not have been admitted as a “witness” in 1789.

NOT THE FRAMERS' DESIGN

383

in *Crawford* do not actually escape the historical issue of whether there were significant framing-era exceptions to the ban against hearsay evidence in criminal trials. Rather, one cannot assess the Framers' conception of the confrontation right unless one searches out "direct evidence" of the treatment of out-of-court statements in the framing-era sources that Justice Scalia ignored. What do those sources tell us? They tell us that there was good reason for Justice Scalia to abandon the earlier assumption that a variety hearsay exceptions were recognized at the time of the framing. As Justice Scalia acknowledged—albeit in a footnote—that assumption was demonstrably false.⁸⁰

II. THE "DIRECT EVIDENCE" OF HEARSAY AND CONFRONTATION DURING THE FRAMING ERA

Framing-era sources document two important features of framing-era evidence law. First, they show that the only kinds of out-of-court statements that could be admitted in criminal trials to prove a defendant's guilt were *sworn or functionally sworn* statements made by genuinely *unavailable* witnesses, but that unsworn hearsay was not permitted to be used as evidence of the defendant's guilt. Second, they also document that it was understood that the confrontation right was one of three principles that each required the ban against admitting unsworn hearsay in criminal trials. In other words, the framing-era authorities do *not* indicate that the Framers would have distinguished between the general ban against hearsay and the confrontation right; rather, the sources indicate that the ban against hearsay evidence was understood to be a salient feature of the confrontation right. Hence, the Framers never had any reason to draw any distinction between the right to confrontation and the ban against unsworn hearsay. Rather they understood that the latter was a component of the former.

In this part, I document the historical evidence for this

⁸⁰ See *supra* note 46 and accompanying text (noting that Justice Scalia cited a 1950 commentary that had concluded that "dying declarations" were the "only" form of admissible criminal hearsay at the time of the framing).

description of the framing-era treatment of out-of-court statements. I begin with a few preliminary comments regarding the sources of evidence of the Framers' understanding of the confrontation right and the language in which the confrontation right was addressed in those sources. I then offer a brief preview of the framing-era criminal evidence regime before systematically working through the pertinent sources.

A. *Recovering the Framing-Era Understanding of the Confrontation Right*

Where does one find evidence of the Framers' understanding of the confrontation right? Unfortunately, the Framers did not leave us much in the way of legislative history.⁸¹ However,

⁸¹ Of course, there were confrontation provisions in the state declarations of rights that were adopted prior to the federal Bill of Rights, but they are unhelpful insofar as they were framed in language as general as the Sixth Amendment Confrontation Clause itself. See *infra* notes 91-93 and accompanying text.

Unfortunately, surviving statements about the confrontation right made during the Ratification debates of 1787-1788 are also scarce. In *Crawford* Justice Scalia did quote a 1787 Letter of a Federal Farmer as though it were a direct antecedent of the Confrontation Clause applicable to criminal trials, but the appearance that the Letter addressed the confrontation right was largely the product of editing rather than the letter's original content. 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." R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787). The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

541 U.S. at 49 (citation omitted).

However, the passage quoted in *Crawford* actually appeared in a discussion of "[t]he trials by jury in *civil causes*." Letter IV by the Federal Farmer (Oct. 12, 1787) (emphasis added), reprinted in CONTEXTS OF THE

NOT THE FRAMERS' DESIGN

385

because there is little doubt that the Framers intended to preserve the important elements of common-law jury trial in the Constitution and Sixth Amendment,⁸² it is generally safe to

CONSTITUTION 706, 710 (Neil H. Cogan, ed. 1999). The Federal Farmer stated that he did not place much weight on the need to be tried by one's neighbors, and 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:

the trial of facts in the neighborhood 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 in the context of expressing concern about the expected use of depositions as evidence in trials in *civil lawsuits*.

⁸² Invocations of the right to common law were ubiquitous during both the Revolutionary period, during which the state declarations of rights were adopted, and during the Ratification period itself when the need for a federal Bill of Rights was debated. *See, e.g.*, Declaration and Resolves of the First Continental Congress, October 14, 1774, *reprinted in* CONTEXTS OF THE CONSTITUTION, *supra* note 72, at 414 (12.1.4.6) ("Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."); Northwest Territory Ordinance, Art. 2 (1787), *reprinted in* CONTEXTS OF THE CONSTITUTION, *supra* note 72, at 414-15 (12.1.4.8) ("the inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law"). Additionally, Richard Henry Lee, one of the most prominent advocates of a federal Bill of Rights called for a Bill of Rights to guarantee freedom of the press, religious liberty, jury trial in civil cases, and "Common Law securities." *See* Letter to Samuel Adams (October 27, 1787), *reprinted in* 2 THE LETTERS OF RICHARD HENRY LEE 456-57 (James C. Ballagh ed.

assume that the Framers undertook to preserve at least the rights that common-law authorities identified in the criminal jury trial.⁸³

As a result, the best evidence we have of the Framers' understanding of the confrontation right are the descriptions of the principles of evidence in criminal trials that appeared in the legal authorities that were widely used in America during the framing-era itself—that is, during the period from the start of the drafting of the state declarations of rights in 1776 through the framing of the Federal Bill in 1789.⁸⁴ Because there were few

1914), *quoted in* Davies, *supra* note 2, at 339 n. 311).

⁸³ The discussion of the original understanding in this article is incomplete insofar as it does not deal with a large topic that I am not yet prepared to address: what the Framers meant when they required, in Article III in the original Constitution that “the trial of all Crimes . . . shall be by Jury.” See U.S. CONST. art. III, § 2, cl 3. It is unlikely that the Framers meant only that a petit jury had to be the final decision maker in a criminal trial. It is far more likely that they understood “trial by jury” to incorporate at least the basic features associated with a common-law criminal prosecution. As a result, it is doubtful that they thought that the provision of a confrontation right in the Sixth Amendment added anything to the guarantee of jury trial already in the Constitution. Rather, it is far more likely that they viewed the Confrontation Clause in the Sixth Amendment as simply making that feature of the jury trial right more explicit. Thus, it is likely that the Framers would have understood the common-law principles of criminal evidence discussed in this article to be part of the broader constitutional guarantee of trial by jury guaranteed by Article III of the Constitution as well as the confrontation right itself. I say that the Framers intended to preserve “at least” the basic common-law protections of the jury trial in the Sixth Amendment because it is possible that they meant to guarantee more than that, but implausible that they meant to guarantee less than that. Thus, Justice Scalia’s assertions that the original Confrontation Clause should be construed independently of the law of evidence (see *supra* note 54) fails to take into account the Framers’ larger understanding of “trial by jury.”

⁸⁴ Because the federal Bill of Rights was based largely on the state provisions adopted between 1776 and 1780, one must be very cautious about treating any statement that first appears in an English source published after 1775 as evidence of original meaning. See Davies, *supra* note 10, at 153-55. Additionally, the date of the framing (1789) is the relevant cutoff date for materials that could have informed the original meaning; not of the date of ratification (1791) that is sometimes invoked in Supreme Court opinions, including *Crawford*. See *id.* at 158-60.

published case reports dealing with evidentiary rulings during that period⁸⁵ (though there are some from the decades following the framing), the most significant authorities are the legal treatises on criminal procedure and evidence and the derivative works, especially justice of the peace manuals, abridgments, and legal dictionaries, that framing-era Americans consulted.⁸⁶

B. Identifying the Confrontation Right in the Historical Sources

The search for the common-law confrontation right in the framing-era sources is complicated somewhat by the fact that the framing-era sources seldom used “confrontation” terminology.

⁸⁵ There were virtually no pre-framing published reports of American cases. See Davies, *supra* note 10, at 124 n. 55. Moreover, published reports of ordinary English criminal trials in which evidence rulings were made were not available until Leach’s Crown Cases appeared in late 1789, after the Confrontation Clause was already framed. See *supra* note 68.

⁸⁶ Professor Kenneth Graham has argued in several commentaries that the confrontation right in the Sixth Amendment was much more of a home-grown understanding arising from the abuses associated with civil law procedure in the colonial vice-admiralty courts than an enactment of an English common-law right derived from Raleigh’s Trial. See, e.g., Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO. ST. J. CRIM. L. 209 (2005) [hereinafter “*Confrontation Stories*”]; Kenneth Graham, *The Right to Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972). See also 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE EVIDENCE § 6341-348.

For example, Graham has asserted that “English common law has never recognized a right of confrontation.” *Confrontation Stories, supra*, at 209. I think that is an overstatement. It may be that English sources did not commonly use that terminology, but the framing-era English treatises did recognize the components of the confrontation right, as I discuss in this article. Additionally, while there is no doubt that American experience with the vice-admiralty courts contributed to the value that the American Framers placed on jury trial, I do not see how that alters the fact that the principal sources that informed the Framers’ understanding of the law of jury trials were the English common-law treatises. Hence, I think those treatises, and the manuals derived from them, must be central to any account of the original Sixth Amendment Confrontation Clause.

As I explain below, the framing-era treatises refer to the main features of the confrontation right when they discuss the requirements that evidence in criminal trials be given in the presence of the defendant and be subject to cross-examination in the view of the jury.⁸⁷ However, they usually do not use the term “confrontation” itself.⁸⁸

It appears that the terminology of a “confrontation” right traces to Matthew Hale’s mid-seventeenth-century endorsement of the “opportunity of confronting the adverse witnesses” as one of the virtues of common-law jury trial.⁸⁹ William Blackstone probably gave that phrasing additional visibility in 1768 when he repeated Hale’s endorsement of the value of “the confronting of adverse witnesses” as a means of “clearing up of truth” in trials.⁹⁰

Although confrontation terminology does not seem to appear in other English treatises, it is likely that George Mason drew

⁸⁷ See also LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 234 n. 241 (2005) (commenting on being “puzzled at the failure of the English common law to identify and develop the confrontation policy as a matter of doctrine”).

⁸⁸ The lack of framing-era discussions that actually used the term “confrontation” right may partly account for the conventional view that the history of the right is especially obscure. See, e.g., *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan J., concurring) (stating that “[t]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause”); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L. J. 77, 77 (1995).

⁸⁹ MATTHEW HALE, *THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND* 258 (first published posthumously in 1713; written sometime before Hale’s death in 1676).

⁹⁰ 3 WILLIAM BLACKSTONE, *COMMENTARIES OF THE LAWS OF ENGLAND* 373 (1st ed. 1768) (the statement quoted in the text follows a footnote to “Hale’s Hist. C. L. 254, 5, 6.”).

Blackstone’s influence on framing-era American thought was substantial. The initial edition of the four volumes of his *Commentaries* was reprinted in Philadelphia in 1771-1772. See ELDON REVARE JAMES, *A LIST OF LEGAL TREATISES PRINTED IN THE BRITISH COLONIES AND THE AMERICAN STATES BEFORE 1801*, 170-71 (1934). There were some 1,557 American subscribers. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 88-89 (1973).

NOT THE FRAMERS' DESIGN

389

upon the statements by Hale and Blackstone when he articulated the defendant's right "to be confronted with the accusers and witnesses" as an essential criminal trial right in the 1776 Virginia declaration of rights.⁹¹ Thereafter, variations on that phrasing were repeated in several other state declarations of rights⁹² (though some used the alternative formulation of a right to "meet" adverse witnesses "face to face"⁹³). James Madison also drew upon Mason's phrasing when he referred to a trial right of the accused "to be confronted with his accusers, and the witnesses against him" when he proposed the proto-Sixth Amendment in June, 1789.⁹⁴ The First Congress then shortened Madison's seemingly redundant references to "accusers" and "witnesses" to the right of the accused "to be confronted with the witnesses against him."⁹⁵ Although the framing-era legal

⁹¹ See HELEN HILL, *GEORGE MASON: CONSTITUTIONALIST* 136, 137-38 (1938) (quoting Section 8 of Mason's draft for the Virginia Declaration of Rights); Virginia Declaration of Rights § 8 (1776), *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 413 (Neil H. Cogan, ed. 1997) [hereinafter "COMPLETE BILL"].

⁹² See Pennsylvania Declaration of Rights § IX (1776), *reprinted in* COMPLETE BILL, *supra* note 91, at 411; Delaware Declaration of Rights § 14 (1776), *reprinted in id.* at 402; Maryland Declaration of Rights § VII (1776), *reprinted in id.* at 403; North Carolina Declaration of Rights § VII (1776), *reprinted in id.* at 410; Vermont Constitution Ch. I (1777), *reprinted in id.* at 413.

⁹³ See Massachusetts Declaration of Rights § XII (1780), *reprinted in* COMPLETE BILL, *supra* note 91, at 404; New Hampshire Bill of Rights § XV (1783), *reprinted in id.* at 405.

⁹⁴ See COMPLETE BILL, *supra* note 91 at 385. Madison had been a member of the committee of the Virginia legislature that drafted the 1776 Virginia Declaration of Rights. See HILL, *supra* note 91, at 135. Thus, it is not surprising that he drew upon the Virginia phrasing.

⁹⁵ U.S. CONST. amend. VI (framed, 1789; ratified, 1791). Professor Graham has suggested that the elimination of "accusers" was substantive. See Graham, *Confrontation Stories*, *supra* note 86. However, it appears that the term "accusers" would have been redundant with "witnesses" in criminal proceedings in 1789, because an accuser would have been permitted and required to testify as a witness at the defendant's trial. There does not seem to be any direct evidence as to why the First Congress deleted "accusers" from Madison's draft language.

authorities had rarely used that confrontation terminology, they had discussed the salient features of what the Framers called the confrontation right.

C. The Framing-Era Ban Against Hearsay Evidence

As noted above, the important sources for recovering the Framers' understanding of the confrontation right are the framing-era editions of treatises on criminal law and evidence,⁹⁶ and the framing-era editions of derivative works such as justice of the peace manuals, abridgments, and legal dictionaries, especially the four major justice of the peace manuals that were printed and widely used in the American colonies and states between 1764 and 1789.⁹⁷ Conveniently, virtually all of those sources (though not all editions of the sources) have recently become available on-line.⁹⁸

⁹⁶ It is important to consult the *pre-framing* editions of treatises. Relying upon post-framing editions of treatises that were initially published prior to the framing can result in serious errors because new material was sometimes added, or alterations were sometimes made, to the pre-framing text. Indeed, sometimes pre-framing authorities were added to post-framing editions. See, e.g., Davies, *supra* note 2, at 310-14 (discussing Justice Souter's erroneous reliance in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), on preframing statements that had been added to post-framing editions of treatises that had been initially published before the framing, as though the added statements were evidence of the Framers' understanding of arrest law).

⁹⁷ The four manuals are identified *infra* note 160. For a discussion and listing of the English and American justice of the peace manuals, see Davies, *supra* note 2 at 278-281 nn. 121, 122.

⁹⁸ With a few exceptions, the various editions of the legal treatises and manuals are now available in word-searchable formats in on-line subscription services. English treatises and manuals published between 1700 and 1800 are available on-line in The Eighteenth Century Collections Online <http://www.gale.com/EighteenthCentury/> (this collection is also available in microfiche). American manuals from that period are available in Early American Imprints, Series 1, available at <http://www.readex.com/readex/product.cfm?product=247> (this series is also available in microfiche). English and American legal publications from the nineteenth century are available in The Makings of Modern Law <http://www.gale.com/ModernLaw>. It should be noted, however, that word-searching the historical sources

NOT THE FRAMERS' DESIGN

391

A brief preview of the framing-era criminal evidence regime may help to keep the trees from obscuring the forest. As I detail in the following pages, the framing-era legal authorities did draw a distinction regarding the admissibility of out-of-court statements as evidence of a defendant's guilt, but it was almost the opposite of the testimonial/nontestimonial distinction drawn in *Crawford* and *Davis*. The framing-era sources indicated that two types of out-of-court statements that now would usually be "testimonial" under *Crawford* were admissible as evidence of a criminal defendant's guilt. However, *unsworn* out-of-court statements, a category that would seem to include the "nontestimonial hearsay" category that is admissible under *Crawford*, were *not* admissible as evidence of a defendant's guilt under framing-era evidence law.

The two forms of admissible out-of-court statements both involved statements by persons who could not be produced as witnesses at trial. One was the written summary of a sworn Marian examination of a person who had been a witness against the defendant at the time of his arrest but who could not be produced at trial because of death, serious illness, or interference by the defendant.⁹⁹ The other form of admissible out-of-court statement was a dying declaration of a murder victim. Although the latter was not technically a sworn statement, the declarant's appreciation of impending death was viewed as being the functional equivalent of an oath.¹⁰⁰ Thus, the admissible out-of-court statements that could be used to prove a defendant's guilt were confined to sworn or functionally sworn statements by witnesses who were genuinely unavailable to testify at trial. (However, there was an unsettled issue regarding the admissibility of unsworn statements by young

available in these collections is not altogether reliable, probably because of deficiencies in the typesettings of the original documents that are reproduced in facsimile in the collections

⁹⁹ Marian procedure was used when a person arrested for a felony was either bailed or committed to jail to await trial. For a brief description of Marian procedure, see *infra* note 116; Davies, *supra* note 10, at 126-29.

¹⁰⁰ See, e.g., *infra* notes 153, 210 and accompanying text.

children who were victims of crime.¹⁰¹)

Conversely, “hearsay” was defined to include all unsworn out-of-court statements made by anyone other than the defendant (the defendant’s out-of-court statements were always admissible and were not labeled “hearsay”).¹⁰² Unlike modern doctrine, the framing-era definition of “hearsay” was not limited to out-of-court statements that were offered to prove the truth of what was said; that refinement does not appear in the framing-era authorities.¹⁰³ Rather, the framing-era authorities simply indicated that unsworn statements were *banned* as evidence of a criminal defendant’s guilt.¹⁰⁴

Put the other way, except for a dying declaration of a murder victim, there was no recognized exception to the ban against admitting unsworn hearsay as evidence of a defendant’s guilt in a felony trial. That point is sometimes obscured by a variety of recognized exceptions under which hearsay statements could be admitted to prove certain issues that could arise in trials of civil lawsuits. However, those exceptions were inapplicable to criminal trials.¹⁰⁵

Instead, the framing-era authorities recognized only two limited-purpose exceptions to the ban against unsworn hearsay that applied in criminal trials, *neither of which permitted direct evidence of the defendant’s guilt*. One limited-purpose exception was a corroboration/impeachment exception: prior out-of-court statements made by a witness who testified at trial could be admitted either to corroborate or impeach that witness’s trial testimony. The other limited-purpose exception allowed the use of hearsay statements to prove background facts that did not go directly to the defendant’s personal guilt; specifically, this

¹⁰¹ See *infra* notes 232-239 and accompanying text.

¹⁰² See *infra* text accompanying notes 124, 129, 137, 144.

¹⁰³ See *supra* note 9, *infra* note 279.

¹⁰⁴ However, there was a unique controversy during the eighteenth century as to whether a child victim of rape or molestation could testify without oath if the child were too young to take an oath. See *infra* notes 231-239 and accompanying text.

¹⁰⁵ See *infra* note 162 and accompanying text; see also *infra* notes 145, 185.

NOT THE FRAMERS' DESIGN

393

exception permitted hearsay evidence to be used to prove the general existence of a conspiracy, but not the defendant's actual participation in it. (Thus, this exception was not equivalent to the modern co-conspirator statement hearsay exception.¹⁰⁶)

Framing-era sources articulated three somewhat overlapping rationales for the strict ban against admitting unsworn hearsay statements as evidence of a criminal defendant's guilt. One was that such statements were presumptively untrustworthy because they were unsworn. A second rationale was that hearsay statements did not constitute the "best evidence" of the facts because the person who repeated a statement made by someone else did not have the direct personal knowledge that was required for legal evidence. The third rationale—which is most obviously identified with the confrontation right—was that admitting a hearsay statement would deny the defendant an opportunity to cross-examine, in the presence of the trial jury, the person who actually made the statement.¹⁰⁷ Because of the requirement that all evidence in felony trials be presented in the

¹⁰⁶ The modern co-conspirator hearsay exception, as formulated in FED. R. EVID. 801 (d)(2)(E), states that an out-of-court statement is not hearsay if it is offered "by the opponent of a party" (that is, the prosecutor in a criminal case) as "a statement by a coconspirator of a party during the course and furtherance of the conspiracy." State evidence codes generally track this federal definition, but with some variations. *See, e.g.* 4 JONES ON EVIDENCE: CIVIL AND CRIMINAL 544-552, §§ 27:38-27:41 (Clifford S. Fishman, ed. 7th ed. 2000).

Cases recognizing this exception date back at least to the 1880s. *See, e.g.*, 4 *id.* at 544 n. 82. However, it does not appear that this hearsay exception was recognized during the early nineteenth century. *See, e.g.*, 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 295 (4th ed. 1848) (stating that "the declarations of a conspirator or accomplice are receivable against his fellows, only when they are either in themselves acts, or accompany and explain acts, for which the others are responsible; but not when they are in the nature of narratives, descriptions, or subsequent confessions").

¹⁰⁷ Professor Langbein has also noted that the eighteenth-century sources gave three main reasons for disapproving hearsay: (1) hearsay was not best evidence, (2) hearsay was not sworn, (3) hearsay meant "that the out-of-court declarant had not been subjected to cross-examination." *See* LANGBEIN, ADVERSARY TRIAL, *supra* note 37, at 179-80.

presence of the defendant, the cross-examination rationale for the ban against hearsay appears to have applied more rigorously to criminal trials than to civil trials.

These rationales for the ban against hearsay and the absence of any hearsay exceptions regarding evidence of the defendant's guilt (except dying declarations) are evident in the discussions of the admissibility of out-of-court statements that appear in the principal framing-era sources. Let me begin with the leading treatises and then review the justice of the peace manuals.

1. *Hawkins's Pleas of the Crown*

The second volume of Serjeant William Hawkins's *Pleas of the Crown*, which was first published in 1721 and reissued in subsequent editions through the eighteenth century,¹⁰⁸ was widely regarded as the leading work on criminal procedure and criminal evidence at the time of the framing.¹⁰⁹ In a chapter on

¹⁰⁸ 2 WILLIAM HAWKINS, PLEAS OF THE CROWN (1721). Volume 1 of this treatise, which dealt largely with substantive criminal law, was published in 1716. The title "Serjeant" indicated that Hawkins was a senior barrister. Several later editions were virtually identical to the first edition. I also cite the 1771 edition to show that continuity. 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].

In 1787, Thomas Leach published an edition of Hawkins's treatise to which he added substantial notes and some new textual sections. However, Leach did not alter the passages from Hawkins's original treatise that I quote and cite in this article. To distinguish between this and the original treatise, I cite this work separately: WILLIAM HAWKINS, PLEAS OF THE CROWN (Thomas Leach ed. 1787) [hereinafter "LEACH'S HAWKINS (1787 ed.)"]. In 1795, Leach published an even more expanded four volume edition: WILLIAM HAWKINS, PLEAS OF THE CROWN (Thomas Leach ed. 1795) [hereinafter "LEACH'S HAWKINS (1795 ed.)"].

¹⁰⁹ The influential nature of Hawkins's treatise is evident in the attention given it in the preface to Richard Burn's leading English justice of the peace manual, discussed *infra* note 144. See also the discussion of the influential nature of Hawkins's treatise in 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 361-62 (1938).

Hawkins's treatise was widely consulted by framing-era Americans. For

NOT THE FRAMERS' DESIGN

395

evidence in criminal trials, Hawkins explicitly set out two basic requirements for valid criminal evidence and implied a third.

At the outset of his evidence chapter, Hawkins stated a requirement for valid criminal evidence as an overarching premise for his discussion of criminal trial evidence; that it was a “settled rule” that in felony trials “no evidence is to be given against a prisoner but in his presence.”¹¹⁰ This principle prohibited repetitions of the abuses associated with earlier treason trials, such as that of Sir Walter Raleigh, in which out-of-court statements were admitted as evidence despite the availability of the declarants to testify in person at the trial.¹¹¹

example, one study of the libraries of four Massachusetts lawyers who were in practice at the time of the American Revolution found that Hawkins’s treatise was one of only a few works that all four owned. See RICHARD S. ECKERT, “THE GENTLEMEN OF THE PROFESSION”: THE EMERGENCE OF LAWYERS IN MASSACHUSETTS, 1630-1810, 256-57, 547 (1991). Likewise, Hawkins’s Treatise was still viewed as authoritative in the decades following the framing. For example, Chief Justice John Marshall also cited Hawkins’s treatise as authority in a prominent 1807 treason trial. See *infra* note 126.

¹¹⁰ Hawkins opened his chapter on criminal trial evidence by stating: “[a]s 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; . . .”² HAWKINS, *supra* note 108, at 428 (1721 ed.); 2 *id.* at 428 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 108, at 602 (1787 ed.); 4 *id.* at 418 (1795 ed.).

¹¹¹ Hawkins commented that:

There are many Instances in the Reigns of Queen *Elizabeth* and King *James* the first, wherein the Depositions of absent Witnesses were allowed as Evidence in Treason and Felony, even where it did not appear, but that the Witnesses might have been produced *viva voce*. And it was adjudged in the Earl of *Strafford’s* Trial, that where Witnesses could not be produced *viva voce*, by Reason of Sickness, &c. their Depositions might be read for or against the Prisoner on a Trial of High Treason, but not where they might have been produced in Person.

² HAWKINS, *supra* note 108, at 430 (1721 ed.); 2 *id.* at 430 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 108, at 605 (1787 ed.). In the margin to this section, Hawkins cited, among others, *Strafford’s* Trial, “State Trials [1719 ed.], Vol. 2. fol[io, 593,] 622 to 627, 644, 647, 651” (1680); and “Sir Walter Raleigh”’s Trial [1 St. Tr. (1719 ed.)], fol[io] 181, 182” (1603). Note

Thus, out-of-court statements of *available* witnesses were *never* admissible as evidence of a defendant's guilt.

Hawkins also stated a second requirement; that "evidence for the king must in *all* cases be upon oath."¹¹² Thus, there was a complete ban against admitting unsworn testimony against a criminal defendant. This principle reflected the assumption that testimony was not trustworthy unless it was given under the threat of eternal damnation that attended a lie told under oath.¹¹³ The requirement of an oath was also a source of the ban against admitting hearsay evidence; indeed, "hearsay" was defined to include any *unsworn* out-of-court statement.

Additionally, Hawkins also implicitly drew upon a third principle that the terms "evidence" and "witness" implicitly carried during the eighteenth century: only a person who had direct personal knowledge of the facts or events could qualify to give evidence in a criminal trial. Although Hawkins did not explicitly discuss this point, other treatises referred to this as the "best evidence" principle or rule,¹¹⁴ and Thomas Leach later

that Hawkins indicated that the reading of depositions of available witnesses in treason trials was banned starting with Strafford's trial in 1680.

¹¹² 2 HAWKINS, *supra* note 108, at 434 (1721 ed.); 2 *id.* at 434 (1771 ed.); 2 LEACH'S HAWKINS, *supra* note 108, at 612 (1787 ed.) (emphasis added).

¹¹³ Under framing-era law, non-Christians could be admitted as witnesses provided they followed some religion, but atheists could not. Children could not be admitted unless they were mature enough to appreciate the prospect of eternal damnation for lying under oath, and adults who had not had religious instruction were sometimes also deemed inadmissible as witnesses. *See, e.g.*, *The King v. White*, 1 Leach 430, 168 Eng. Rep. 317 (Old Bailey 1789) (ruling that although a potential witness said he had heard there was a god and believed that he could be hung for lying at a trial, he was inadmissible as a witness because "he had never learned the catechism" and thus "was altogether ignorant of the obligations of an oath, a future state of reward and punishment, the existence of another world, or what became of wicked people after death").

¹¹⁴ *See infra* note 144 and accompanying text. During the eighteenth century, "best evidence" referred to a broad principle of evidence. Thus, that term historically carried a much broader meaning than the term "best evidence" is accorded in contemporary evidence rules, such as the "original writing rule" codified in Rule 1002, FED. R. EVID.

NOT THE FRAMERS' DESIGN

397

added an explicit statement of this “best evidence” requirement to Hawkins’s treatise when he revised that work in 1787.¹¹⁵

Thus, evidence in criminal trials had to take the form of sworn oral testimony, by a person with direct knowledge of the facts testified to, given in the presence of the defendant, and subject to cross-examination by the defendant in the presence of the jury. Conversely, unsworn hearsay statements could not be admitted as evidence of the defendant’s guilt, but only to corroborate or impeach testimony already given by another witness at the trial, or to prove the general existence of a conspiracy or similar background fact.

With that overview, let me review the specific statements that Hawkins made about out-of-court statements in criminal evidence.

a. The Admissibility of a Marian Examination of an Unavailable Witness

Hawkins identified only one kind of out-of-court statement that could be admitted as evidence of a defendant’s guilt: the written record of a sworn Marian witness examination given by a person who subsequently became genuinely unavailable to testify at trial. Under the Marian statutes, justices of the peace were not only authorized but required to take and record in writing the sworn “information” of the complainant and any supporting witnesses whenever a felony arrest was made, and coroners were required to do likewise regarding witnesses who testified at inquests of homicides.¹¹⁶ Hawkins stated that the

¹¹⁵ See *infra* note 154.

¹¹⁶ Marian procedure, which was a standard feature of felony prosecutions in England and in the American colonies and most of the original states, was created by the Marian statutes, enacted in the mid-sixteenth century during the reign of Mary Tudor (hence, the term “Marian”). See 1 & 2 Phil. & Mar. c. 13, § IV (1554); 2 & 3 Phil. & Mar., c. 10, § II (1555). The statutes provided the procedure to be followed when a person arrested for a felony or manslaughter was brought before a justice of the peace to be bailed or committed to gaol (that is, jail) to await trial. The statutes required the justice of the peace to whom the “prisoner” (that is, arrestee) was taken, to take the sworn “information” of the witnesses who

written record of a Marian witness examination¹¹⁷ was admissible as evidence in a felony trial if the witness was genuinely unavailable.¹¹⁸ Because the Marian statutes required witness examinations to be taken under oath, such examinations carried an indicia of trustworthiness. Probably for that reason, Hawkins did not refer to Marian examinations as “hearsay.”

However, Marian examinations were admissible only if the declarant was genuinely unavailable—that is, dead, too seriously ill to travel, or kept away by the defendant.¹¹⁹ Because of the unavailability of the witness, the written record of a witness examination became the best evidence that could be had and thus was admissible of necessity. Although there is some controversy regarding the precise procedure required for Marian witness examinations as of 1789,¹²⁰ there is no doubt that such

made the arrest, as well as the unsworn “examination” of the arrestee, to reduce those statements to writing, and to certify those 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, record, and certify to the trial court the sworn information of witnesses at inquests into homicides. For a more detailed description, see Davies, *supra* note 10, at 126-30.

¹¹⁷ Modern commentaries typically refer to Marian witness examinations as “depositions,” and the historical sources sometimes did so. However, because use of the deposition label can lead to confusion, and because the historical sources usually used the term “examination,” I refer to these witness statements as Marian witness “examinations.” See Davies, *supra* note 1, at 580 n. 80.

¹¹⁸ 2 HAWKINS, *supra* note 108, at 429 (1721 ed.); 2 *id.* at 429 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 108, at 605 (1787 ed.). See also Davies, *supra* note 108, at 146-48.

¹¹⁹ See 2 HAWKINS, *supra* note 98, at 429 (1721 ed.); 2 *id.* at 429 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 98, at 605 (1787 ed.)

¹²⁰ Whether the admissibility of the written record of a Marian witness examination depended upon the defendant’s having had an opportunity to cross-examine the witness when the examination was taken, as Justice Scalia claimed in *Crawford*, is a contested point. Justice Scalia asserted in *Crawford* that the Marian “statutory derogation” of a broad common-law cross-examination right had been “rejected” in English law by 1791. *Crawford*, 541 U.S. at 54-55 n. 5. In my previous article, I argued that claim was prochronistic because, although a cross-examination rule did become a part of Marian procedure in English law sometime after the framing of the federal

NOT THE FRAMERS' DESIGN

399

examinations were admissible only if the witness was unavailable to testify at trial.¹²¹ Thus, although the admissibility

Bill of Rights, no cross-examination requirement for Marian witness examinations had appeared in any of the published treatises or case reports that were available in America by the time of the 1789 framing. See Davies, *supra* note 10, at 120-189.

Mr. Robert Kry, who clerked for Justice Scalia during the term when *Crawford* was decided, has responded to my criticism of Justice Scalia's originalist claim regarding the "cross-examination rule" aspect of *Crawford*. See Robert Kry, *Confrontation Under the Marian Statutes: A Response to Professor Davies*, 72 BROOK. L. REV. 493 (2007).

I do not think the historical materials Mr. Kry has identified regarding the evolution of Marian practice in London alter my previous conclusions that no cross-examination rule for Marian procedure had been recognized in English law as of the 1789 framing of the Sixth Amendment Confrontation Clause and that no such rule had come to the Framers' attention by that date. See Davies, *supra* note 1 (responding in detail to Kry's arguments, and specifically noting that Kry's evidence indicates only that a controversy regarding cross-examination in Marian witness examinations had arisen in London as of 1789, not the settled rule Justice Scalia asserted in *Crawford*, and that Kry has not identified significant evidence that Americans would have been aware even of that controversy as of 1789).

However, Mr. Kry has not addressed the criticism in my prior article regarding *Crawford*'s originalist testimonial formulation of the scope of the confrontation right, which I further elaborate in this article.

¹²¹ It is unclear why Justice Thomas persists in asserting that Marian witness examinations were the target of the Confrontation Clause. Justice Thomas's rhetoric conveys the impression that the Framers would have thought there was an unsettled issue as to whether Marian depositions might be admitted in lieu of live testimony by an available witness. That simply was not the case. As Hawkins indicated, the admissibility of a Marian witness examination had been limited to *unavailable* witnesses in a ruling in 1680, more than a century prior to the framing. See *supra* note 111. Thus, the framing-era rule permitted the admission of a Marian witness examination in a common-law criminal jury trial only in the unusual circumstance in which a witness had died, become seriously ill, or was kept away by the defendant. Otherwise, evidence at trial had to be given *viva voce* in the presence of the prisoner. Thus, the rule of admissibility of Marian witness examinations of genuinely unavailable witnesses did not threaten to turn criminal trials into trial by deposition. Notably, neither Justice Thomas nor Justice Scalia has identified any pre-framing complaints about the admissibility of Marian examinations of genuinely unavailable witnesses. I have not located any such complaint prior to 1794. See Davies, *supra* note 10, at 186.

of a Marian witness examination did contravene the usual principle that a defendant was entitled to cross-examine, face-to-face, all adverse witnesses in the presence of the jury,¹²² that deviation seems to have been permitted because of the presumed trustworthiness of the statement in light of its having been taken under oath, and the potential importance of the evidence that would otherwise be lost. The admissibility of Marian examinations of unavailable witnesses also served an important practical purpose; the admissibility of a witness's preserved written information removed a defendant's incentive to kill or otherwise obstruct the appearance of an adverse witness.¹²³

b. The Ban Against Hearsay

Hawkins also discussed the general ban against hearsay evidence in criminal trials and identified the two limited-purpose exceptions to that ban. He stated the general ban against the admission of hearsay statements as evidence in a criminal trial as follows:

As to . . . How far Hearsay is Evidence: It seems agreed That what a Stranger [that is, an out-of-court declarant] has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other side had no Opportunity of a cross Examination; and therefore it seems a settled Rule, That it shall never be made use of but only by way of Inducement or Illustration of what is properly Evidence¹²⁴

Thus, Hawkins defined all unsworn out-of-court statements as "hearsay" and also stated that such statements were

¹²² Hawkins did not explicitly refer to cross-examination in the presence of the jury, but other commentators did. *See, e.g.,* HALE, *quoted supra* note 89; BLACKSTONE, *quoted supra* note 90.

¹²³ *See* Davies, *supra* note 10, at 148.

¹²⁴ 2 HAWKINS, *supra* note 108, at 431 (1721 ed.); 2 *id.* at 431 (1771 ed.); 2 LEACH'S HAWKINS, *supra* note 108, at 606-07 (1787 ed.).

NOT THE FRAMERS' DESIGN

401

inadmissible not only because they were unsworn (and thus unreliable), but also “because the other side had no opportunity of a cross-examination.” The latter statement makes it clear that Hawkins did not treat the ban against hearsay as being distinct from the in-the-presence/confrontation principle; rather, he treated admitting hearsay—unsworn out-of-court statements—as a violation of the principle that all evidence in criminal trials had to be given in the presence of the defendant. Hawkins’s linkage of the ban against hearsay to the right to cross-examine is particularly significant because it was repeated in all of the prominent framing-era American justice of the peace manuals.¹²⁵

c. The Two Limited-Purpose Hearsay Exceptions

Hawkins identified only two exceptions to the ban against admitting hearsay evidence, and each was confined to a specific use. One allowed hearsay statements to be used “by way of inducement or illustration of what is properly evidence” and the other allowed hearsay statements to be used to corroborate (or impeach) the testimony a witness had already given at trial. Those are the only instances in which Hawkins indicated that hearsay statements could be admissible.

Although Hawkins’s statement that hearsay can “be made use of . . . by way of inducement or illustration of what is properly evidence . . .” may seem mysterious, the marginal citations that accompany this point indicate that Hawkins was referring to the use of hearsay statements to prove the general existence of a conspiracy—but not to prove the defendant’s personal involvement in it.¹²⁶ This seems to have been a

¹²⁵ See *infra* notes 190-193.

¹²⁶ The meaning of Hawkins’s reference to the allowance of hearsay statements “by way of inducement or illustration of what is properly evidence” (see *supra* quotation in the text at note 124) is explained by Hawkins’s citations in the margin to five seventeenth-century treason trials. In each, the court allowed witnesses (usually persons who admitted some involvement in the plot) to repeat hearsay statements that showed the general existence of a conspiracy against the government, but indicated that such statements were not to be treated as evidence of the defendant’s own guilt.

See 2 HAWKINS, *supra* note 108, at 431 (1721 ed.), citing: (1) Tryal of Richard Langhorn, 2 State Tryals (1st ed. 1719) 325, 328, 332, 333 (Old Bailey 1679) (reporting, in this Popish Plot trial, that witnesses who were involved were allowed to repeat hearsay statements regarding the general existence of a plot to kill the king; however, in one instance when a hearsay statement regarding the defendant was made, the court instructed the jury that that statement was “no evidence” against the defendant); (2) Trial of Thomas Knox and John Lane, 2 State Tryals (1st ed. 1719) 410, 414-15 (K.B. 1679) (reporting, in this Popish Plot trial, that the admission of hearsay evidence regarding statements made by a conspirator who had “run away” was contested, and the court ruled that the prosecution should first present some evidence of acts by the defendants and then could use the hearsay evidence to prove the circumstances in which the defendants had acted); (3) Tryal of Lord Russell, 3 State Tryals (1st ed. 1719) 133, 144, 145 (K. B. 1683) (reporting, in this Rye House Plot trial, that when a witness gave a long narrative about the existence of a conspiracy which included hearsay statements about the defendant, the defendant objected to “a great deal of Evidence by Hearsay” and the court responded that “[t]his is nothing against you, I declare it to the Jury”); (4) Tryal of Algernone Sidney, 3 State Tryals (1st ed. 1719) 207, 210 (K.B. 1683) (reporting, in this Rye House Plot trial, that when defendant objected to admission of evidence not about himself, the court cited the Popish Plot trials as precedent for admitting evidence of the general design of a conspiracy; when the witness then recounted some hearsay statements about the defendant himself, the defendant objected and the court ruled that “this Evidence does not affect you, and I tell the Jury so”); (5) Tryals of Charnock, King, and Keyes, 4 State Tryals (1719 ed.) 1, 33 (Old Bailey 1695) (reporting, in a Jacobite plot trial, that the court instructed the jury that hearsay accounts of statements made by others involved in the plot were “not Evidence” against the individual defendants, but were “good Proof” of the existence of the plot itself). The same citations appear in later editions. *See* 2 *id.* at 431 (1771 ed.); 2 LEACH’S HAWKINS, *supra* note 108, at 606 (1787 ed.) All of these defendants were convicted of treason and executed. For historical background on the Popish Plot trials and the Rye House Plot trials, see LANGBEIN, ADVERSARY TRIAL, *supra* note 37, at 69-72, 75-76.

Unlike the modern co-conspirator statement exception, in each of these cases the court limited the use of hearsay to the general existence of a conspiracy, but instructed the juries that the hearsay evidence was not to be considered as evidence of the defendant’s personal involvement.

This limited understanding of the use to which hearsay evidence of a conspiracy could be admitted was still evident in Chief Justice Marshall’s rulings in the Burr Conspiracy trials of 1807. Marshall premised his ruling by stating that “courts will always apply the rules of evidence to criminal

NOT THE FRAMERS' DESIGN

403

pragmatic response to the difficulty that would otherwise have been encountered in proving the existence of a conspiracy involving more than a few persons.¹²⁷ However, this framing-era exception was not equivalent to the modern co-conspirator hearsay exception because a co-conspirator's hearsay statement could not be used to prove the defendant's own involvement in the conspiracy.¹²⁸ Although some later works suggest that this exception could allow the use of hearsay to prove other background facts, Hawkins mentioned only proof of a conspiracy.

The only other hearsay exception Hawkins mentioned appeared at the end of his passage on hearsay, quoted above:

Yet it seems that what the Prisoner had been heard to say at another Time may be given in Evidence for him as well as against him, and also what a Witness

prosecutions so as to treat the defence with as much liberality and tenderness as the case will admit." *United States v. Burr*, 25 Fed. Cas. 187, 191 (Cir. Ct. D. Va. 1807) (No. 14,696). He then noted that there was an exception to the rule against hearsay evidence "for the purpose of proving the conspiracy" but noted that the hearsay "is not to operate against the accused, unless brought home to him by [nonhearsay] testimony drawn from his own declarations or his own conduct." *Id.* at 193. On that basis, he then ruled that the hearsay evidence proffered was inadmissible in the case at hand. *Id.* at 195. Although Marshall did not cite authorities in this specific discussion, he discussed the proof of the existence of a conspiracy hearsay exception in the same way that Hawkins had, and also cited "2 Hawk. P.C." as authority for several later points in the same proceeding. *Id.* at 196, 197. Hence, there is no doubt he was conversant with Hawkins's treatment and regarded it as authoritative.

A comparable use of hearsay evidence to prove that a mutiny occurred was allowed in *The Ulysses*, 24 Fed. Cas. 515, 516-17 n.2 (1800).

However, Hawkins's reference to the use of hearsay "by way of inducement or illustration of what is properly evidence" may have been applied more loosely during the early nineteenth century. See *infra* notes 171, 200, 257.

¹²⁷ The treason trials that Hawkins cited, see *supra* note 126, had typically involved a significant number of alleged participants. The primary example was the "Popish Plot" trials of 1678-80. For a description, see LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 69-75.

¹²⁸ See *supra* note 126, *infra* notes 134, 163.

hath been heard to say at another Time, may be given in Evidence in order *either to invalidate or confirm the Testimony which he gives in Court.*¹²⁹

This impeachment/corroboration exception was quite limited. It did not permit a hearsay statement to be admitted independently as direct evidence of a defendant's guilt. Rather, the only hearsay statements that were admissible were those that were previously made out-of-court by a person who had testified under oath as a witness at trial. Thus, the hearsay declarant was actually subject to cross-examination by the defendant during the trial.

In sum, Hawkins identified only three instances in which out-of-court statements were admissible in criminal trials. The only form of out-of-court statement that was admissible as "proper[] evidence"—that is, as evidence of the defendant's guilt—was a sworn Marian examination of a genuinely unavailable witnesses. In contrast, Hawkins did not identify any instances when unsworn hearsay statements were admissible to prove the guilt of the defendant.

2. Bacon's Abridgment

A summary of Hawkins's statements regarding the rule against hearsay also appeared in an "abridgment" published by Matthew Bacon in 1736:

It seems agreed, that what another has been heard to say is no Evidence, because the Party was not under Oath; also, because the Party who is affected thereby, had not an Opportunity of Cross-examining; but such Speeches or Discourses may be made use of by Way of Inducement or Illustration of what is properly Evidence.

¹²⁹ 2 HAWKINS, *supra* note 108, at 431 (1721 ed.) (emphasis added); 2 *id.* at 431 (1771 ed.); 2 LEACH'S HAWKINS, *supra* note 108, at 606-07 (1787 ed.). Note that the use of a defendant's own unsworn statements was not regarded as hearsay and posed no difficulty because the defendant's statements were neither required nor permitted to be taken on oath.

NOT THE FRAMERS' DESIGN

405

Also, what a Witness hath been heard to say at another Time, may be given in Evidence, in order either to invalidate or confirm the Testimony he gives in Court.¹³⁰

The restrictive treatment of out-of-court statements that is evident in Hawkins's treatise is also evident in the other treatises on evidence doctrine that were available in framing-era America. In particular, those sources also state a rigid ban against hearsay evidence in criminal trials.

3. *Nelson's Law of Evidence*

A 1717 treatise titled *The Law of Evidence*, which was published anonymously but is attributed to William Nelson, was written more or less contemporaneously with that by Hawkins.¹³¹ Like Hawkins, Nelson also recognized the admissibility of sworn Marian examinations of deceased witnesses.¹³² Also like Hawkins, Nelson stated a strong ban against unsworn hearsay. Specifically, Nelson wrote that “[a] Witness shall not give Evidence of what he has heard another say, (For *Hearsay is not to be admitted*),” but like Hawkins, he recognized the limited-purpose corroboration exception,¹³³ and

¹³⁰ 2 MATTHEW BACON, *THE NEW ABRIDGMENT OF THE LAW* 313 (1st ed. 1736) (citing “2 Hawk. P. C. 431 [1st ed.]”). This summary appears without change in 2 *id.* at *313 (6th ed., T. Cunningham ed. 1793). For bibliographic information, see 1 MAXWELL, *supra* note 108, at 16.

¹³¹ WILLIAM NELSON, *THE LAW OF EVIDENCE* (1717). This work was initially published in 1717 and subsequent editions were published in 1735 and 1744. See 1 MAXWELL *supra* note 108, at 379. I quote and cite the 1744 edition.

¹³² See NELSON, *supra* note 131, at 120, 277 (1744 ed.).

¹³³ Nelson's treatise stated the hearsay rule as follows:

12. A Witness shall not give Evidence of what he has heard another say, (For *Hearsay is not to be admitted*, except as No. 7. *supra.*) Yet [in a treason trial] The Acts and Speeches of others admitted as Evidence against a Prisoner. (Sed quare Legem? [But query whether legal?])

Id. at 270 (citations omitted, emphasis in original). The exception in “No. 7” referred to in the above passage was the corroboration exception:

also mentioned the allowance of hearsay for the limited purpose of proving the general existence of a conspiracy.¹³⁴ However, Nelson did not identify any other exceptions to the ban against unsworn hearsay evidence.

4. *Gilbert's Law of Evidence*

Chief Baron Geoffrey Gilbert's treatise, *The Law of Evidence*, was written more or less contemporaneously with Hawkins's and Nelson's, but was published posthumously several decades later in 1754, and reissued in several later editions, including a 1788 New York printing.¹³⁵ Unlike

7. Hearsay is admitted for Evidence where it is to establish another Witness's Testimony; as where a second swears he heard the first Witness declare the same Thing formerly.

Id. (citation omitted). *See also id.* at 181 ("Though a Hear-say was not to be allowed as direct Evidence, yet it might be made use of to this Purpose, viz. to prove that [a witness] was constant to himself; whereby his Testimony was corroborated").

¹³⁴ Nelson's treatise also noted that hearsay could be used to prove the existence of a conspiracy but not the defendant's personal involvement in it:

11. Hearsay from others is not to be applied immediately to the Prisoner; however those Matters that are remote at first, may serve to prove there was a general Conspiracy to destroy the King and Government; and so was the constant Rule and Method about the Popish Plot, first to produce Evidence of the Plot in General.

Id. (citation omitted).

¹³⁵ GEOFFREY GILBERT, *THE LAW OF EVIDENCE* (1754). The title "Chief Baron" indicated that Gilbert was chief judge of the Court of Exchequer. Gilbert's treatise was reprinted in several later editions with little alteration except for the pagination. I cite the 1777 London edition to show continuity. For bibliographic information, see 1 MAXWELL, *supra* note 108, at 379. Gilbert's treatise was also printed in Philadelphia in 1788 [hereinafter "GILBERT (1788 Philadelphia ed.)"]. *See* JAMES, *supra* note 90, at 184. Examination of that edition indicates that it was a reprinting of the London 1777 edition.

Capel Lofft edited a substantially expanded four volume edition of Gilbert's *Law of Evidence* in 1791-1796. Because it is so altered, I cite this work separately: GEOFFREY GILBERT, *THE LAW OF EVIDENCE* (Capel Lofft ed. 1791) [hereinafter LOFFT'S GILBERT.] For bibliographic information, see

NOT THE FRAMERS' DESIGN

407

Hawkins, Gilbert dealt with evidence in both civil and criminal matters, and gave predominance to the former. Nevertheless, Gilbert's treatment of out-of-court statements was essentially the same as that set out by Hawkins and Nelson.

Like Hawkins and Nelson, Gilbert recognized that Marian witness examinations of unavailable witnesses were admissible as evidence in felony trials.¹³⁶ Also like Hawkins and Nelson, Gilbert offered a strong (if wordy) ban against hearsay evidence, which he defined to include any unsworn out-of-court statement:

The Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence, for 'tis his Knowledge that must direct the Court and Jury in the Judgment of the Fact, and not his mere Credulity, which is very uncertain and various in several Persons; For Testimony being but an Appeal to the Knowledge of another, if indeed he doth not know he can be no Evidence: Besides tho' a Person testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath . . .¹³⁷

1 MAXWELL, *supra* note 108, at 379.

¹³⁶ GILBERT, *supra* note 135, at 100 (1754 ed.), discussed in Davies, *supra* note 10, at 144-45.

¹³⁷ GILBERT, *supra* note 135, at 107-08 (1754 ed.); *id.* at 149-50 (1777 ed.); *id.* at 149-50 (Philadelphia 1788 ed.). Capel Lofft located this passage under the heading "Of Secondary Evidence; or, Hearsay in Criminal Cases." 2 LOFFT'S GILBERT, *supra* note 135, at 889 (1791 ed.). This is the passage that Chief Justice Rehnquist quoted from Gilbert's 1769 edition in *Crawford*, 541 U.S. at 70 n. 2, discussed *supra* note 32 and accompanying text.

The first part of this passage reflects the “best evidence” principle—a person who can only repeat someone else’s account does not have the sort of direct knowledge that is required for valid evidence; hence, he cannot qualify as a witness. The second part condemns hearsay for the inherent untrustworthiness of an unsworn statement. However, perhaps because he was not primarily concerned with criminal evidence, Gilbert did not identify the absence of cross-examination or the lack of testimony in the presence of the defendant as deficiencies in hearsay.

Gilbert identified only a single exception under which hearsay could be admitted as evidence—the limited-purpose corroboration exception also mentioned by Hawkins and Nelson. At the end of the passage quoted above, Gilbert wrote:

But tho’ Hearsay be not allow’d as direct evidence, yet it may be in Corroboration of a Witness’s Testimony, to shew that he affirmed the same thing before on other occasions, and that he is still consistent with himself; for such Evidence is only in Support of the Witness that gives in his Testimony upon Oath.¹³⁸

Interestingly, however, Gilbert presented this corroboration exception under the heading of “One Witness, Hearsay Evidence,” suggesting that the exception applied only in an instance where only a single witness was available to give evidence on a matter.¹³⁹ Perhaps because he was not primarily concerned with criminal evidence, Gilbert did not mention the limited-purpose exception for proving the general existence of a

¹³⁸ GILBERT, *supra* note 135, at 108 (1754 ed.); *id.* at 150 (1777 ed); *id.* at 150 (1788 Philadelphia ed.); 2 LOFFT’S GILBERT, *supra* note 135, at 890 (1791 ed.).

¹³⁹ GILBERT, *supra* note 135, at 106, 108 (1754 ed.); *id.* at 147, 150 (1777 ed.); *id.* at 147, 150 (1788 Philadelphia ed.). Gilbert included a margin citation at this passage to “Skin 402,” the citation for *Thompson v. Trevanion*, which I discuss *infra* notes 244-247 and accompanying text. Thus, Gilbert treated *Thompson* as involving the corroboration hearsay exception, rather than as involving a spontaneous declaration or *res gestae* hearsay exception.

conspiracy.

5. *The Bathurst and Buller Treatises*

Two additional English evidence treatises appeared in the mid eighteenth century, although they were so closely related that they constituted virtually the same work. Henry Bathurst's *The Theory of Evidence*, which acknowledged heavy borrowing from Nelson and Gilbert, was published anonymously in 1761.¹⁴⁰ That work was then totally incorporated into a somewhat larger treatise, *An Introduction to the Law Relative to Trials at Nisi Prius*, which was published anonymously in 1767 but, starting with the 1772 edition, was published under the name of Francis Buller, Bathurst's nephew.¹⁴¹ A New York edition of this latter treatise was published in 1788.¹⁴²

Like Gilbert's treatise, those by Bathurst and Buller were primarily concerned with evidence in civil litigation.

¹⁴⁰ HENRY BATHURST, *THEORY OF EVIDENCE* (1761). There was no later edition of this work under this title. See 1 MAXWELL, *supra* note 108, at 378.

¹⁴¹ FRANCIS BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* (1772). (Nisi Prius referred to trial jurisdiction.) The incorporation of the contents of *THE THEORY OF EVIDENCE* into the later Nisi Prius treatise was well known. See RICHARD WALLEY BRIDGMAN, *A SHORT VIEW OF LEGAL BIBLIOGRAPHY* 230-31 (1807) (noting that the contents of *THE THEORY OF EVIDENCE* were "generally understood to have been afterwards engrafted on" the Nisi Prius treatise). The initial editions of the Nisi Prius treatise are attributed to Bathurst, but his nephew, Francis Buller, is identified as the author starting with the 1772 edition, and this work is often cited as Buller's. See 1 MAXWELL *supra* note 108, at 378 (entry 1; *THEORY OF EVIDENCE* incorporated into *AN INTRODUCTION TO THE LAW OF NISI PRIUS*); *id.* at 335 (entries 1 & 3; discussing 1767 & 1772 editions of *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* and attributing 1772 edition to Buller). There were also some later editions published by others, sometimes titled *AN INSTITUTE OF THE LAW RELATIVE TO TRIALS AT NISI PRIUS*. For simplicity, I cite the 1772 edition identifying Buller as the author.

¹⁴² FRANCIS BULLER, *AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS* (reprinted by Hugh Gaine, New York, 1788) [hereinafter "BULLER (1788 New York ed.)"]. See JAMES, *supra* note 90, at 184.

Nevertheless, they did recognize the admissibility of Marian examinations of genuinely unavailable witnesses in felony trials.¹⁴³ The Bathurst and Buller treatises also stated a strong ban against hearsay evidence while recognizing the exception for the limited purpose of corroboration of a trial witness's testimony:

Hearsay is no Evidence, for no Evidence is to be admitted but what is upon Oath ; and if the first Speech was without Oath, another Oath that there was such Speech, makes it no more than a bare Speaking, and so of no Value in a Court of Justice. Beside, if the Witness is living, what he has been heard to say is not the best Evidence. But though Hearsay be not to be allowed as direct Evidence, yet it may in Corroboration of a Witness's testimony, to shew that he affirmed the same Thing before on other Occasions, and that he is still constant to himself.¹⁴⁴

Following this passage, these works then listed several

¹⁴³ THE THEORY OF EVIDENCE stated:

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 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 Goal-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.

BATHURST, *supra* note 140, at 33-34 (1761). See also BULLER, *supra* note 141, at 238 (1772 ed); BULLER, *supra* note 142, at 242 (1788 New York ed.).

¹⁴⁴ BATHURST, *supra* note 140, at 111; BULLER, *supra* note 141, at 289-90 (1772 ed.) (same passage with minor stylistic changes); BULLER, *supra* note 142, at 294 (1788 New York ed.) (same). Note that the language in the statement regarding the corroboration exception was taken almost verbatim from that by Gilbert, quoted *supra* text accompanying note 138.

NOT THE FRAMERS' DESIGN

411

specific issues on which hearsay evidence was admissible in civil lawsuits, including legitimacy, ancestry, whether a person was dead, pedigree, "prescription" (that is, a claim to land based on long occupancy), customary right-of-ways, or reputation as to a title.¹⁴⁵ However, none of these issues were pertinent to criminal

¹⁴⁵ The paragraph that immediately follows that quoted in the text identifies civil litigation hearsay exceptions as follows:

So where the Issue is on the Legitimacy of the Plaintiff or Defendant, it seems the Practice to admit Evidence of what the Parents have been heard to say, either as to their being or not being married, and with Reason, for the Presumption arising from the Cohabitation is either strengthened or destroyed by such Declarations, which are not to be given in Evidence directly, but may be assined the Witness as a Reason for his Belief one Way or the other. But in *Pendrel* and *Pendrel*, *Hil. 5. G. 2.* Lord *Raymond* would not suffer the Wife's Declarations, that she should not know her Husband by Sight, &c. to be given in Evidence till after she had been produced on the other Side. So Hearsay is good Evidence to prove, who is my Grandfather, when he married, what Children he had, &c. of which it is not reasonable to presume I have better Evidence. So to prove my Father, Mother, Cousin, or other Relation beyond the Sea, is dead, and the common Reputation and Belief of it in the Family gives Credit to such Evidence; and for a Stranger it would be good Evidence if a Person swore that a Brother or other near relation had told him so, which Relation is dead. In Ejectment between the Duke of *Athol* and Lord *Asburnham*, *E. 14. G. 2.* Mr. Sharpe, who was Attorney in the Cause, was admitted to prove, what Mr. *Worthington* told him he knew and had heard in regard to the Pedigree of the Family, Mr. *Worthington* happening to die before the Trial. So in Questions of Prescription, it is allowable to give hearsay Evidence in order to prove general Reputation; and where the Issue was a Right to a Way over the Plaintiff's Close, the Defendants were admitted to give Evidence of a Conversation between Persons not interested, then dead, wherein the Right to the Way was agreed. In Ejectment the Plaintiff derived his Title from Lord *R.* in whom he laid a Presentation of one *Knight*; the Bishop set up a Title in himself, and traversed the Seisin of Lord *R.* The Plaintiff gave in Evidence an Entry in the Register of the Diocese of the Institution of *Knight*, in which there was Blank in the Place, where the Patron's Name is usually inserted, upon which he

prosecutions.¹⁴⁶ Like Gilbert's treatise, the Bathurst and Buller treatises did not mention the existence-of-a-conspiracy exception that Hawkins and Nelson had discussed.

6. *Viner's Abridgment and the Dying Declaration Exception*

None of the treatises mentioned so far had recognized any exception under which unsworn hearsay could be admitted as evidence of a criminal defendant's guilt. The first such exception, for a dying declaration by a murder victim, was introduced into the treatise literature around 1750 when Charles Viner published volume 12 of his twenty-three volume *General Abridgment of Law and Equity*¹⁴⁷

Viner stated that "Hearsay from others is not to be applied immediately to the prisoner" and that "hearsay [is] not to be

offered parol Evidence of the general Reputation of the Country, that *Knight* was in by the Presentation of Lord *R*. Upon a Bill of Exceptions, this came on Error into *K*[ing's] *B*[ench] where the better Opinion was, that the Evidence was allowable; the Register which was the proper Evidence being silent. A Presentation made by Parol, may be transmitted to Posterity by Parol, and that creates a General Reputation.

BATHURST, *supra* note 140, at 111-113; BULLER, *supra* note 141, at 290-91 (same passage with minor stylistic changes); BULLER, *supra* note 142, at 294-95 (1788 New York ed.) (same).

No similar list of hearsay exceptions appeared in Gilbert's Treatise, until Capel Lofft added a passage derived from the passage quoted above in his 1791 revision of Gilbert's treatise. See 1 LOFFT'S GILBERT, *supra* note 135, at 279 (1791 ed.).

¹⁴⁶ Capel Lofft explicitly noted that these hearsay exceptions were inapplicable in criminal trials when he published an enlarged edition of Gilbert's treatise in 1791. See *infra* note 162 and accompanying text.

¹⁴⁷ CHARLES VINER, GENERAL ABRIDGMENT OF LAW AND EQUITY. The twenty-three volumes were published between 1741 and 1753. See 1 MAXWELL, *supra* note 108, at 20. I have been unable to establish the precise publication date of volume 12, which dealt with the topic of evidence, and which was sometimes published and sold separately. See 1 MAXWELL, *supra*, at 379. R. Kelham published an index to the twenty-three volumes as the twenty-fourth volume in 1758. See 1 *id.* at 19.

NOT THE FRAMERS' DESIGN

413

allowed as *direct evidence*.”¹⁴⁸ He also recognized the limited-purpose exceptions for proof of the existence of a conspiracy¹⁴⁹ and for corroboration.¹⁵⁰ However, he added a new exception for a dying declaration that, for the first time, permitted unsworn hearsay to be admitted as evidence of a defendant's guilt in a criminal trial:

11. In the case of murder, what the deceased declared after the wound given, may be given in evidence. Coram King Ch. J. apud. Old Bailey, 1720. the King v. Ely.

12. In Trowter's Case, Pasch. 8 Geo. B.R. the Court would not admit the *declaration of the deceased which had been reduced into writing* to be given in evidence without producing the writing.¹⁵¹

No similar dying declaration exception had been noted by Hawkins or the other evidence treatises. The explanation is suggested by the dates of the cases that Viner cited as authority for the exception: an unreported 1720 ruling in the Old Bailey and a 1722 (“Pasch. 8 Geo.”) ruling in King's Bench (“B.R.”)

¹⁴⁸ 12 VINER, *supra* note 147, at 118 (page numbering according to first edition) (emphasis in original).

¹⁴⁹ Viner wrote:

4. Hearsay from others is not to be applied immediately to the prisoner; however those matters that are remote at first *may serve to prove there was a general conspiracy* to destroy the King and Government; and so was the constant rule and method about the Popish plot, first to produce evidence of the plot in general; by Ch. J. cites Sidney's Case, Try. per Pais, 56.

12 *id.* (emphasis in original).

¹⁵⁰ Viner wrote:

7. Though a hearsay was not to be allowed as a *direct evidence*, yet it might be made use of to this purpose (viz.) to *prove that a man was consistent with himself*, whereby his testimony was *corroborated*. 1 Mod. 283. pl. 29. Trin. 29 Car. 2 B.R. Lutterell v. Reynell.

12 *id.* (emphasis in original).

¹⁵¹ 12 *id.* 118-19 (page numbers of first edition).

which was not published until 1730.¹⁵² Thus the case authority for a dying declaration exception appeared a bit too late to have been included in the treatises by Hawkins, Nelson, or Gilbert.

Viner did not discuss the rationale for the hearsay exception for dying declarations, but a 1787 commentator suggested that a dying declaration was admissible because the declarant's apprehension of imminent death would stimulate the same fear that a false accusation would result in eternal damnation as would an oath, and thus that the exception should apply only when the declarant actually apprehended his imminent "dissolution" (death).¹⁵³ Thus, a dying declaration of a murder victim was viewed as carrying the same assurance of truthfulness and reliability as an oath. Moreover, because the information of the dying murder victim often constituted the "best evidence," or even the only evidence, regarding the identity of the murderer and circumstances of the crime, such statements were admitted "of necessity," notwithstanding that they could not meet the usual in-the-presence/cross-examination requirement for evidence at criminal trials.¹⁵⁴

¹⁵² Viner's reference to "Trowter's Case" was to the 1721 King's Bench ruling in *King v. Reason and Tranter*. Two reports of that case were published. The earliest appeared in 6 *State Trials* 195 (2nd ed. Supplement 1730) [reprinted 16 *How St. Tr.* 1, 24-38]. See 1 MAXWELL, *supra* note 108, at 369 (indicating that the sixth volume of *State Trials* was first published in 1730). The second report appeared in *Strange* 499 (1st ed. 1755) [reprinted 1 *Str.* 499 (3rd ed. 1795), 93 *Eng. Rep.* 659, 659-60]. See 1 MAXWELL, *supra*, at 309 (indicating that *Strange's Reports* were first published in 1755).

¹⁵³ Thomas Leach added a section on the admissibility of dying declarations and a note setting out the rationale for that exception when he edited the 1787 revision of Hawkins's treatise. See, 2 LEACH'S HAWKINS, *supra* note 108, at 619, n. "(10)" (1787 ed.) (commenting that a dying declaration can be admitted only if "the party is sensibly appreciative of approaching dissolution" when the declaration is made). In *Crawford*, Justice Scalia wrote that "The existence of [the dying declaration] exception as a general rule of criminal hearsay law cannot be disputed" and described dying declarations as a "sui generis" hearsay exception. *Crawford v. Washington*, 541 U.S. 36, 56 n. 6 (2004).

¹⁵⁴ Thomas Leach added the section on dying declarations in his 1787 revision of Hawkins's treatise immediately after a section he added setting out the "best evidence" principle. 2 LEACH'S HAWKINS, *supra* note 108, at 619

7. *Burn's Justice of the Peace Manual*

The more salient passages in the treatises by Hawkins, Nelson, Gilbert, Viner, Bathurst, and Buller were also set out in justice of the peace manuals, a sort of legal encyclopedia covering topics relevant to that office. These works were often more substantial than the term “manual” may suggest. The leading English justice of the peace manual during the last half of the eighteenth century was Richard Burn’s *The Justice of the Peace and Parish Officer*, first published in 1755 and reissued in numerous later editions by Burn to 1785.¹⁵⁵ Because Burn drew upon all of the treatises, abridgments, and earlier manuals, his four-volume manual provides a fairly comprehensive summary of late eighteenth-century criminal evidence law.

Like the treatises, Burn noted the admissibility of Marian examinations of witnesses who were dead, too ill to travel, or kept away by the defendant,¹⁵⁶ and the admissibility of a dying declaration of a victim “[i]n the case of murder.”¹⁵⁷ Like the treatises, he also stated the general ban against hearsay evidence and the limited-purpose corroboration exception.¹⁵⁸ However, like the treatises by Gilbert, Bathurst, and Buller, Burn omitted the limited-purpose exception that allowed hearsay to be

(1787 ed.) (*see* sections 45, 46).

¹⁵⁵ RICHARD BURN, *JUSTICE OF THE PEACE AND PARISH OFFICER* (four volumes, 1755). Numerous further editions were published during the eighteenth century. For simplicity, I usually cite the 1764 edition, but call attention to any changes from that edition by citing later editions. For bibliographic information, *see* 1 MAXWELL, *supra* note 108, at 225-26 (entry 15); BRIDGMAN, *supra* note 141, at 42-43.

Blackstone recommended that students interested in the role of the justice of the peace 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 90, at 343 (1st ed. 1765).

¹⁵⁶ 1 BURN, *supra* note 155, at 336 (1764 ed.).

¹⁵⁷ 1 *id.* at 345.

¹⁵⁸ 1 *id.* at 345. *See also infra* text accompanying notes 184-186.

admitted to prove the existence of a conspiracy.¹⁵⁹

8. *Framing-era American Justice of the Peace Manuals*

Burn's manual is an especially important source regarding the framing-era American understanding of criminal evidence doctrine because the four principal justice of the peace manuals that were published in America between 1765 and 1789 each reprinted Burn's treatment of admissible criminal evidence.¹⁶⁰

¹⁵⁹ Burn initially quoted Hawkins's passage on hearsay in his 1755 first edition, which included Hawkins's statement that hearsay could be admitted "by way of inducement or illustration of what is properly evidence." See 1 Burn, *supra* note 155, at 292 (1755 ed.) (quoting 2 HAWKINS, *supra* note 108, at 431 (1721 ed.); passage quoted *supra* text accompanying note 124). However, Burn did not link that exception to proof of the existence of a conspiracy as Hawkins had.

After publication of *THE THEORY OF EVIDENCE* in 1761, however, Burn replaced Hawkins's passage on hearsay with the passage on hearsay in that treatise, which did not mention the allowance of hearsay "by way of inducement or illustration of what is properly evidence." See 1 Burn, *supra* note 155, at 345 (1764 ed.), quoting BATHURST, *supra* note 140, at 111-12.

¹⁶⁰ Framing-era Americans were likely to have consulted one of the four substantial justice of the peace manuals that were published in America between 1765 and 1789, each of which borrowed heavily from Burn's English manual. The earliest of these was *CONDUCTOR GENERALIS* (Woodbridge N.J. 1765; printed by James Parker, "[o]ne of his Majesty's Justices of the Peace for Middlesex County, in New-Jersey") [hereinafter *PARKER'S CONDUCTOR*] (examination indicates the section on "Evidence" in this work selectively reprinted material from Burn's 1762 edition). Parker's treatment of "Evidence" was also reprinted in two later 1788 New York printings of this manual with different paginations but apparently without any updating of the material on "Evidence" to later editions of Burn's manual: *THE CONDUCTOR GENERALIS* (New York, 1788; printed by Hugh Gaine) [hereinafter "*GAINE'S CONDUCTOR*"]; *CONDUCTOR GENERALIS* (New York, 1788; printed by John Patterson for Robert Hodge) [hereinafter "*HODGE'S CONDUCTOR*"].

There were also three other prominent manuals, each of which was based on later editions of Burn's manual: *JOSEPH GREENLEAF, AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER* (Boston, 1773); *RICHARD STARKE, OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* (Williamsburg, 1774); and *JOHN FAUCHAUD GRIMKE, SOUTH CAROLINA JUSTICE* (Philadelphia, 1788)(published anonymously but attributed to Judge

NOT THE FRAMERS' DESIGN

417

Thus, directly or indirectly, Burn's summary of criminal evidence was probably the most widely available source on the subject in framing-era America.

9. Summary of the pre-framing treatises and manuals

In sum, the treatises and justice of the peace manuals that were available in framing-era America identified only two kinds of out-of-court statements that could be admitted as evidence of a defendant's guilt in a criminal trial: a sworn Marian

Grimke; *see* Davies, *supra* note 10, at 185 n. 256). There were some earlier less substantial manuals, as well as a shorter and superficial 1774 justice of the peace manual for North Carolina: JAMES DAVIS, *THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE* (New Bern, N.C., 1774).

Like Burn, the four substantial American manuals each noted the admissibility of Marian examinations of deceased or otherwise unavailable witnesses. *See* PARKER'S CONDUCTOR, *supra*, at 165; GREENLEAF, *supra*, at 118; STARKE, *supra*, at 143; GRIMKE, *supra*, at 184; GAINES'S CONDUCTOR, *supra*, at 137-38; HODGE'S CONDUCTOR, *supra*, at 168.

Like Burn, the substantial American manuals each stated the general ban against hearsay, the corroboration exception, and the dying declaration of a murder victim exception; however they did not all identify the limited purpose exception for proof of a conspiracy. The three printings of CONDUCTOR GENERALIS quoted Burn's passage on dying declarations and the passage on hearsay and the corroboration exception that Burn initially quoted from Hawkins's treatise: *see* PARKER'S CONDUCTOR, *supra*, at 170; GAINES'S CONDUCTOR, *supra*, at 142; HODGE'S CONDUCTOR, *supra*, at 173. The Hawkins passage quoted in these printings of Conductor Generalis also mentioned the allowance of hearsay "by way of inducement or illustration of what is properly evidence," but did not contain any explanation of that exception, and did not link it to proof of the existence of a conspiracy as Hawkins had (*see supra* note 126).

The other three manuals by Greenleaf, Starke, and Grimke quoted passages on dying declarations, hearsay and the corroboration exception from recent editions of Burn's manual. Thus, they quoted the passage on hearsay from *THE THEORY OF EVIDENCE* that Burn substituted for the Hawkins passage in Burn's 1764 edition (*see infra* notes 185-186 and accompanying text). As a result, they made no mention of the limited hearsay exception for statements "by way of inducement or illustration of what is properly evidence." *See* GREENLEAF, *supra*, at 127; STARKE, *supra*, at 144, 150; GRIMKE, *supra*, at 194-95.

examination of an unavailable witness or a dying declaration of a murder victim. Both involved (1) either an oath or the functional equivalent of an oath, and (2) the genuine unavailability of the witness. However, none of the framing-era authorities recognized any other exception to the ban against hearsay evidence under which unsworn hearsay statements could be admitted as evidence of the defendant's guilt. Rather, most of these works recognized only a limited-purpose corroboration exception, and some also recognized that hearsay could be used to prove background facts such as the general existence of a conspiracy, though not the defendant's part in it.

However, except for dying declarations, all of the modern criminal hearsay exceptions are missing from these works (and even the dying declaration exception was limited to statements made by murder victims). For example, none of the preframing sources mentioned the modern "*res gestae*," "spontaneous declaration," "declaration against interest," or statement of a co-conspirator exceptions that could now fall within *Crawford's* "nontestimonial hearsay" category. Rather, the modern exceptions under which "nontestimonial" hearsay can now be admitted against a criminal defendant *did not exist* when the Confrontation Clause was framed in 1789.¹⁶¹ In fact, hearsay exceptions for criminal trials are still absent even from the leading treatises that were published in the decades following the American framing.

10. *Post-Framing English Treatises*

When Capel Lofft published an enlarged edition of Gilbert's *Law of Evidence* in London in 1791, he repeated the strong ban against use of hearsay evidence, noted the cross-examination rationale for that ban (though he did not use the term "cross-examination"), and explicitly commented that the hearsay exceptions "which have their place in civil, do not apply in

¹⁶¹ My conclusion is essentially consistent with that which Professor Heller announced in 1951. *See supra* note 46 and accompanying text.

NOT THE FRAMERS' DESIGN

419

criminal cases.”¹⁶² Lofft also noted that hearsay could be

¹⁶² Capel Lofft’s revisions of Gilbert’s treatise, published in London in 1791, clearly indicated that no exceptions beyond the limited-purpose exceptions for corroboration and for proof of the existence of a conspiracy had been recognized by that date. Although Lofft inserted a passage identifying the various hearsay exceptions for civil litigation noted by Bathurst and Buller, he stated that those exceptions were not pertinent to criminal cases when he restated Gilbert’s definition of “hearsay.” He began the discussion under the heading of “Of Secondary Testimony; or, Hearsay in Criminal Cases” as follows:

We have seen in general that Hearsay is not Evidence: but we have had occasion at the same time to observe some Exceptions to this Rule, such as the Proof of ancient Custom or Pedigree, where the Nature of the Thing to be proved supposes a failure of direct living Testimony. But these and other Exceptions, which have their place in civil, *do not apply to criminal Cases*: and therefore in these the Attestation of the Witness must be to what he knows, and not to that only which he has heard; for a mere hearsay is no Evidence

2 LOFFT’S GILBERT, *supra* note 135, at 889 (1791 ed.) (emphasis added). At the end of this passage Lofft repeated Gilbert’s original statement of the ban against hearsay, *quoted supra* text accompanying note 137. (A peculiarity of Lofft’s edition is that the material he added is indicated by quotation marks along the left margin but the original material by Gilbert is presented without those marks.) Shortly thereafter, he indicated the linkage between the ban against hearsay and the defendant’s right to cross examine by noting that a person who testified to his own knowledge, unlike a person who testified only to hearsay information, “incur[red] the Risque of Con[f]utation.” 2 *id.* at 890 (there is an apparent typographical error; a high “s” appears instead of an “f,” but “Consutation” was not and is not a recognized word).

Lofft also restated Gilbert’s statement of the corroboration exception (though he emphasized the potential for impeachment by noting that the absence of a complaint by the alleged victim immediately after a personal injury would carry a strong implication that the crime had not occurred). 2 *id.* at 890.

In addition, Lofft also added a passage incorporating Hawkins’s existence-of-a-conspiracy exception (discussed *supra* note 126), but noted that the hearsay evidence of a conspiracy could not be admitted “to charge the Prisoner [that is, defendant] in particular.” 2 *id.* at 891. However, the limited purpose exceptions for corroboration and proof of a conspiracy are the only two exceptions to the ban on hearsay that Lofft discussed in his section on hearsay in criminal cases.

admitted for the limited purposes of proving a conspiracy,¹⁶³ or by way of corroborating the testimony of a witness,¹⁶⁴ but only hinted that a dying declaration exception applied in criminal trials.¹⁶⁵

The three principles of evidence that Hawkins had described as requiring the strong ban against unsworn hearsay were also evident in Thomas Peake's *A Compendium of the Law of Evidence*, published in London in 1801. Peake made the following general statement about hearsay:

The Law . . . always requires the sanction of an oath: It further requires [the witness's] personal attendance in Court, that he may be examined and cross examined by the different parties, and, therefore, in cases depending on parol [i.e., oral] evidence, the testimony of persons who are themselves conusant of the facts they relate, must in general be produced; for the relation of one who has no other knowledge of the subject than the information he has received from others, is not a relation upon oath; and moreover the party against whom such evidence should be permitted, would be precluded from his benefit of cross examination.¹⁶⁶

As in the previous evidence treatises, the specific hearsay exceptions that Peake identified were not pertinent to criminal

¹⁶³ 2 *id.* at 891 (“But Hearsay maybe Evidence of Inducement in matters that do not constitute the Crime, and are of a general Nature. As that there was a Plot, a Conspiracy, a Disaffection; but not to charge the Prisoner in particular”).

¹⁶⁴ 2 *id.* at 890.

¹⁶⁵ In his discussion of hearsay in civil lawsuits, Lofft commented that “what a deceased person said on his death-bed touching the Cause of his Death” was admissible evidence. *See* 1 *id.* at 280. However, he did not repeat that point when discussing hearsay in criminal cases. *See* 2 *id.* at 889-91.

¹⁶⁶ THOMAS PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 7-8 (1801) (“relation” in this passage means “account” or “speaking”). Note that the reference to a person “conusant of the facts they relate,” that is, a person with direct personal knowledge, amounts to a version of the framing-era “best evidence” principle.

NOT THE FRAMERS' DESIGN

421

trials.¹⁶⁷

Joseph Chitty's *Practical Treatise on the Criminal Law*, which was published in London in 1816,¹⁶⁸ and reprinted in America in 1819,¹⁶⁹ also still described the treatment of out-of-court statements in criminal trials in essentially the same terms that Hawkins had used in 1721. Chitty noted the admissibility of Marian witness examinations of unavailable witnesses,¹⁷⁰ stated the strong rule against hearsay evidence and the cross-examination rationale for that prohibition, and recognized the two limited-purpose exceptions for corroboration and "inducement or illustration of more substantial testimony" (although, unlike Hawkins, he did not link the latter specifically

¹⁶⁷ Peake listed the recognized hearsay exceptions as follows:

The few instances in which this general rule [against hearsay] has been departed from, and in which hearsay evidence has been admitted, will be found, on examination, to be such as were, in their very nature, incapable of positive and direct proof. Of this kind are all those which can only depend on reputation. The excluding of hearsay evidence in questions of pedigree, prescription, or custom, would prevent all testimony whatsoever; for the evidence of any living witness of what passed within the short time of his own memory, would often be insufficient in the former instance, always in the latter; and there is no other way of knowing the evidence of deceased persons, than by the relation of others, of what they have been heard to say. In these cases, therefore, the law departs from its general rule, and receives evidence of the declarations of deceased persons, who, from their situation, were like to know the facts; and also the general reputation of the place or family most interested to preserve in memory the circumstances attending it. Any thing which shews such reputation is, on a question of this sort, received in evidence, though oftentimes wholly inadmissible in other cases.

Id. at 8-9. ("[P]rescription" refers to a claim to land based on constant occupation.)

¹⁶⁸ JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (London 1816).

¹⁶⁹ JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (Philadelphia 1819).

¹⁷⁰ 1 CHITTY, *supra* note 168, at 72-79; 1 CHITTY, *supra* note 169, at *72-79.

to proof of the general existence of a conspiracy).¹⁷¹ Chitty also noted the exception for the “dying declaration of a party murdered” as “one great and important exception” to the rule against admitting hearsay evidence relating to a criminal defendant’s guilt.¹⁷² As noted above, Thomas Leach had previously added the dying declaration exception to his 1787 revision of Hawkins’s treatise.¹⁷³

11. *Post-framing American Cases*

Reported American cases from the decades following the framing also seem to confirm that the modern hearsay exceptions had not yet appeared on the scene. Professor Randolph N. Jonakait surveys those cases in another article in this symposium issue.¹⁷⁴ Although Jonakait finds that relevant, available American case law from the decades immediately

¹⁷¹ Chitty wrote the following regarding hearsay:

There is no general rule better established in the law of evidence, than that mere statements of what was uttered by a stranger, cannot be admitted to prove any circumstance on the trial. For the law admits of no evidence but such as is delivered upon oath, and the original expressions were not only uttered when the speaker was not under that obligation, but are liable to be forgotten, misunderstood, and unconsciously altered, by the party who repeats them. Besides, if the original speaker be living, this statement of his words is not the best evidence, which, we have seen, the courts will require; and the prisoner loses the benefit of cross-examination, which is of such eminent service in discovering the true color of the circumstances related. . . . But hearsay may be used as inducement and illustration of more substantial testimony. And the declarations of a witness, at another time, may be adduced to invalidate or to confirm his evidence; by showing that he varies in his statement; or has maintained a uniform consistency in his narration.

1 CHITTY, *supra* note 168, at 568-69.

¹⁷² 1 *id.* at 569-70.

¹⁷³ See *supra* text accompanying note 153.

¹⁷⁴ Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier’s Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL’Y 471 (2007).

NOT THE FRAMERS' DESIGN

423

following the framing about evidentiary practices in criminal cases “is slight,”¹⁷⁵ he reports that there is evidence of the general rule against unsworn hearsay evidence in the cases we do have.¹⁷⁶ Although participants in those cases sometimes made loose but unspecific assertions that there were “many exceptions” to the general rule against hearsay¹⁷⁷ (perhaps referring to the civil hearsay exceptions), the hearsay evidence that actually was contested in the criminal trials that Jonakait identifies involved either background or general information that did not go directly to the defendant’s guilt of a crime¹⁷⁸ (that is, Hawkins’s hearsay as “inducement or illustration of what is properly evidence”), corroboration of a witness’s in-court testimony,¹⁷⁹ or dying declarations of murder victims.¹⁸⁰ Thus, the exceptions that Jonakait finds in the post-framing cases seem to be limited to the exceptions identified in the treatises.¹⁸¹ Like the treatises and manuals, the post-framing American cases

¹⁷⁵ *Id.* at 483.

¹⁷⁶ *See, e.g., id.* at 479 (noting an exchange in a 1794 case that indicated that the proposition that hearsay is generally inadmissible “went unchallenged by the prosecutor and was readily accepted by the court”). *See also id.* at 485 (noting that statements by the judge in an 1800 federal criminal trial indicated that hearsay “was usually banned”).

¹⁷⁷ *Id.* at 479 (discussing judge’s statement in *State v. Baynard*, 1794 W.L. 184 (Del. O.& T. 1794).

¹⁷⁸ *See, e.g., id.* at 478-80 (noting that in *State v. Bayard*, 1794 W.L. 184 (Del. O.&T. 1794). the prosecutor sought to admit hearsay on the ground that it was not “substantive evidence” itself but rather was offered “introductory to that which was good legal evidence” to explain the narrative).

¹⁷⁹ *See, e.g. id.* at 486, n.43 (discussing hearsay rulings in *State v. Norris*, 1796 W.L. 327 (N.C. Super. L. & Eq. 1796) and *The Ulysses*, 24 F. Cas. 515 (D. Mass. 1800).

¹⁸⁰ *See, e.g., id.* at 481 n.30 (discussing a ruling regarding the dying declaration hearsay exception in *Respublica v. Langcake & Hook*, 1795 W.L. 708 (Pa. 1795).

¹⁸¹ Jonakait also found that depositions were deemed inadmissible in criminal cases unless the parties consented, which tends to confirm that the admissibility of Marian witness examinations was understood to be *sui generis*. *See id.* at 487 (discussing ruling in *The Ulysses*, 24 F. Cas. 515, 516 n.2 (D. Mass. 1800).

Jonakait identified do not reveal anything like the modern variety of criminal hearsay exceptions.

12. Summary

Taken together, the framing-era treatises and manuals, the treatises from the decades immediately after the framing, and the post-framing American cases all present a strikingly consistent treatment of a strong prohibition against use of unsworn out-of-court statements as evidence of a defendant's guilt. Except for dying declarations of murder victims, they did not permit unsworn hearsay statements to be admitted as evidence of a defendant's guilt. Rather, the only other exceptions they allowed were the limited-purpose exceptions for corroboration (or impeachment) of the testimony of a witness who had already testified at trial, or for background information such as the general existence of a conspiracy, that did not bear directly on the defendant's guilt of a crime. The bottom line is that none of these historical authorities identified any hearsay exceptions that would have permitted any unsworn, "nontestimonial" hearsay statement to be admitted as evidence of a criminal defendant's guilt.

The absence of framing-era hearsay exceptions that relate to proof of the defendant's guilt demonstrates that the "reasonable inferences" that Justice Scalia announced in *Crawford* and *Davis* regarding "the Framers' design" for cross-examination cannot be valid. Indeed, the historical sources provide even stronger evidence of that invalidity. The originalist testimonial formulation announced in *Crawford* and repeated in *Davis* was rooted in the foundational premise that the law of hearsay statements was analytically distinct from the confrontation right. However, that is not how the framing-era authorities treated those subjects. Rather, the framing-era authorities indicated that the confrontation right itself required that unsworn hearsay statements be inadmissible.

D. How the Confrontation Right Required the Ban Against Hearsay

As noted above, Serjeant Hawkins observed in 1721 that an unsworn hearsay statement was inadmissible in a criminal trial “not only because it is not upon oath, but also because the other side had no opportunity of a cross examination.”¹⁸² In other words, if the statement of an out-of-court declarant—a “stranger” in Hawkins’s terminology—were to be admitted, a criminal defendant would be deprived of the right to cross-examine the maker of the statement in the view of the jury, one of the key features of the confrontation right.¹⁸³

When Burn published the first edition of his manual in London in 1755, he included Hawkins’s passage on the ban against hearsay, including the statement that hearsay was banned “because the other side hath no opportunity of a cross examination.”¹⁸⁴ When Bathurst’s *The Theory of Evidence* became available a few years later, however, Burn’s 1764 edition replaced Hawkins’s passage on hearsay with the more extensive discussion of hearsay, and the listing of the civil litigation hearsay exceptions, that appeared in *The Theory of Evidence*.¹⁸⁵ However, Burn made a significant alteration in the

¹⁸² See *supra* text accompanying note 124.

¹⁸³ See *supra* note 122.

¹⁸⁴ 1 BURN, *supra* note 155, at 292 (1755 ed.) (entry for Evidence).

¹⁸⁵ After quoting the passage of hearsay that had appeared in the Bathurst and Buller treatises, as set out *supra* text accompanying note 144, Burn also provided the following less cumbersome summary of the hearsay exceptions that applied to various issues pertinent to civil lawsuits that had appeared in the Bathurst and Buller treatises:

So where the issue is on the legitimacy of a person, it seems the practice to admit evidence of what the parents have been heard to say, either as to their being or not being married, for the presumption arising from the cohabitation is either strengthened or destroyed by such declarations, which altho’ not to be given in evidence directly, they may be assigned by the witness as a reason for his belief one way or the other. So hearsay is good evidence to prove who was a man’s grandfather, when he married, what children he had, and the like, of which it is not

latter. Because Bathurst had not mentioned the cross-examination rationale for the rule against hearsay, Burn retained a paraphrase of Hawkins's statement of the cross-examination rationale and inserted it into the discussion of hearsay that he otherwise borrowed from *The Theory of Evidence*. The phrase Burn added is set out in italics:

It is a general rule, that hearsay is no evidence; for no evidence is to be admitted but what is upon oath; and if the first speech was without oath, another oath that there was such a speech, makes it no more than a bare speaking, and so of no value in a court of justice; *and besides, the adverse party had no opportunity of a cross examination*; and if the witness is living, what he had been heard to say is not the best evidence that the nature of the thing will admit.¹⁸⁶

Thus, all of the editions of Burn's leading manual treated the right to cross-examine adverse witnesses as requiring the ban against hearsay evidence.

It is highly likely that the American Framers also understood that the confrontation right itself required the ban against

reasonable to presume that there is better evidence. So to prove that a man's father or other kinsman beyond the sea is dead, the common reputation and belief of it in the family gives credit to such evidence; and for a stranger it would be good evidence, if a person swore that a brother or other near relation had told him so, which relation is dead. So in questions of prescription, it is allowable to give hearsay evidence, in order to prove general reputation; and where the issue was of a right to a way over the plaintiff's close, the defendants were admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed.

1 *id.* at 345 (1764 ed.) (citing "*Theory of Evid.* 111, 112" and paraphrasing Bathurst's discussion of civil hearsay exceptions quoted *supra* note 145). This passage on exceptions to the ban against hearsay is unchanged in later editions. *See, e.g.*, 1 *id.* at 529 (1785 ed.).

¹⁸⁶ 1 BURN, *supra* note 155, at 345 (1764 ed.) (emphasis added); 1 *id.* at 529 (1785 ed.). Compare the italicized clause to the Hawkins passage quoted *supra* text accompanying note 124.

NOT THE FRAMERS' DESIGN

427

hearsay evidence regarding a criminal defendant's guilt. For one thing, the Framers would have consulted Hawkins's treatise because it was the leading work on criminal law and procedure during the entire eighteenth century and the pertinent passage on hearsay appeared in all of the eighteenth century editions of that work,¹⁸⁷ as well as in the summary of Hawkins's views in Bacon's Abridgment.¹⁸⁸

Moreover, Hawkins's treatment of the hearsay ban as a consequence of the right of cross-examination also appeared, directly or indirectly, in each of the significant justice of the peace manuals published in America during the framing period.¹⁸⁹ The 1765 printing of *Conductor Generalis* in New Jersey and the 1788 printings of that work in New York each quoted Hawkins's passage on hearsay itself.¹⁹⁰ The other three manuals quoted Burn's altered quotation of the ban against hearsay from *The Theory of Evidence*, including his reference to the loss of cross-examination. Joseph Greenleaf included that passage when he published his *Abridgment of Burn's Justice* in Boston in 1773;¹⁹¹ Richard Starke included that passage when he published his *Office and Authority of a Justice of the Peace* in Williamsburg in 1774;¹⁹² and Judge John Fauchaud Grimke also included that passage in his *South Carolina Justice*, which was printed in Philadelphia in 1788.¹⁹³ Thus, the linkage between the confrontation right and the ban against unsworn hearsay appeared in the justice of the peace manuals published for New England, New York and the mid-Atlantic states, Virginia, and South Carolina, as well in the works by Hawkins and Burn themselves (both of which appear to have been imported by Americans in significant numbers¹⁹⁴).

¹⁸⁷ See *supra* note 124 and accompanying text.

¹⁸⁸ See *supra* note 130 and accompanying text.

¹⁸⁹ One shorter and less substantial manual published in North Carolina in 1774 did not discuss hearsay at all. See *supra* note 160.

¹⁹⁰ See *supra* note 160.

¹⁹¹ GREENLEAF, *supra* note 160, at 127.

¹⁹² STARKE, *supra* note 160, at 250.

¹⁹³ GRIMKE, *supra* note 160, at 194.

¹⁹⁴ One can make an admittedly crude estimate as to whether an English

Additionally, the linkage between a criminal defendant's right to cross-examine adverse witnesses and the ban against hearsay evidence was also stated in several other widely used legal works. For example, Matthew Bacon's summary of Hawkins' passage on hearsay—that hearsay “is no evidence . . . because the party who is affected thereby had not an opportunity of cross-examining”¹⁹⁵—was repeated in the framing-era editions of the leading legal dictionaries (really more like encyclopedias) published by Giles Jacob¹⁹⁶ and Timothy Cunningham.¹⁹⁷ Given

publication was imported in significant numbers by counting the number of surviving copies of the work that are currently found in American public libraries. That number can be derived from the Worldcat listing of the Online Computer Libraries Center. See Online Computer Libraries Center, <http://www.oclc.org> (last visited Mar. 18, 2007).

A search of that source revealed 163 copies of preframing editions of Hawkins's PLEAS OF THE CROWN (99 from the first through the 1771 editions and 64 of the 1787 edition edited by Thomas Leach (including a 1788 Dublin reprinting of that edition). A similar search located 150 copies of the 16 preframing-editions of Burn's manual (133 from the first through the 1785 edition and 17 of the 1788 edition).

By comparison, a similar search revealed 33 copies of Nelson's treatise, 61 of Gilbert's plus 30 of the 1788 New York edition, 15 of Bathurst's, and 81 of Buller's plus 39 of the 1788 New York edition. I am indebted to my colleague Professor Sibyl Marshall for this information.

¹⁹⁵ See *supra* text accompanying note 130.

¹⁹⁶ 1 GILES JACOB, A LAW DICTIONARY (Owen Ruffhead & J. Morgan, eds., 10th ed. 1773) (pages unnumbered; entry on “Evidence II,” subsection “3. Of parol, preemptive, and hearsay evidence”); 1 *id.* (T.E. Tomplins, ed., 1797 ed.) (same). There were a number of earlier editions, see 1 MAXWELL, *supra* note 108, at 9; however, I cannot locate this passage in earlier editions of this dictionary; rather, it appears to have been added when Ruffhead and Morgan revised it in the early 1770s.

The passage quoted also appears in the first American edition of this dictionary: 2 GILES, JACOB, THE LAW DICTIONARY 462-63 (Philadelphia, 1811).

¹⁹⁷ 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY OR GENERAL ABRIDGMENT OF THE LAW (2d ed. 1777) (entry for “Evidence,” subsection “5. Of parol, presumptive, and hearsay evidence”); 1 *id.* (3rd ed. 1783) (same). The first edition of Cunningham's dictionary was published in 1764-1765; see 1 MAXWELL *supra* note 108, at 8. However, I have been unable to locate that edition.

NOT THE FRAMERS' DESIGN

429

all of these sources, it seems highly likely that framing-era American lawyers and judges understood the bar against unsworn hearsay evidence to be a *component* of a criminal defendant's right to confront adverse witnesses.¹⁹⁸

¹⁹⁸ My conclusion that the connection between the right to confrontation (in the form of a criminal defendant's right to cross-examine at trial) and the ban against unsworn hearsay evidence was well established during the eighteenth century and certainly during the framing era (1775-1789) may appear to contrast with descriptions of the development of hearsay doctrine that Professors Gallanis and Langbein have given in other recent historical commentaries. However, the differences seem to reflect only the different historical sources that were consulted.

On the basis of a review of historical English *evidence treatises*, Professor Gallanis concluded that the cross-examination rationale for the hearsay rule "appeared first in Lofft's 1791 revision of Gilbert, although only in connection with criminal cases." Gallanis, *supra* note 37, at 533, citing 2 GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 890 (Capel Lofft ed., London, 1791) (cited as LOFFT'S GILBERT in this article) (stating that a witness at trial "incur[s] the Risque of Co[f]futation") (there is an apparent typographical error in the original; see *supra* note 162). That statement by Professor Gallanis has also been quoted in LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 245 (2003). The explanation for the seeming difference between Gallanis's discussion of the cross-examination rationale and mine is simply that Gallanis only undertook to summarize the statements that appeared in evidence treatises themselves, but did not review the discussions of hearsay and the references to the cross-examination rationale for the hearsay rule that appeared in criminal procedure treatises such as Hawkins's treatise, or in other kinds of legal publications such as Bacon's Abridgment, Burn's manual, or the law dictionaries by Jacob and Cunningham. Moreover, because Gallanis was interested only in the contents of the English evidence treatises per se, he also did not consult the framing-era American justice of the peace manuals which also articulated the cross-examination rationale for the ban against hearsay evidence. Hence, as Professor Gallanis has confirmed to me by e-mail, his statement should be understood only as specific description of the hearsay rationales that appear in English evidence treatises, but not as a statement dating the first appearance of the cross-examination rationale for the ban against hearsay. Gallanis's study simply did not address the eighteenth-century criminal procedure publications in which the cross-examination rationale appeared.

Likewise, the seeming differences between my statements about the appearance of the cross-examination rationale for the hearsay rule and some of those made by Professor Langbein also appear to arise from the different

The linkage between the cross-examination right and the ban

sources that we each examined. Thus, although Professor Langbein did note that Hawkins had noted the cross-examination rationale for the hearsay rule as early as 1721, *see* LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 238, and that cross-examination was one of the three rationales for the confrontation right during the eighteenth century, *see id.* at 180, he commented, based on his examination of the surviving records of trials in London's Old Bailey, that recorded objections to hearsay were still uncommon in eighteenth-century criminal trials in that court, that "concern about the want of cross-examination remained a muted theme in criminal practice throughout the eighteenth century," and that "[t]he first judicial mention of [the cross-examination] rationale for excluding what we could call hearsay . . . in the [surviving records of criminal trials in the Old Bailey] turns up in 1789." *Id.* at 233-238 (citing the passage from *Woodcock* quoted *infra* text accompanying note 215). Likewise, he suggested that "[o]nly in the middle of the nineteenth century did the consensus form that the doctrinal basis of the hearsay rule was to promote cross-examination." *Id.* at 180.

My assessment is that Langbein's observations simply show that one cannot accurately recover historical *doctrinal* understandings from the records of statements made during criminal trial proceedings themselves. It is not surprising that discussions of the rationale for the hearsay rule are not particularly apparent in the surviving trial records. For one thing, the surviving accounts of Old Bailey trials are far from complete prior to the 1780s and hardly amount to a transcript. *See id.* at 182-89. Moreover, precisely because the hearsay rule was settled as a doctrinal matter and rested on three rationales, there would have been little reason for counsel or the judge to discuss those rationales in the course of trials. Indeed, some of the trial records that did show the exclusion of hearsay evidence did not indicate that either the judge or counsel actually even bothered to use the term "hearsay," let alone discuss the rationale for that rule. *See, e.g., infra* text accompanying notes 253-256. Those cursory applications of the hearsay rule during trials suggest that the rule was so well understood that neither counsel nor the judge thought any discussion of the basis for the rule was necessary.

Additionally, it would seem that the heightened prominence accorded the cross-examination rationale for the hearsay rule that Langbein reports during the nineteenth century might be explained as readily in terms of the diminishing importance accorded to the other rationales for the hearsay rule – that is, the diminishing significance of the oath and the relaxation of the "best evidence" principle—as in terms of any increased assignment of importance to the cross-examination rationale *per se*. Thus, the fact that cross-examination emerged as "the" rationale for hearsay in the nineteenth century does not mean that cross-examination did not earlier constitute one of several salient doctrinal grounds for the hearsay rule at the time of the framing.

NOT THE FRAMERS' DESIGN

431

against hearsay also was still prominent in the criminal evidence treatises published in the decades that immediately followed the framing. In addition to the recognition of the cross-examination rationale for the hearsay ban in the treatises by Lofft, Peake, and Chitty mentioned above,¹⁹⁹ Leonard MacNally's 1802 treatise also treated the ban against hearsay evidence as flowing from the requirement that all criminal evidence had to be given in the defendant's presence.²⁰⁰

A statement by Chief Justice John Marshall also demonstrates that Americans still understood that the ban against hearsay was a component of the confrontation right in the decades following the framing of the Confrontation Clause. In an 1807 evidentiary ruling in one of the trials that arose from the Burr conspiracy, Marshall said the following in a discussion in which he also cited Hawkins's treatise as authority:

The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than him against whom the proceedings are instituted has generally been deemed all essential to the correct

¹⁹⁹ See, e.g., the 1791 statement by Lofft, quoted *supra* note 162; the 1801 statement by Peake, quoted *supra* text accompanying note 166; the 1816 statement by Chitty, quoted *supra* note 171.

²⁰⁰ LEONARD MACNALLY [sometimes cited as M'NALLY], THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 360 (Dublin 1802). In the first "rule" in his chapter on "parol" (oral) evidence, MacNally combined Hawkins's statements regarding the requirement that criminal evidence be presented in the defendant's presence and Hawkins's statement of the ban against hearsay: "No evidence can be received against a prisoner but in his presence: and therefore it is agreed that what a stranger has been heard to say, is in strictness no manner of evidence, either for or against the prisoner." *Id.*, citing "2 HAWK. P.C. ca. 46" (see passages quoted *supra*, text accompanying notes 110, 124). MacNally then continued: "The reasons assigned as the grounds of this [hearsay] rule are, because such evidence is not upon oath: and also because the party, who would be affected by such evidence, had no opportunity of cross examination." *Id.* (citations omitted).

However, MacNally then recognized (as the second rule of oral evidence) "[b]ut hearsay evidence may be made use of by way of inducement or illustration of what is properly evidence." *Id.* (citations omitted).

administration of justice. *I know not . . . why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him.* I know of no principle in the preservation of which all are more concerned. I know of none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.²⁰¹

Marshall made that statement in the context of deciding whether an unsworn hearsay statement proffered by the prosecution fell within the limited-purpose exception that allowed hearsay to be used to prove the general existence of a conspiracy. He went on to rule that the proffered hearsay statement went beyond those bounds because it implicated the defendant personally, and thus was inadmissible.²⁰²

Although Justice Scalia did his best in *Crawford* to evade the plain import of Marshall's statement, what Marshall said leaves no doubt that he understood that the ban against admitting hearsay evidence of a defendant's guilt was required by the defendant's constitutional confrontation right.²⁰³ Indeed,

²⁰¹ United States v. Burr, 25 Fed. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,696). Marshall cited Hawkins's treatise in discussing the hearsay issue. See *supra* note 126.

²⁰² Burr, 25 Fed. Cas. at 195.

²⁰³ Justice Scalia wrote:

Although Chief Justice Marshall made one passing reference to the Confrontation Clause, the case was fundamentally about the hearsay rules governing statements in furtherance of a conspiracy. The "principle so truly important" on which "inroad[s]" had been introduced was the "rule of evidence which rejects mere hearsay testimony." Nothing in [Marshall's] opinion concedes exceptions to the Confrontation Clause's exclusion of testimonial statements as we use the term.

Crawford v. Washington, 541 U.S. 36, 59 n. 9 (2004) (citation to *Burr* omitted).

Justice Scalia's characterization that Marshall made only a "passing reference" to confrontation but that the principle at issue was only the rule

NOT THE FRAMERS' DESIGN

433

Marshall was simply stating the same understanding that the legal authorities of the period also stated. Marshall's understanding of the confrontation-hearsay linkage was essentially the same as that set out by Hawkins, Burn, the American justice of the peace manuals, the legal dictionaries, and the post-framing treatises. Given the consistency among those authorities, it seems highly likely that Marshall's statement reflected a continuation of the pre-framing understanding of that linkage.

Thus, contrary to statements in *Crawford* and *Davis* that seem to deny a connection between the confrontation right and

against hearsay rather than the confrontation right was merely a false dichotomy. Marshall plainly linked the prohibition against hearsay to the constitutional confrontation right. Additionally, Marshall's statement did not indicate that there were "inroad[s]" which "had been introduced" regarding the ban against use of hearsay to prove a defendant's own guilt. The only use of hearsay at issue in *Burr* was the limited-purpose exception that allowed hearsay to prove the general existence of a conspiracy, but *not* to prove the defendant's involvement, and Marshall excluded the hearsay statement in question because it reflected directly on the defendant. Thus, Marshall applied the rule against hearsay, not the limited-purpose exception. *See supra* note 126. As of 1807, there were still no recognized hearsay exceptions (other than a dying declaration of a murder victim) that would have permitted hearsay to be admitted as evidence of a defendant's guilt, so it is apparent that Marshall did not refer to any "inroad[s]" of that sort. Thus, the limited-purpose proof-of-the-existence-of-a-conspiracy exception that Marshall actually discussed was not the equivalent of the modern statements in furtherance of conspiracy exception.

Chief Justice Rehnquist's concurring opinion in *Crawford* also mischaracterized Marshall's statement in *Burr*. The Chief Justice quoted Marshall's statement in the context of asserting that "there were always exceptions to the general rule of exclusion [of hearsay]" and suggested that Marshall's statement "recognized that [the confrontation] right was not absolute, acknowledging that exceptions to the exclusionary component of the hearsay rule, which [Marshall] considered an 'inroad' on the right to confrontation, had been introduced." *Crawford*, 541 U.S. at 74 (Rehnquist, C.J., concurring). Again, however, that rendition overstated the situation regarding historical hearsay exceptions. Marshall had not referred to any exception that would permit use of hearsay to prove a defendant's guilt, as the Chief Justice's statements implied.

the hearsay ban,²⁰⁴ the framing-era authorities did not divorce the ban against unsworn hearsay from the cross-examination right that is central to confrontation. The direct historical evidence that Justice Scalia did not consult in either *Crawford* or *Davis* reveals that the hearsay ban was understood to be a requirement of the confrontation right.

Hence, however “reasonable” the originalist inferences that Justice Scalia drew in *Crawford* might have appeared when viewed in isolation,²⁰⁵ they collide head-on with the evidentiary doctrine that actually shaped the Framers’ understanding of the confrontation right. Admitting unsworn, “nontestimonial” hearsay was not part of “the Framers’ design.”

III. THE CASES CITED IN *CRAWFORD* AND *DAVIS*

What of the historical English cases that were discussed in *Crawford* and *Davis*? Do they alter the picture of the Framers’ understanding of the confrontation right that emerges from the framing-era treatises and manuals? Do they cast doubt on the description of framing-era law presented above? If one actually pays attention to what the cases say, rather than to the modern glosses imposed on them during the arguments in *Davis*, one finds that the statements that appear in the case reports are consistent with the treatment of out-of-court statements in framing-era treatises and manuals.

A. *The Historical Treatment of the Purportedly “Testimonial” Cases*

Let me begin with the two cases that were discussed in *Davis* as though they might be examples of the exclusion of testimonial hearsay statements, *King v. Dingler*,²⁰⁶ and *King v. Brasier*.²⁰⁷

²⁰⁴ See *supra* note 54.

²⁰⁵ See *supra* notes 48-52 and accompanying text.

²⁰⁶ 2 Leach 561, 168 Eng. Rep. 383 (Old Bailey 1791), discussed in *Davis*, 126 S.Ct. at 2277.

²⁰⁷ 1 Leach 199, 168 Eng. Rep. 202 (Twelve Judges 1779), discussed in *Davis*, 126 S.Ct. at 2277.

NOT THE FRAMERS' DESIGN

435

As explained above, neither of these cases were published early enough to constitute valid evidence of the Framers' understanding. In fact, the actual publication stories of these two cases amply illustrate the pitfalls of attempting to base claims about original meaning upon late eighteenth-century English cases. The cases are relevant here only insofar as they provide a check on the evidentiary regime spelled out in the framing-era treatises and manuals.

I. Dingler

Although no one seems to have been aware of it when *Davis* was argued, the 1791 ruling in the Old Bailey in *Dingler* was never published, and thus never available to Americans, until 1800²⁰⁸—eleven years after the Sixth Amendment was framed. Hence, it plainly did not inform the original meaning of the Confrontation Clause in 1789. Nevertheless, Justice Scalia discussed *Dingler* in *Davis* as though the exclusion of the out-of-court statement of the deceased victim was an example of the exclusion of a “testimonial” hearsay statement.²⁰⁹ However, that is not the reason the English judge gave when he ruled the statement inadmissible.

In *Dingler* a justice of the peace had taken and recorded the statement of a victim of an assault after the assailant had been arrested and committed to jail to await trial. The victim subsequently died prior to the trial, and the issue was the admissibility of the victim's statement. The victim's statement did not constitute a dying declaration because she had not been aware of impending death when it was made.²¹⁰ Thus, the issue was whether it was admissible as a sworn Marian witness examination. As noted above, the framing-era evidence authorities recognized that sworn Marian examinations of

²⁰⁸ See *supra* note 69.

²⁰⁹ *Davis*, 126 S.Ct. at 2277.

²¹⁰ *Dingler*, 2 Leach (4th ed. 1815) at 563, 168 Eng. Rep. at 384 (noting that prosecuting counsel conceded that the victim's statement was not a dying declaration).

deceased witnesses could be admitted in felony trials.²¹¹ However, because that rule of admissibility was grounded in the statutory authority for justices of the peace to take such examinations, issues could arise as to whether a statement by a deceased person had actually been taken within the statutory window for exercising Marian authority. This was the issue that was actually argued in *Dingler*.

The Marian statutes provided for the taking of sworn statements of witnesses at the time of a felony arrest, when the justice of the peace was required to decide whether the arrestee should be released, bailed, or committed to jail to await trial. However, the victim's statement in *Dingler* was taken a day after the defendant was arrested and committed to jail. Thus, at *Dingler's* trial, his counsel objected that the victim's statement was inadmissible because, not having been taken in connection with the arrest, it was outside the scope of Marian authority and not properly sworn. *Dingler's* counsel offered the 1789 Old Bailey ruling in *King v. Woodcock* as authority for his position.²¹²

In *Woodcock*, in turn, the trial judge had ruled that a deceased victim's out-of-court statement could not be admitted at trial as a Marian examination because, having been taken separately from, rather than in connection with, the defendant's arrest, the procedure was "extrajudicial" and, thus, the victim's statement was not "upon oath, judicially taken."²¹³ The presiding trial judge at *Dingler's* trial accepted that ruling as authority and excluded the victim's statement on the basis of

²¹¹ See *supra* text accompanying notes 116-123, 132, 136, 143, 156; see also note 160.

²¹² *Dingler*, 2 Leach (4th ed. 1815) at 562-63, 168 Eng. Rep. at 383-84, noting that defense counsel cited the case of *King v. Woodcock*, 1 Leach (4th ed. 1815) 500, 168 Eng. Rep. 352 (Old Bailey 1789). *Woodcock* was initially published in the first edition of Leach's reports. See Leach (1st ed. 1789) 437. That volume was probably published in late 1789, after the framing of the Sixth Amendment. See *supra* note 68. Unlike some of the other cases reported in Leach's first edition, there were no significant alterations of the *Woodcock* report in the later editions.

²¹³ *Woodcock*, Leach (1st ed. 1789) at 440; 1 Leach (4th ed. 1815) at 502, 168 Eng. Rep. at 353.

NOT THE FRAMERS' DESIGN

437

Woodcock.²¹⁴

The significant point for present purposes is that neither the ruling in *Dingler* nor that in *Woodcock* made any reference to the “testimonial” character of the excluded statement or to any other aspect of the character of what was said. Likewise, neither of the cases said anything that might suggest that an unsworn, nontestimonial hearsay statement could ever be admitted as evidence. To the contrary, the presiding judge in *Woodcock* made a statement that identified only two forms of out-of-court statements that could be admitted as to a defendant’s guilt:

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 statute], 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.²¹⁵

Significantly, the only two kinds of out-of-court statements that the judge in *Woodcock* identified as admissible evidence of a

²¹⁴ *Woodcock*, Leach (1st ed. 1789) at 440; 1 Leach (4th ed. 1815) at 502, 168 Eng. Rep. at 353.

²¹⁵ *Woodcock*, Leach (1st ed. 1789) at 439; 1 Leach (4th ed. 1815) at 501-02, 168 Eng. Rep. at 352-53.

defendant's guilt—a dying declaration of a murder victim and a sworn Marian witness examination of an unavailable witness—are precisely the same as the only two kinds identified in the treatises and manuals.²¹⁶

Dingler and *Woodcock* do not reveal the “testimonial” end of a distinction between “testimonial” and “nontestimonial” hearsay. Rather, they simply reflect an across-the-board rule that no statement could be offered as evidence in a criminal case, even from an unavailable declarant, unless it was made under a valid oath, or the equivalent of an oath in the case of a dying declaration. Thus, these cases underscore that unsworn out-of-court statements were never admissible as evidence of a defendant's guilt, and that out-of-court statements of available witnesses were never admissible, either.

2. Brasier

The reporting of the 1779 rulings in *Brasier* also illustrates the hazards of working with reports of English criminal trials from the late eighteenth century. The version of *Brasier* that was relied upon in the briefs and opinion in *Davis* was substantially different from the report that Thomas Leach initially published in 1789. It appears that Leach got the facts of the trial wrong in the first version; the version of *Brasier* that now appears in the English Reports and that everyone used in *Davis* is a corrected account that was not published until 1815.²¹⁷ Hence, it is patent

²¹⁶ See *supra* text accompanying notes 116-123, 151-154.

²¹⁷ The initial one-page report of *Brasier* appeared in Leach (1st ed. 1789) 346. That report was published in late 1789 after the framing. See *supra* note 68. The initial report stated that Brasier had been convicted of rape on the basis of the unsworn trial testimony of the child-victim, “an infant under seven years of age” who was too immature to be sworn. The trial judge allowed the admission of the child's testimony but then “respited” (that is, delayed) entering judgment on Brasier's conviction and took the issue to the Twelve Judges. The Twelve Judges then unanimously overturned the conviction and ruled “[t]hat no testimony whatever can be legally received except upon oath,” but also stated, as a rule for future trials, that an infant victim of a crime even younger than seven might be sworn if the child could appreciate the consequences of the oath. The ruling of the Twelve Judges

NOT THE FRAMERS' DESIGN

439

that the account discussed in *Davis* could not have informed American framing-era thinking. Nevertheless, the corrected account does shed some light on late eighteenth-century English hearsay doctrine.

The report of *Brasier* stated rulings in two courts: first, a ruling admitting evidence in a felony trial at the Assizes in Reading (that is in a felony trial comparable to that held at the

was:

That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath: for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent, their testimony cannot be received.

Id.

However, in the 1800 third edition, Leach inserted a footnote into the earlier report of *Brasier* to the effect that further information indicated that the child had not testified at all, but that the mother and another witness had testified as to what the child had told them. 1 Leach (3rd ed. 1800) at 237 n. (a). The note indicates that the revised information came from “a manuscript of this case, in the possession of a gentleman at the bar” (possibly Edward Hyde East who had access to the judges’ unpublished manuscripts. *See infra* notes 223-224 and accompanying text).

Then in the 1815 fourth edition, which is reprinted in the English Reports—that is, the version that was actually cited and discussed in *Davis*, 126 S.Ct. at 2277—Leach gave a fuller corrected account of the trial proceedings. 1 Leach (4th ed. 1815) 199, 168 Eng. Rep. 202. The corrected report even identified a different trial judge and location: the initial 1789 report identified Justice Gould at the York Assizes, but the revised 1815 account identified Justice Buller at the Reading Assizes.

I am indebted to Professor Robert Mosteller for calling the inconsistency of the reports of *Brasier* in the various editions of Leach’s reports to my attention, as well as for calling my attention to the discussion by East, discussed in the text below. For a more detailed discussion of the changes in Leach’s reports of *Brasier*, see Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them,”* 82 IND. L.J. 919, 925-35 (2007).

Old Bailey in London²¹⁸), and then the more authoritative, quasi-appellate ruling by the Twelve Judges in London.²¹⁹ In the corrected account of *Brasier* that was cited and discussed in *Davis*, the evidence at Brasier's trial was described as follows:

The case against the prisoner was proved by the mother of the [child victim], and by another woman who lodged with her, to whom the child, immediately on her coming home, told all the circumstances of the injury which had been done to her: and there was no fact or circumstance to confirm the information which the child had given, except that the prisoner lodged at the very place which she had described, and that she had received some hurt, and that she, on seeing him the next day, had declared that he was the man; but she was not sworn or produced as a witness on the trial.²²⁰

However, Leach reported that when Brasier's conviction was reviewed and reversed by the Twelve Judges, they stated "[t]hat no testimony whatever can be legally received except upon oath," but went on to say (presumably as advice for future trials) that a child victim of a crime even younger than seven might be sworn if the child could appreciate the consequences of

²¹⁸ The Old Bailey was the London-area equivalent of the provincial assize courts, that is a felony trial court. See LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 16-17.

²¹⁹ The Twelve Judges were composed of the combined benches of the three common-law superior courts at Westminster: King's Bench, Common Pleas, and Exchequer. These were also the judges who presided at felony trials in the Old Bailey and on Assizes. See LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 212-13.

When novel or unsettled issues arose in trials, the presiding judge could "respite" (delay) the judgment in the case and refer the question to the collective judgment of the combined judges. Because there was no writ of error in criminal cases, this was the primary mode of review in criminal cases. See *id.* The Twelve Judges were also sometimes referred to as the Court of Exchequer Chamber. See 3 BLACKSTONE, *supra* note 90, at 55-56 (1st ed. 1768).

²²⁰ *Brasier*, 1 Leach (4th ed. 1815) at 199; 168 Eng Rep. at 202.

NOT THE FRAMERS' DESIGN

441

the oath.²²¹ Leach also added in his corrected report that “[t]he Judges determined, therefore, that the evidence of the information which the infant had given to her mother and the other witness, ought not to have been received”;²²² that is, that the *unsworn* “information” of the child could not not be repeated by anyone else at trial.

There is also another even fuller account of *Brasier*, not mentioned in *Davis*, that was published in 1803 by Edward Hyde East.²²³ East’s account indicated that the Twelve Judges were not initially unanimous as to the final rulings. Specifically, it indicated that two of the judges initially thought that the mother might testify to what the child said immediately after the rape “because it was part of the fact or transaction itself.” (This is the earliest indication of the *res gestae* concept I have come across in a criminal case.) However, most of the judges rejected that view in their initial discussion, and ultimately the judges unanimously rejected it.²²⁴

²²¹ The account of the ruling of the Twelve Judges is essentially the same in Leach’s various reports of *Brasier*. Because the child-victim had not actually testified at the trial, and because *Brasier* could not be retried, the statements of the Twelve Judges regarding the minimum age at which a child had sufficient “discretion” to take an oath can only have been forward-looking dicta to provide direction for future trials. The only statement the judges made regarding *Brasier*’s own trial was that the mother could not testify to the child’s statements as a substitute for the child testifying herself. Thus, the ruling overturning *Brasier*’s conviction carried a clear message that a valid conviction could be obtained in future child rape cases only if the living child victim testified in person at the trial.

²²² *Brasier*, 1 Leach (4th ed. 1815) at 200, 168 Eng. Rep. at 202-03.

²²³ See 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 443-44 (London, 1803) (discussing *Brasier* in the context of a larger discussion of evidence in child rape cases). East’s account of *Brasier* was apparently based on manuscript accounts of the case by judges Gould and Buller. See East’s marginal note, 1 *id.* at 443 (“MS Gould and Buller Js”) and the Preface and listing of the manuscripts on which the work was based, 1 *id.* at v-xv.

²²⁴ According to East’s account of *Brasier*, there was initially a difference of opinion among the judges. Most of the judges were of the view that the mother’s hearsay evidence was inadmissible, but that even a child under seven might be sworn if it appeared she was “capable of distinguishing

Does the ruling in *Brasier* tell us anything about *Crawford's* originalist testimonial/nontestimonial hearsay distinction? In *Davis*, counsel for *Davis* argued that the hearsay account of the child's statements that had been excluded in *Brasier* were comparable in character to the statements contained in the 911 call in *Davis* itself, and thus that the statements to the 911 operator should be deemed to fall within *Crawford's* "testimonial" category and be inadmissible.²²⁵ However, Justice Scalia rejected the comparison between the statements made by the child in *Brasier* and the statements made during the 911 call in *Davis*. Specifically, Justice Scalia noted that the child's statements in *Brasier* were not made "during an ongoing emergency" but were only an "account of past events," and thus were dissimilar from those made during the ongoing emergency situation in *Davis* itself. Thus, Justice Scalia commented that the

between good and evil." However, two judges, Gould and Willes, were of the view that a child under seven could never be sworn but that the mother's account of the child's statements should have been admitted because, the statement "being recently after the fact [that is, the rape], so that it excluded a possibility of practicing on her, it was a part of the fact or transaction itself and therefore admissible" (that is, what would now be termed *res gestae*). One other judge, Buller, took the view that the mother's evidence should have been admissible "if by law the child could not be examined under oath." 1 *id.* at 443-44. (This is the earliest mention of a *res gestae* exception in a criminal case that I have located, though that term was not used—but note that most of the judges still rejected it.)

East indicated that the judges later met and "unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined on oath; and consequently that evidence of what she had said ought not to have been received. And that a child of whatever age cannot be examined unless sworn." 1 *id.* at 444. Thus, the *res gestae* treatment was ultimately rejected by all of the justices.

East also added that "[i]t does not however appear to have been denied by any in the above case that the fact of the child's having complained of the injury recently after it was received is *confirmatory* evidence." 1 *id.* (emphasis added). This would appear to be a reference to the limited-purpose corroboration hearsay exception; that is, if the child testified under oath, statements she made after the rape could be testified to by another witness to confirm that the child's account at trial was consistent with her earlier statements.

²²⁵ *Davis*, 126 S.Ct. at 2277.

NOT THE FRAMERS' DESIGN

443

exclusion of the hearsay evidence in *Brasier* would have been “helpful” in Davis’s attempt to exclude the 911 statements only “if the relevant statement had been the girl’s screams for aid as she was being chased by her assailant.”²²⁶

The important point for assessing the originalist claims in *Crawford* and *Davis*, however, is simply that the historical ruling in *Brasier* was not based on the context in which the child’s statements had been made; rather, the Twelve Judges ruled that the mother’s account of the child’s unsworn statements was inadmissible as hearsay regardless of the context. Thus, the ruling actually reported in *Brasier* neither said nor implied that any distinction could be drawn between testimonial or nontestimonial hearsay in 1779.²²⁷ Indeed, the mere fact that the judges used the term “testimony” when they ruled that “no testimony whatever” could be admitted without oath did not refer to *Crawford*’s “testimonial” category—any statement made by a witness during a trial constituted “testimony” in 1789, regardless of whether its content might now be characterized as being “testimonial” or “nontestimonial” under *Crawford*’s scheme.²²⁸ Indeed, the ultimate ruling of the Twelve Judges—

²²⁶ *Id.* It may be noteworthy that Justice Scalia did not say whether the girl’s “account of past events” to her mother in *Brasier* amounted to a testimonial statement under *Crawford*. That silence would seem to reflect the Court’s disinclination to decide in *Davis* whether a statement to a private person can constitute a testimonial statement under *Crawford*. See *id.* at 2274 n. 2.

²²⁷ As Chief Justice Rehnquist previously noted, the ruling in *Brasier* drew no distinction between kinds of hearsay statements. *Crawford*, 541 U.S. at 69-70 (Rehnquist, C.J., concurring).

²²⁸ I mention this rather obvious point only because I have heard discussions in which the judges’ use of the rather general term “testimony” in the ruling of the Twelve Judges in *Brasier* was arbitrarily equated with the narrower meaning assigned to “testimonial” in *Crawford*. However, it is patent in the context that the judges used “testimony” simply as a generic term for any statement made by a witness during a trial. Any statement made by a witness in court would constitute “testimony” (what else would one call it?), regardless of the content or character of the statement. As noted above, it does not appear that “testimonial” was ever used to designate a category of evidence at the time of the framing; in fact, it does not appear that “testimonial” was even used as an adjective. See *supra* notes 50, 51.

that the mother could not recite the unsworn statement of the child because “no testimony whatever can be legally received except upon oath”—did not leave room to admit any unsworn hearsay statement.²²⁹ The Twelve Judges simply restated the same blanket exclusion of *unsworn* hearsay that also was set out by the treatises and manuals of the time.²³⁰

However, a question remains: if there was a blanket prohibition against hearsay evidence, why did the trial judge permit the mother to testify at all in *Brasier*? The answer appears to be that the issue of what could constitute admissible evidence in the case of a child rape victim who was too young to be sworn was understood to be a uniquely difficult and unsettled question.²³¹ On the one side, the likelihood that the child would be the only source of information about the crime presented a case for allowing that evidence somehow to come in as a matter of necessity. For example, writing in the mid 1600s Sir Matthew Hale had opined that a child’s unsworn information might be admitted, or that a parent might be allowed to recount the child’s account (though Hale thought the latter was the less preferable option).²³² Moreover, Blackstone had initially

²²⁹ Recall the statements in the evidence treatises to the effect that a sworn recitation of an unsworn statement could not cure the unsworn character of the original “bare speaking.” See *supra* text accompanying notes 137 (GILBERT), 144 (BATHURST and BULLER).

²³⁰ As discussed above, dying declarations of murder victims, which were viewed as having been made under circumstances equivalent to an oath (see *supra* note 153 and accompanying text), were the only category of hearsay that could be admitted to prove the guilt of the defendant. See, e.g., *supra* notes 172, 215 and accompanying text.

²³¹ See LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 239-41 (noting that no formal exception to the hearsay rule was developed for child rape cases because allowing hearsay was too hard to reconcile with the core policies underlying the hearsay rule, the oath and cross-examination).

²³² 1 MATTHEW HALE, *HISTORY OF THE PLEAS OF THE CROWN* 634-35 (published 1736; written sometime prior to Hale’s death in 1676). In addition to suggesting that a child rape victim under the age of twelve might be permitted to testify under oath (as had been allowed in trials of witches), Hale suggested that a young child might be permitted to testify without oath. However, Hale suggested that a rape conviction should not be based on such unsworn testimony unless there was some additional corroborating evidence.

NOT THE FRAMERS' DESIGN

445

endorsed Hale's views in 1769²³³ (though he later reversed and took the opposite position after he participated as one of the Twelve Judges in the *Brasier* decision).²³⁴ Hawkins offered only an ambiguous statement on the subject.²³⁵

On the other side, several reported cases had taken the view that the admission of a child's unsworn testimony plainly violated the basic requisites of criminal evidence, and that this was also the case if a parent was admitted as a sworn witness to recite a child's unsworn information. By the late eighteenth

1 *id.* Hale also left open the possibility that a parent might testify to what a young child had reported, though he suggested that was second best to hearing from the child directly. 1 *id.* The fact that Hale probably wrote his treatise sometime around 1665 is significant, however, because the law of hearsay may not have been much developed at that time. Rather, Hawkins traced the requirement that all evidence be presented under oath in the presence of the prisoner to 1680. *See supra* note 111.

In the second volume of this treatise, Hale also suggested that "an infant of tender years may be examined without oath, where the exigence of the case requires it, as in case of rape, buggery, witchcraft." 2 HALE, *supra*, at 279.

²³³ 4 BLACKSTONE, *supra* note 90, at 214-15 (1st ed. 1769). Blackstone probably repeated this position through his eighth London edition in 1778, which was published prior to the 1779 decision in *Brasier*. I have not located that edition, but I have confirmed that Blackstone made no change as of the 1775 seventh London edition. *See 4 id.* at 214-15 (7th ed. 1775).

Blackstone's initial statement is important for assessing the American understanding of this issue because of the large number of Americans who purchased copies that were printed in Philadelphia in 1771-1772. *See supra* note 90. There was no subsequent American printing of Blackstone's *Commentaries* until 1790 (that is, until after the framing of the Bill of Rights). *See JAMES, supra* note 90, at 185 (entry 69).

²³⁴ Blackstone was one of the Twelve Judges who decided *Brasier* in 1779, so he amended the statement in his ninth London edition in 1783 to reflect that decision. *See 4 BLACKSTONE, supra* note 90, at 214-15 (9th ed. 1783). The 1783 9th edition was the last in which Blackstone personally made alterations. *See 1 MAXWELL, supra* note 108, at 28.

²³⁵ 2 HAWKINS, *supra* note 108, at 434 (1771 ed.) (stating "[t]hat want of discretion [that is, maturity] is a good exception against a witness; on which account alone it seems, That an infant may be excepted against; for in some cases an infant of nine years of age has been allowed to give evidence").

century, most of the authorities seem to have opined that a prosecution could be based on a child-victim's information only if the child was old enough to be sworn and personally testified under oath.²³⁶ However, there are indications that trial rulings on the issue during the eighteenth century went both ways.²³⁷

The Twelve Judges had taken up the issue of whether a young child-victim could testify a few years before *Brasier* in a 1775 case, but had not resolved it at that time.²³⁸ Hence, it

²³⁶ King v. Travers, 2 Str. 700, 700-01; 93 Eng. Rep. 793, 793-94 (K.B. 1726); Omychund v. Barker, 1 Atk. 21, 29; 26 Eng. Rep. 15, 20 (Chancery 1744). Burn appears to have altered his discussion of the admissibility of statements by child rape victims on the basis of these cases. As late as the 1764 edition, Burn's manual simply noted Hale's statements allowing the admission of the child's information. See 1 BURN, *supra* note 155, at 342 (1764 ed.). However, in 1766 he altered his rendition of Hale's position by removing the words "without oath" from the end of a statement that "in many cases an infant of tender years may be examined," and by adding a new statement that "[b]ut in no case shall an infant be admitted as evidence without oath. Str. 700. Tracy Atk. 29." See 1 *id.* at 475 (1766 ed.).

²³⁷ The amicus brief of the National Association of Counsel for Children supporting respondents Washington and Indiana in *Davis* and *Hammon* reported that cases described in the Old Bailey Sessions Papers show that young child victims sometimes were permitted to testify without oath and that other witnesses sometimes were permitted to testify about out-court statements by child victims. See Brief for the National Association of Counsel for Children as Amicus Curiae Supporting Respondents at 19-22, n. 13, *Davis v. Washington*, 126 S.Ct. 2266 (2006). See also Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons from King v. Brasier*, 15 J.L. & POL'Y 495, *passim* (2007) (reporting that in some of the Old Bailey trials involving young child victims, the child was permitted to testify without oath, but that in some the child was prevented from testifying, while in others family members, doctors, neighbors, or others were sometimes allowed to repeat what the child victim had said out-of-court). See also LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 239-40.

²³⁸ See *Powell's Case*, Leach (1st ed. 1789)114 (1775). Leach's initial report indicated that the defendant was convicted of rape on the basis of the unsworn testimony of an infant between six and seven years of age, but that Justice Gould reserved the case for the Twelve Judges because, especially in criminal cases, "no evidence can be legal unless it is given upon oath." This initial report stated that "[t]he question was under consideration [by the Twelve Judges], and the prisoner was pardoned," but no express opinion was given on the point.

NOT THE FRAMERS' DESIGN

447

appears that the issue of a parent's hearsay testimony arose in *Brasier* because the law remained *uniquely* unsettled as to what evidence could be admitted in a child rape prosecution. However, it was not unsettled after *Brasier*: the Twelve Judges came down on the side of enforcing the principles of evidence even in the hard case of the child-victim, albeit while signaling that in future trials some flexibility could be shown in determining whether a child victim was mature enough to be sworn.²³⁹

However, the report of *Powell* in Leach's 1800 third edition is quite different. In that report, the child testified without being sworn, but "the prisoner was *acquitted* upon her testimony." 1 Leach (3rd ed. 1800) at 128 (emphasis added). Nevertheless, the trial judge "mentioned the case to the Judges; and the majority of them were of opinion that in criminal cases no testimony can be received except upon oath." *Id.* at 128-29. Thus, assuming the latter report is correct, there was a split of opinion among the judges on this issue as late as 1775, only four years prior to *Brasier*.

²³⁹ The conflict among the authorities regarding the admissibility of a young child victim's information regarding a rape makes it problematic how framing-era Americans would have evaluated legal authority on that issue. The opinion in *Brasier* was not published until late 1789. *See supra* note 68. The only information available about *Brasier* by the date of the framing in 1789 was the alteration that Blackstone had made in the 1783 edition of his *Commentaries*. *See supra* note 234. However, it seems unlikely that Americans would have imported many copies of Blackstone's editions between 1782 and 1789; instead, most of the copies of Blackstone's *Commentaries* then in circulation in America would have been of the 1771-1772 Philadelphia reprint of Blackstone's earlier 1769 edition.

Moreover, even if Americans learned of *Brasier* from the later editions of Blackstone's *Commentaries*, that ruling was made by an English court after American independence, so it would not have been part of the common law absorbed by the American states in 1775 or 1776. Thus Americans may have given more weight to Blackstone's earlier statement.

On the other hand, as noted above, Burn had revised his statement on the issue in the 1766 edition of his justice of the peace manual to the effect that a child's information could not be admitted except under oath, and had cited early eighteenth-century cases to that effect. *See supra* note 236. A number of the framing-era justice of the peace manuals printed in America repeated Burn's revised statement and his citations to the earlier cases. *See GREENLEAF, supra* note 160 at 124; STARKE, *supra* note 160, at 144-45; GRIMKE, *supra* note 160, at 191. However, the 1765 through 1788 printings of *Conductor Generalis* continued to quote Burn's earlier statement endorsing

The significant point for present purposes is that the ruling in *Brasier*, like the rulings in *Dingler* and *Woodcock*, did not draw on any historical distinction between testimonial and nontestimonial hearsay. Rather, the actual rulings in all three cases consistently confirmed the basic doctrinal rule that unsworn hearsay statements were inadmissible as evidence of a criminal defendant's guilt.

B. The Absence of Cases that admitted "Nontestimonial" Hearsay

The other and more telling aspect of the search for historical cases in *Davis* and *Hammon* is the absence of any example of a historical case that admitted any unsworn out-of-court statement that could now be labeled a "nontestimonial" hearsay statement. As noted above, no such case was identified in the briefing in *Davis*. Moreover, it appears that the only case of that sort identified in *Crawford* probably involved a different consideration.

In *Crawford*, Justice Scalia suggested that the 1694 trial ruling in *Thompson et Ux v. Trevanion*²⁴⁰ might be an example of what is now termed the "excited utterance" or "spontaneous declaration" hearsay exception. Specifically, Justice Scalia quoted from the ruling of the trial judge in *Thompson* when Justice Scalia commented that "to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'"²⁴¹

Thompson may now appear to have involved a spontaneous declaration hearsay exception. The entire report was as follows:

the admission of a child-victim's unsworn information. See PARKER'S CONDUCTOR, *supra* note 160, at 167; GAINÉ'S CONDUCTOR, *supra* note 160, at 140; HODGE'S CONDUCTOR, *supra* note 160, at 170.

²⁴⁰ *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (Nisi Prius 1694), discussed in *Crawford*, 541 U.S. at 58 n. 8.

²⁴¹ *Crawford*, 541 U.S. at 58 n. 8, quoting *Thompson*, Skin. 402, 90 Eng. Rep. 179 (Nisi Prius 1694).

NOT THE FRAMERS' DESIGN

449

Ruled upon evidence, that a mayhem may be given in evidence, in an action of trespass of assault, battery, and wounding, as an evidence of wounding per Holt Chief Justice; and in this case he also allowed, that what the wife said immediately upon the hurt received, and before that she had time to devise or contrive any thing for her own advantage, might be given in evidence; quod nota; this was at Nisi Prius in Middlesex for wounding of the wife of the plaintiff.²⁴²

A similarly cryptic report also appears in Holt's King's Bench Reports.²⁴³

On its face, this report indicates that someone other than "the wife of the plaintiff" testified as to "what the wife said immediately upon the hurt received." Thus, it may appear that this is a case in which a hearsay account of the wife's statement was testified to by another witness under a spontaneous declaration exception, albeit in a civil rather than criminal trial. However, that is not how Gilbert characterized the issue in *Thompson*.

As Petitioner's brief in *Davis* noted, Gilbert's evidence treatise cited *Thompson* as an example of the allowance of hearsay for corroboration that applied when there was a single witness;²⁴⁴ that is, the limited-purpose corroboration exception

²⁴² Skin. 402, 90 Eng. Rep. 179 (Nisi Prius 1694).

²⁴³ The other report of *Thompson* states:

Holt C. J. Ruled upon Evidence, that a Mayhem may be given in Evidence in an Action of Trespass of Assault, Battery and Wounding, as an Evidence of Wounding. And in this Case he also allowed, that what the Wife said immediate upon the hurt received, and before she had Time to devise or contrive any thing for her own Advantage, might be given in Evidence.

Thompson v. Trevanian, Holt K.B. 286, 90 Eng. Rep. 1057 (Nisi Prius 1694). (Chief Justice Holt was not the author of these reports; rather, they were called "Holt's King's Bench Reports" because they report cases from the period when Holt was chief justice.)

²⁴⁴ Brief of Petitioner at 30, *Davis v. Washington*, 126 S.Ct. 2266 (2006), citing GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 108 (1st ed. 1754). The marginal note to Gilbert's discussion of the allowance of hearsay

discussed above.²⁴⁵ Gilbert's classification of the case suggests that the wife (possibly as the only witness to her wounding) had testified under oath during the trial, and that the out-of-court statements she had made "immediately upon the hurt received" were then recited by another witness simply to corroborate the wife's trial testimony. Although the *Thompson* report has more than its share of mysteries²⁴⁶—or perhaps because it has more than its share—Gilbert's nearly contemporaneous interpretation should be accorded considerable weight.²⁴⁷ Hence, it does not

to corroborate a single witness contains the citation "Skin. 402," the citation to *Thompson*.

²⁴⁵ See *supra* text accompanying note 138.

²⁴⁶ There is another cite to *Thompson* that is quite mysterious. Matthew Bacon's 1736 *Abridgment* cited "Skin. 402" in the margin next to his paraphrase of Hawkins's statement that hearsay was no evidence, but that hearsay might "be made use of by Way of Inducement or Illustration of what is properly Evidence." See 2 BACON, *supra* note 120, at 313 (*compare* passage quoted *supra* text accompanying note 120). However, it is hard to see any way to read the wife's statement in *Thompson* as illustrating what is otherwise proper evidence. Bacon apparently had access to Gilbert's still unpublished manuscripts, so it is likely that the "Skin 402" cite came from Gilbert's evidence manuscript. It may be a simple case of Bacon's printer having placed the "Skin 402" citation in the margin next to the wrong paragraph in the text, because the paragraph that follows in Bacon's *Abridgment* sets out the corroboration hearsay exception to which Gilbert had cited "Skin. 402." See 2 *id.* (passage quoted *supra* text accompanying note 130).

²⁴⁷ Of course, one might wonder why, if *Thompson* involved only the corroboration exception, the judge bothered to note that the wife's prior statement was "immediately upon the hurt received"? My hunch is that this was prompted because allowing the wife to testify at all involved an exception to the usual rule that, in civil cases, an interested party—which the wife was as a co-plaintiff with her husband—usually could not be admitted as a witness. Exceptions to that rule were permitted, however, in criminal prosecutions for assault where the interested party was the only possible source of information as to what happened. My hunch is that something like that criminal exception was involved here. (Indeed, it is possible that the opening statement in the report "that a mayhem may be given in evidence" may be a cryptic reference to the crime of mayhem or even to a conviction for that crime. "Mayhem" referred to a disabling wound.) Hence, my hunch is that the trial judge thought that, because the wife was an interested party and her testimony already involved an exception, it was appropriate to put

NOT THE FRAMERS' DESIGN

451

appear that *Thompson* was actually an example of a spontaneous declaration hearsay exception.

Additionally, whatever *Thompson* actually involved, the case report seems to have lurked in obscurity prior to the framing of the Confrontation Clause in 1789. Petitioner's reply brief in *Hammon* noted that *Thompson* was never cited by any reported English decision prior to 1805.²⁴⁸ As a result, it appears that the only way a framing-era American lawyer would have been likely to have discovered the case was through Gilbert's citation.²⁴⁹

some additional limit on the corroboration of a party's testimony by hearsay evidence about the party's prior out-of-court statements.

It should be noted that although Petitioner's Brief in *Hammon* dismissed *Thompson* as being too obscure to matter, it rejected Gilbert's characterization of *Thompson* as a corroboration case as "inapposite." That dismissal seems to have been based partly on the assumption that the citation was posthumously added by the editor rather than by Gilbert himself, and partly on the assumption that exceptions were never made to the rule that an interested party could not be a witness in a civil lawsuit for damages. See Brief of Petitioner at 25 n. 26, *Hammon v. Indiana*, 126 S.Ct. 2266 (2006). I am doubtful that either objection has much weight. I know of no reason why the margin cite was not one that Gilbert made himself—it appeared in the first edition of Gilbert's treatise, and the editor who published the treatise described the contents as Gilbert's own work without alterations (of course, even Gilbert's editor was in a better position to know what the cryptic report referred to than we now are). Second, I think it is quite plausible that the admissibility of an assault victim as a witness in a criminal proceeding could have leaked over into a related civil suit for assault, as well.

²⁴⁸ Brief of Petitioner at 30-31, *Hammon v. Indiana*, 126 S.Ct. 2266 (2006) (citing *Aveson v. Kinnaird*, 6 East 197, 102 Eng. Rep. 1258 (K.B. 1805), discussed *infra* text accompanying notes 266-269).

²⁴⁹ Legal research was far more difficult during the framing-era than it is today. In particular, there were no general digests to locate pertinent cases. Rather, each volume or set of case reports typically had its own table of subjects. Thus, research was time-consuming. Additionally, few Americans would have had access to anything like a comprehensive collection of the English case reporters. Instead, a framing-era American lawyer or judge probably started research with a treatise or justice of the peace manual and then looked to the cases cited in the margins of those authorities, if they had access to those reporters. Hence, it seems likely that a framing-era American lawyer would have located *Thompson* only through the marginal citation in Gilbert's treatise—assuming the lawyer had access to a set of Skinner's reports. Notably, no copies of Skinner's reports are identified in one study of

The fair conclusion seems to be that framing-era Americans were probably unaware of *Thompson*, but were unlikely to have thought it was authority for a spontaneous declaration or *res gestae* hearsay exception even if they somehow did become aware of it.

Once the confusion over *Thompson* is dealt with, the net result is that no brief or opinion in *Davis* or *Crawford* identified even a single published framing-era case report that actually admitted an unsworn out-of-court statement that might now be described as “nontestimonial hearsay.”²⁵⁰ The obvious explanation for that absence, given the absence of pertinent criminal hearsay exceptions in the discussions in the treatises,²⁵¹ is that the criminal hearsay “exceptions” that are now prominent features of evidence law simply had not yet been invented when the Bill of Rights was framed. Available evidence regarding the post-framing appearance of criminal hearsay exceptions also points to that conclusion.

IV. WHEN WERE THE HEARSAY EXCEPTIONS INVENTED?

When did judges actually invent the hearsay exceptions that are now part of criminal evidence law? And did those judges take the confrontation right into account when they invented those exceptions? Based on available clues, it does not appear that the judges who fashioned the modern exceptions gave much thought to the conflict between the new exceptions and the earlier understanding of the confrontation right.

the libraries of eighteenth-century Massachusetts lawyers. See ECKERT, *supra* note 109, at 551-55.

²⁵⁰ Justice Scalia did recognize that a “dying declaration” was admissible evidence at the time of the framing, and that such declarations might be either testimonial or nontestimonial under *Crawford*’s scheme, *See Crawford*, 541 U.S. at 56 n. 6.

²⁵¹ The recognized exceptions pertained only to certain specific issues in civil lawsuits. *See supra* text accompanying note 162.

NOT THE FRAMERS' DESIGN

453

A. The Hearsay that English Juries "Heard"

As discussed above, framing-era evidence authorities state a virtually total ban (that is, except for dying declarations of a murder victim) against admitting unsworn hearsay statements as evidence of a defendant's guilt. Because it seems safe to assume that the American Framers were concerned with legal doctrine when they framed the Confrontation Clause, it also seems safe to assume that the legal doctrine of the time informed their actual design for the Confrontation Clause. Hence, the reasonable conclusion is that the original Confrontation Clause incorporated the doctrinal ban against unsworn hearsay evidence.

Of course, there has always been some slippage between legal doctrine and legal practice, and there are reasons to think that the "gap" between doctrine and practice was at least as large in 1789 as it is today. For one thing, not all defendants were represented by counsel, so hearsay often may have gone unchallenged during criminal trials. For another, the absence of systematic forms of appellate review in criminal cases meant that trial judges retained considerable discretion as to whether to adhere to doctrine in admitting evidence at trial.

We know very little about the way framing-era criminal trials were actually conducted in the American states. However, recent historical research has shed considerable light on how criminal trials were conducted in London in the 1780s. Although one cannot assume that English trials, and particularly London trials, shed direct light on framing-era American trial practices, the English practices are indirectly relevant insofar as they shed light on doctrinal developments. That is so because English evidence doctrine almost certainly did influence American doctrinal developments during the nineteenth century.

What does the recent research on English trials show about when and how hearsay exceptions emerged? Unsurprisingly, it shows that the doctrinal rule against hearsay was inconsistently enforced during the eighteenth century. The surviving criminal

trial records, primarily the Old Bailey Sessions Papers,²⁵² are inadequate to support a quantitative assessment of how frequently the hearsay rule was enforced. However, the accounts of Old Bailey trials do provide clear examples of judges or defense counsel cutting off a witness who was about to repeat a potentially material out-of-court statement made by someone other than the defendant.

For example, Professor Langbein has related a 1783 trial for theft of iron goods in which a constable who discovered the stolen goods stated that he “asked Mrs. Dunn whose they were,” at which point defense counsel interjected that “You must not tell us what she said” and the judge said “No, certainly not.”²⁵³ Professor Gallanis has identified similar rulings. For example, in a 1780 trial involving theft of wood, a witness for the prosecution stated that the defendant had told him he had bought the wood in question from John Gibbons (recall that testimony about a defendant’s own statement did not constitute hearsay), but when the witness started to repeat what Gibbons had told him (which would constitute hearsay), the judge inquired if Gibbons was going to testify and, being told he was not, told the witness “You must not tell us what he said.”²⁵⁴ In other instances, however, the judge did not succeed in preventing the reciting of a hearsay statement but either told the jury the out-of-court statement was “no evidence”²⁵⁵ or simply commented that the witness should not have repeated the statement.²⁵⁶

²⁵² See *supra* note 63 (the Old Bailey Sessions Papers are abbreviated as “OBSP” in the notes following).

²⁵³ Trial of William Jones, OBSP December 1783, no. 102, at 130, 131, described in LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 243.

²⁵⁴ Trial of Francis Hall, OBSP January 1780, no. 83, at 110, 113, identified by Gallanis, *supra* note 37, at 535 n. 263.

²⁵⁵ See, e.g., Trial of John Mills, OBSP January 1785, no. 253, at 291 (reporting, in a case involving theft of a lottery ticket, that a servant testified that he knew relevant directions “[b]ecause I heard my master say so” and either defense counsel or the judge stated “[t]hat is no evidence at all”), identified in Gallanis, *supra* note 37, at 535 n. 263.

²⁵⁶ See, e.g., Trial of John Gould, OBSP January 1780, no. 46, at 61, identified in Gallanis, *supra* note 37 at 535 n. 263.

NOT THE FRAMERS' DESIGN

455

In still other instances, however, witnesses repeated hearsay statements without prompting objection or comment,²⁵⁷ so Old Bailey juries sometimes heard hearsay testimony despite the doctrinal prohibition against it.²⁵⁸ For example, Professor Langbein has reported that records of Old Bailey trials indicate that juries often heard hearsay regarding what Langbein calls “pursuit hearsay”—that is testimony regarding statements that were made regarding the discovery and arrest of the accused.²⁵⁹ Thus, there is little doubt that a witness sometimes repeated a hearsay statement during his or her narrative account.

In addition, the enforcement of the prohibition against hearsay was limited by the absence of appellate review, and by the still fairly informal structure of the trial process itself. Although defense counsel were appearing more frequently in criminal trials in London by the 1780s, the question-and-answer format of the modern trial was still not fully developed. As a result, there was less opportunity for judges to filter the admissibility of statements in advance than in the modern trial. Because witnesses often simply narrated what they had to tell, it seems likely that witnesses who had been admitted to testify as to their own direct knowledge of events might also have mentioned another person’s unsworn statement in the course of their narrative testimony.

Indeed, the regulation of hearsay was especially limited by the fact that evidentiary points were still argued in the presence of the jury as the trial progressed.²⁶⁰ Thus, although counsel or a judge could sometimes prevent a witness from reciting patent hearsay, in other instances the only remedy for improper hearsay testimony was for the judge to admonish the jury to disregard or discredit such statements.²⁶¹

²⁵⁷ Langbein also cites a 1744 Irish case in which Hawkins’s statement that hearsay could be used “by way of inducement or illustration of what is properly evidence” was applied rather loosely. See LANGBEIN, *ADVERSARY TRIAL*, *supra* note 37, at 239, n. 272.

²⁵⁸ *Id.* at 234-35.

²⁵⁹ *Id.* at 239, n. 275.

²⁶⁰ *Id.* at 249.

²⁶¹ See Davies, *supra* note 10, at 198-99.

It would hardly be surprising, in that setting, if judges sometimes gave a pass to hearsay evidence that did not seem terribly material—a precursor of sorts to a harmless error approach. Likewise, it also would not be surprising if the sort of incidental hearsay evidence that slipped into jury trials as “pursuit hearsay” and such was of the sort that would later fall within “*res gestae*” or “spontaneous declaration” hearsay exceptions when those exceptions were invented. On the other hand, because judges had more control over admitting witnesses than over statements, it seems unlikely a person would have been admitted as a witness in a late eighteenth century trial if the person had nothing to offer but hearsay statements.²⁶² (Thus, it does not appear that a person in the position of the 911 operator in *Davis*, who had *only* second-hand information, would have been permitted to testify at all in 1789.)

Moreover, although hearsay testimony happened, those instances still constituted *departures from evidence doctrine* during the late eighteenth century. The accounts of the Old Bailey trials appear to be consistent with the statements in the treatises and manuals insofar as they do not reveal any legally authorized hearsay “exceptions” (beyond dying declarations). That is significant because the important inquiry for assessing the original understanding of the Confrontation Clause is not so much the degree to which the rule against unsworn hearsay was adhered to in practice, but how legal doctrine defined the legal standard for admissible evidence at the time of the framing.

B. When Did Hearsay Exceptions Begin to Apply to Criminal Trials?

Obviously, evidence law now recognizes a variety of hearsay exceptions that are pertinent to criminal trials. When were they first formally recognized? And why?

An 1869 Supreme Court opinion indicates that judges began

²⁶² However, pursuant to the corroboration exception, a witness could have been admitted who could only provide hearsay that corroborated or impeached statements previously made by other witnesses who had testified at a trial. *See, e.g., supra* text accompanying notes 129, 138, 144.

NOT THE FRAMERS' DESIGN

457

to recognize new doctrinal hearsay exceptions sometime during the first half of the nineteenth century—but well after the 1789 framing of the Confrontation Clause. The evidentiary issue in *Insurance Company v. Mosley*²⁶³ arose from a claim brought under an accidental death insurance policy. Four days before his death, the insured person had told his wife and son that he had suffered an accidental fall. Those statements were the only evidence that he died because of an accident, and thus were the only basis for a claim under the policy. At trial, the court permitted the decedent's wife and son to repeat the deceased's statements, and they won a judgment. On appeal, the defendant insurance company objected to the admission of those hearsay statements into evidence. The Supreme Court upheld the admission of the statements as "*res gestae*." What is interesting for present purposes is how little authority the justices could muster to justify that conclusion in 1869.

Justice Swayne's *Mosley* opinion identified an 1849 Massachusetts criminal manslaughter case, *Commonwealth v. M'Pike*, in which a stabbing victim's out-of-court statement had been admitted under a "*res gestae*" formulation. However, the Massachusetts court itself had cited no precedents for that ruling.²⁶⁴

In addition, Justice Swayne cited an 1834 English criminal case, *King v. Foster*,²⁶⁵ in which the defendant was charged with manslaughter for running over one Ferrall in a "cabriolet." In

²⁶³ 75 U.S. (8 Wall.) 397 (1869).

²⁶⁴ 57 Mass. (3 Cush.) 181 (1849). The defendant had been convicted of manslaughter for the stabbing of the defendant's wife. The court ruled that "[t]he admission in evidence of [a hearsay account of] the statement of the party injured, as to the cause and manner of the injury which terminated in her death, may be sustained upon the ground that the testimony was of the nature of the *res gestae*"; that "[t]he period of time, at which these acts and statements took place, was so recent after the receiving of the injury, as to justify the admission of the evidence as a part of the *res gestae*"; and that "[i]n the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge." *Id.* at 184 (emphasis in original).

²⁶⁵ *King v. Foster*, 6 Car. & P. 325, 172 Eng. Rep. 1261 (K.B. 1834) (cited in *Mosley*, 75 U.S. at 406).

Foster, a waggoner testified for the prosecution that he did not see the accident, but he heard the victim groan and went to him and asked what was the matter, and the victim made a statement to him. Presumably the statement of the victim incriminated Foster—the case report does not actually recite what the victim said. The English appellate judges ruled that the statement was properly admitted, but they cited only one precedent, an 1805 English trial ruling in an insurance case, *Aveson v. Kinnaird*.²⁶⁶ Moreover, the judges' familiarity with that precedent appears to have been serendipitous; Justice Park, who delivered the ruling in *Foster*, had earlier been one of the counsel in *Aveson*.

Significantly, this trail of authority seems to extend back no farther than *Aveson* in 1805. The issue in *Aveson* had involved the health and insurability of the decedent at the time a life insurance policy was taken out. The evidence at trial seems to have amounted to dueling hearsay: because the medical doctor whom the insured's beneficiary called as a witness had based his professional opinion that the insured was in good health largely on the unsworn statements that the insured had made to him, the trial court judge permitted the defendant insurance company to call as a witness an acquaintance of the insured to whom the insured had confided that she was not at all in good health.

Aveson appears to have been the first formally reported recognition of the "*res gestae*" hearsay exception.²⁶⁷ The only authority that the trial judges in *Aveson* could muster was the 1694 *Thompson* case, which they interpreted—probably incorrectly—as having authorized the admission of an excited utterance.²⁶⁸ Nobably, *Aveson* appears to have been the first

²⁶⁶ *Aveson v. Kinnaird*, 6 East 188, 102 Eng. Rep. 1258 (K.B. 1805).

²⁶⁷ See Brief of Petitioner at 30-32, *Hammon v. Indiana*, 126 S.Ct. 2266 (2006). There is no mention of "*res gestae*" in the treatises by Hawkins, Gilbert, Bathurst, or Buller, or in Blackstone's *Commentaries*. However, references to "*res gestae*" became fairly common in evidence treatises published in the 1820s. See Brief of Petitioner, *supra*, at 30-31.

²⁶⁸ As discussed *supra* notes 241-247 and accompanying text, it appears that *Thompson* actually allowed the hearsay account of the victim's statement to be admitted under the corroboration exception.

NOT THE FRAMERS' DESIGN

459

court decision to cite *Thompson* as authority.²⁶⁹ Whatever else one might say of the *Aveson* ruling, the rationale had little to do with the admission of hearsay evidence in criminal cases.

A variety of other indications also suggest that the recognition of the “*res gestae*” and “spontaneous declaration” exceptions in *criminal* cases occurred sometime after the 1805 ruling in *Aveson*. For example, although Professor Gallanis concluded that a variety of hearsay exceptions were evident in English rulings between 1780 and 1799,²⁷⁰ the list he recites did *not* include examples of hearsay exceptions that applied in criminal trials other than Marian witness examinations, dying declarations, and the limited-purpose corroboration exception (each of which was recognized in the treatises²⁷¹). In particular, Gallanis did not report indications of exceptions for statements against penal interest or by co-conspirators,²⁷² nor for excited

²⁶⁹ See *supra* note 248 and accompanying text.

²⁷⁰ Gallanis noted hearsay exceptions pertaining to various issues that could arise in civil lawsuits including the settlement (that is, residence) of a pauper, general reputation and character, prescriptions (that is, claims to land based on long occupation), other property rights, marriages, and customs. Gallanis, *supra* note 37, at 536-37. Gallanis's list of civil hearsay exceptions is comparable to that which appeared in the treatises and the justice of the peace manuals. See, e.g., *supra* notes 145, 162, 185.

²⁷¹ See *supra* text accompanying notes 118, 129, 151.

²⁷² Out of court statements by accomplices or co-conspirators, including the Marian examinations taken of an accomplice when he was arrested, were inadmissible against any other defendant because they were unsworn. Thus, the rule was that a confession could be admitted only against the person who confessed, but not against anyone else. See e.g., 2 HAWKINS, *supra* note 108, at 429 (1771 ed.); LEACH'S HAWKINS, *supra* note 108, at 603-04 (1787 ed.).

However, an accomplice could be admitted as a prosecution witness and testify under oath at trial. See Davies, *supra* note 10, at 196-97 n. 298 (discussing Tong's Case, Kelyng J. 17, 84 Eng. Rep. 1061 (K.B. 1662)).

It may appear that a deceased accomplice's confession was admitted contrary to this rule in *King v. Westbeer*, 1 Leach 12, 168 Eng. Rep. 108 (Old Bailey 1739); however, in that case the accomplice had not only “made a full confession in writing,” which was presumably unsworn and inadmissible, but had also “given information upon oath against the prisoner [pursuant to the Marian statutes].” *Id.* In other words, the accomplice had given a sworn Marian examination against Westbeer as a witness in that case; because the

utterances or spontaneous declarations,²⁷³ though he did describe a bankruptcy case as an example of “*res gestae*” (although the case report never used that term).²⁷⁴

There are other indications that hearsay exceptions in criminal cases still were not recognized during the early nineteenth century. As noted above, the English criminal evidence treatises that were published in the early decades of the nineteenth century still did not recognize any hearsay exceptions

accomplice was deceased, that sworn examination would have been admissible, even though the unsworn confession would not have been. See *supra* notes 116-123 and accompanying text.

²⁷³ Gallanis concluded that “[b]y the close of the eighteenth century . . . the contours of the modern rule against hearsay were largely in place.” Gallanis, *supra* note 37, at 535. However, that conclusion would not appear to be applicable to the hearsay *exceptions* that were pertinent to *criminal* trials.

²⁷⁴ Gallanis identified a 1794 bankruptcy case, *Bateman v. Bailey*, 5 T.R. 512, 513, 101 Eng. Rep. 288 (K.B. 1794), as an example of a “*res gestae*” hearsay exception. Gallanis, *supra* note 37 at 535 n. 266. The evidentiary ruling in that case was “that a bankrupt cannot be called as a witness to prove his bankruptcy, but that ‘what was said by him at the time in explanation of his own act may be received into evidence.’” *Id.* Some early nineteenth century treatises did identify *Bateman* as an example of a “*res gestae*” ruling. See, e.g., S.M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 102 (London, 1814).

However, the term “*res gestae*” did not appear in *Bateman* itself. Likewise, there was no mention of “hearsay” in that report. Rather, on the face of the report it appears that the issue may have been peculiar to bankruptcy law. Because of concerns about fraudulent manipulations, bankruptcy could not be initiated by the bankrupt at that time. See Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 510-13 (1996). Thus, it is possible that the concern that gave rise to the issue in *Bateman* was that allowing a third person to testify to what a bankrupt said about a condition of bankruptcy (for example, the person’s avoidance of creditors) might allow the bankrupt to end-run the prohibition against the bankrupt personally initiating bankruptcy. That may be the concern in the case because the opposition to the allowing the third person’s recitation of the bankrupt’s statement was that it could open a door to “fraud.” *Bateman*, 5 T.R. at 513, 101 Eng. Rep. at 288. Hence, it is not clear whether *Bateman* involved a *res gestae* analysis, or whether that characterization was simply a gloss applied to it prochronistically in later commentaries.

NOT THE FRAMERS' DESIGN

461

beyond dying declarations²⁷⁵ and the limited-purpose corroboration and existence-of-a-conspiracy exceptions that had been recognized in the earlier treatises.²⁷⁶ However, some other English commentaries began to mention “*res gestae*” in civil cases.²⁷⁷ Even so, briefs in *Davis* and *Hammon* identified several English criminal cases from the 1830s that still prohibited admission of the content of a crime victim’s apparently spontaneous out-of-court statements (although it appears that judges sometimes side-stepped the rule).²⁷⁸

²⁷⁵ See *supra* text accompanying note 172 (discussing Chitty’s 1816 treatise).

²⁷⁶ See *supra* text accompanying notes 163, 164, 171.

²⁷⁷ See PHILLIPPS, *supra* note 274, at 102 (1814 ed.) (stating that “[h]earsay is often admitted by way of inducement of illustration of what is properly evidence, or, as part of the *res gestae*” but citing only rulings in civil lawsuits). In his 1817 third edition (I have not located the second edition), Phillipps also treated *Brasier* as though it were an example of *res gestae* in a criminal case. *Id.* at 219 (1817 ed.). However, Phillipps *misstated* the ruling in *Brasier* as though the mother’s testimony had been ruled proper, when it was actually ruled to have been illegal and inadmissible. See *supra* text accompanying note 222. The fact that Phillipps could identify a criminal example of *res gestae* only by misstating the ruling in *Brasier* suggests that *res gestae* had not yet become an accepted doctrine in criminal evidence.

²⁷⁸ For example, the petitioner’s brief in *Davis* cited *Rex v. Wink*, 172 Eng. Rep. 1293 (1834) (trial judge ruled that a constable could not be asked the name of the robber that a robbery victim had told him several hours after the robbery, but that the constable could testify as to whether he went in search of any person “in consequence of the [victim] mentioning a name to him”). The petitioner’s brief attempted to treat that ruling as an aspect of “hue and cry” or a hue and cry “report.” See Brief for Petitioner at 20, *Davis v. Washington*, 126 S.Ct. 2266 (2006). However, there is no mention of hue and cry in the case report and that characterization appears to reflect a misunderstanding of the hue and cry procedure for arrests, which was likely obsolete by that date.

Similarly, the Petitioner’s brief in *Hammon* noted that an 1830 English treatise and English cases decided in the 1830s and 1840s indicated that witnesses could testify to the fact that an alleged rape victim had made complaints shortly after the alleged incident but that such witnesses still could not testify to the contents of her statements, including the name of the person she identified as the perpetrator. See Brief for Petitioner at 29-30 nn. 36, 37, *Hammon v. Indiana*, 126 S.Ct. 2266 (2006).

Thus, the available evidence allows considerable confidence that there were no pre-framing hearsay exceptions relevant to criminal cases other than dying declarations and the limited-purpose exceptions for corroboration or for proving the general existence of a conspiracy or similar background facts.

C. Why Were Hearsay Exceptions Invented?

Why did nineteenth-century judges move away from the strict doctrinal ban against hearsay and invent the variety of hearsay exceptions that now often permit unsworn out-of-court statements to be admitted in criminal trials? The change probably reflects the combined effects of a number of factors and developments, and I can only speculate.

Part of the explanation may lie in increasing judicial acceptance of relativistic and probabilistic notions of truth and proof. That shift probably made some hearsay evidence seem more acceptable than it had in the past. Additionally, it seems fairly obvious that the significance accorded to the oath as an indicia of reliability declined during the nineteenth century, and that would have removed one of the earlier supports for the strict ban against the admission of unsworn statements.

Changes in trial procedures may also have contributed to the acceptance of hearsay exceptions. The rigid doctrinal ban against hearsay may not have had that great an effect on the outcomes of criminal trials when defendants were often unrepresented by counsel, evidentiary practices were less formal, and trial judges exercised considerable discretion. It is possible that the ban against hearsay evidence became more costly—either in the sense of making the prosecution's case more cumbersome or in the sense of preventing convictions of accused persons—when the criminal trial became increasingly adversarial and formalized as the nineteenth century progressed. Hence, those changes may have created pressures for creating hearsay exceptions, as well as for restricting the concept of hearsay to out-of-court statements offered for the truth of what was said.²⁷⁹

²⁷⁹ The modern definition of hearsay reaches only those out-of-court

NOT THE FRAMERS' DESIGN

463

Changes in other aspects of criminal procedure may also have fed into the recognition of hearsay exceptions. For example, the institutionalization of a police prosecutor or public prosecutor may have created a “repeat player” who could press for relaxation of the hearsay ban.²⁸⁰ Additionally, the shift from the accusatorial criminal procedure of the framing-era to modern investigatory procedure and the accompanying invention and institutionalization of police departments and public prosecutor offices may have given a new gloss of reliability to hearsay information obtained by official sources and may also have increased pressures to admit hearsay evidence.²⁸¹

Unlike the constables of the eighteenth century, the new police officers of the nineteenth century were expected to be more proactive in ferreting out crime. In particular, unlike the eighteenth-century constable who usually made an arrest only after another person had charged that a crime had been committed “in fact,” the new police officers of the nineteenth century were authorized to arrest on their own assessment of “probable cause”²⁸²—a relaxed standard that implied room to use second-hand hearsay information.²⁸³ As a result, it seems likely that police testimony would have generated even more

statements that are offered into evidence “for the truth of the matter asserted.” See *supra* note 9. That qualification is not stated in any of the definitions of hearsay that appeared in any of the eighteenth-century authorities discussed in this article. It would appear that the qualification was developed in connection with the articulation of the *res gestae* concept during the early nineteenth century. The distinction between a hearsay statement, and an out-of-court statement constituting “original” evidence or *res gestae* is evident in mid- and late-nineteenth century discussions of hearsay. See, e.g., 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §§ 98-102, 108 (Boston, 4th ed., 1848); 1 *id.* at 185 (16th ed. 1899).

²⁸⁰ See Marc Galanter, *Why the “Haves” Come Out Ahead; Speculations on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974).

²⁸¹ For an overview of the post-framing shift from accusatory to investigatory criminal procedure, see Davies, *supra* note 2, at 419-35.

²⁸² See Davies, *Fourth Amendment*, *supra* note 11, at 627-39.

²⁸³ Indeed, the change in the law that permitted police officers to use hearsay information to justify warrantless arrests eventually undermined the framing-era ban against using hearsay information to justify the issuance of arrest or search warrants. See *id.* at 650-51 n. 287.

“pursuit hearsay” during nineteenth-century trials than Professor Langbein observed in accounts of eighteenth-century trials.²⁸⁴

Whatever the explanation, it seems fairly evident that nineteenth-century judges gave more priority to facilitating the introduction of evidence of a defendant’s guilt than to enforcing the previously rigorous conception of the confrontation right. In a very real sense, American judges rejected the original understanding of the Confrontation Clause during the nineteenth century—though they obviously did not admit as much.²⁸⁵ That rejection, in turn, is the source of the hearsay-confrontation conundrum that has been a constant in the Supreme Court’s interpretation of the Confrontation Clause since the Supreme

²⁸⁴ See *supra* text accompanying note 259; see also the indirect allowance of pursuit hearsay in the 1834 *Wink* case discussed *supra* note 278.

²⁸⁵ The fact that trial testimony came to be recorded in written transcripts may have also played a role. During the eighteenth century, although the written record of a sworn Marian witness examination of a deceased witness was admissible as evidence, see *supra* notes 116-123 and accompanying text, oral testimony purporting to recite the sworn testimony a deceased witness had given in a prior trial was inadmissible as hearsay. The reason was that the oral nature of an account of prior trial testimony made it inferior in reliability to the written record of an examination or deposition. See Davies, *supra* note 10, at 180 n. 235.

However, the objection regarding the unreliability of oral accounts of prior trial testimony was undercut when trial testimony began to be recorded in writing. Thus, a number of the nineteenth century American cases that discussed the confrontation right did so in the context of justifying a rule change to allow admission of sworn testimony that a deceased witness had given in a prior trial. However, because that form of evidence still did not conform to the earlier emphasis on the importance of cross-examination in the presence of the trial jury, the opinions that were written to justify that change tended to downplay the significance of the earlier emphasis on cross-examination in the presence of the trial jury and instead treated the opportunity for cross-examination at a *previous* trial as though that satisfied the confrontation right. As a result, those cases tended to give a truncated account of the connection between the rule against hearsay and the confrontation right. For example, *Mattox* seems to have introduced the inaccurate historical notion that the confrontation right was aimed merely at preventing trial by *ex parte* depositions as a means of downplaying the concept of cross-examination in the presence of the trial jury. See *supra* note 23.

NOT THE FRAMERS' DESIGN

465

Court first began to hear criminal appeals in the late nineteenth century.²⁸⁶

The bottom line is that *Crawford* and *Davis* cannot have invoked an authentic understanding of the original Confrontation Clause because the original understanding is no longer compatible with modern criminal evidence or procedure. The distinction between testimonial and nontestimonial hearsay may appear to be a convenient way to adjust the confrontation right to the *post-framing* invention of the hearsay exceptions that now permit far greater admission of hearsay evidence than the Framers ever imagined. However, that convenience hardly makes the distinction part of the original Confrontation Clause.

Crawford and *Davis* depart from the Framers' design when they allow the admission of unsworn hearsay in criminal trials. Even if one sets aside the historical requirement of an oath, they depart from the Framers' design insofar as they allow second-hand, hearsay evidence to be admitted that tends to prove the guilt of the defendant. *Crawford* and *Davis* limit the scope of the confrontation right in ways the Framers would neither have imagined nor endorsed.

CONCLUSION

Given the holdings in *Crawford* and *Davis*, it is plain that the testimonial/nontestimonial hearsay distinction is now a central feature of the law of the Confrontation Clause. It is highly improbable that the Court will revisit that treatment. However, accurate investigations of authentic framing-era law will not provide any guidance as to how that distinction should now be applied. Contrary to *Crawford's* claims, the confrontation right was not limited to "testimonial hearsay" at the time of the framing, and framing-era sources did not draw any distinction between testimonial and nontestimonial hearsay. Hence, authentic history cannot shed any light on how the distinction

²⁸⁶ There generally was no appellate review of felony convictions prior to the late nineteenth century, and the Supreme Court itself did not review criminal convictions until the 1880s. *See, e.g.*, ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 312-14 (2d ed. 2002).

should now be applied—unless it is to suggest that the disparity between the testimonial scheme and the original understanding of the right could be reduced by redefining the “testimonial” category to include any statement that constituted material evidence of a defendant’s guilt, regardless of whether it was made to a government officer or private person.

Rather, the hypothetical originalist claims in *Crawford* and *Davis* are significant primarily for what they demonstrate about originalism itself. In particular, the hypothetical character of those claims reveals a defect that commonly infects originalist claims—the denial of the degree to which legal doctrine and institutions (and almost everything else) has changed since the framing. Originalism is dependent upon the historical fiction that the content of constitutional rights can somehow have remained constant when the law that shaped and informed the content of those rights plainly has not.

As noted above, Justice Scalia asserted in *Crawford* that “[a]ny attempt to determine the application of a constitutional provision to a *phenomenon that did not exist* at the time of adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation . . . but that is hardly a reason not to make the estimation as accurate as possible.”²⁸⁷ In a similar vein, Justice Scalia has more recently asserted that “[t]here 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 presents no problem for the originalist.”²⁸⁸

The “problem” of changeable law would matter for originalists, however, if originalist claims were actually confined to authentic history. The difficulty with recovering or applying the original confrontation right is not, as Justice Scalia’s comments suggest, a matter of making an “estimation” of how the Framers would have applied a constitutional provision “to a phenomenon that *did not exist* at the time of the adoption.” Rather, the difficulty lies in attempting to apply a constitutional

²⁸⁷ *Crawford*, 541 U.S. at 53 n. 3 (emphasis added).

²⁸⁸ *Georgia v. Rudolph*, 126 S. Ct. 1515, 1540 (2006).

NOT THE FRAMERS' DESIGN

467

provision to a post-framing phenomenon such as the invention of criminal hearsay exceptions that actually *contravenes* the framing-era law that shaped the Framers' understanding of the constitutional provision. The difficulty lies in applying the Confrontation Clause to hearsay exceptions that *violate* the Framers' expectations and design.

No amount of clever speculation can uncover "our unchanging Constitution" because the Constitution does not hover out there someplace—rather, constitutional rights have always drawn their content from the relevant bodies of "changeable law" (though it is doubtful that the Framers' anticipated how changeable evidence law would turn out to be²⁸⁹). Additionally, Supreme Court justices have been revising both the law *and the Constitution* for more than two centuries.²⁹⁰

The result is that we could not to "return" to even an approximation of the original Confrontation Clause unless we were willing to repeal the hearsay exceptions that judges have invented since the framing. Obviously, we are not going to do that. Undoubtedly there are good reasons not to abandon those exceptions wholesale. That being the case, however, originalism cannot be more than a distraction from the policy concerns that

²⁸⁹ It is doubtful, however, that the Framers anticipated that the law of evidence or jury trial would change significantly in the future. *See supra* note 54.

²⁹⁰ The notion of an "unchanging Constitution" can only constitute a rhetorical device today because it cannot be seriously entertained as a description of our constitutional history. The Supreme Court has been revising the Constitution in myriad ways for more than two centuries. For example, I hope to soon publish an article explaining how the Marshall Court itself effectively rewrote Article III to fabricate an opportunity to rule that a statute was unconstitutional in *Marbury v. Madison* in 1803. Likewise, as I have previously documented, the modern Supreme Court has moved the standards for lawful criminal arrests from "due process of law" in the Fifth Amendment, which the Framers understood to preserve common-law arrest requirements, to the Fourth Amendment, which was understood to be only a specific ban against general warrants themselves in 1789. That transposition then allowed the justices to relax the constitutional arrest standard to probable cause, and to press "due process" into service as a surrogate for "privileges and immunities." *See Davies, supra* note 10, at 216 n. 344. It is several centuries too late to speak of an "unchanging Constitution."

we—and the justices—have more reason to be concerned about.

Hence, it is time for everyone to stop pretending that *Crawford*'s restriction of the scope of the confrontation right is other than the policy and political choice that it is.²⁹¹ *Crawford*'s

²⁹¹ The ideological content of *Crawford*'s purportedly originalist scheme looks quite different depending on which aspect of the decision one thinks will have the most practical importance. The "cross-examination rule" that regulates the admission of testimonial hearsay is a pro-defendant feature that imbues the confrontation right with more substance than it had under the previous *Roberts* regime. For example, that standard is the basis for the exclusion of the statements made during police interrogations in both *Crawford* and *Hammon*. Thus, some early commentaries on *Crawford* have tended to describe it as though it were a pro-defendant ruling.

However, the complete withdrawal of the confrontation right from nontestimonial hearsay is plainly a pro-prosecution feature in so far as it allows state courts or legislatures to take a very permissive approach to admitting nontestimonial hearsay in criminal trials. For example, the restrictive interpretation of the scope of the Confrontation Clause in *Crawford* permitted the admission of the hearsay statements made in the 911 call in *Davis*, even though those statements constituted crucial evidence against the defendant.

As a student of criminal procedure, I suspect that the restricted scope assigned to the confrontation right in *Crawford* and *Davis* will turn out to be the most important aspect of those rulings. Viewed against the overall prosecution trajectory of criminal procedure developments over the last two centuries, and especially during the last several decades, I think it is likely that further rulings in the Supreme Court (or the justices' acquiescence in lower court rulings) will define the large mass of hearsay evidence to be only nontestimonial hearsay that is entirely exempt from the confrontation right.

For example, although *Davis* left the issue open, it seems likely that future developments will clarify that only statements that are made to government agents can be deemed to be testimonial and subject to the cross-examination rule. See *Davis*, 126 S.Ct. at 2274 n. 2. Indeed, in *Crawford*, Justice Scalia described the Marian examinations taken by the justice of the peace as the primary target of the Confrontation Clause (see *supra* note 17 and accompanying text), and then announced that the Confrontation Clause applied to police "interrogations" because such interrogations bore "a striking resemblance" to justice of the peace examinations. *Crawford*, 541 U.S. at 52 (discussed in Davies, *supra* note 10, at 202-04). That formulation leaves the door open for the justices to decide in future cases that the Confrontation Clause applies *only* to interrogations by government agents. For example, it will not be surprising if the justices conclude that even accusatory statements

NOT THE FRAMERS' DESIGN

469

testimonial scheme for limiting the confrontation right is decidedly not “the Framers’ design.”

made to private persons do not sufficiently “resemble” framing-era examinations conducted by justices of the peace to fall within the scope of the confrontation right.

Additionally, the ruling in *Davis* itself shows that not all statements made to government agents will be deemed to be testimonial. Rather *Davis* indicates that statements made to police officers will be testimonial only when the “primary purpose” of the police interview was to obtain information for a prosecution and concludes that statements made in police interviews will “often” be nontestimonial. 126 S.Ct. at 2279 (emphasis in original).

Similarly, it seems likely that the justices will create (or allow lower courts to create) a variety of exceptions that will permit the admission of testimonial hearsay even when the unavailability and cross-examination requirements are not met. For example, although *Davis* left the parameters of the “forfeiture” exception to the confrontation right for another time, it did announce in dicta that hearsay (presumably including testimonial hearsay) could be admitted in a forfeiture hearing itself. *Id.* at 2279-80.

Thus, it seems likely that the Court may define the scope of the Confrontation Clause so narrowly in future cases that the cross-examination rule applicable to only “testimonial” hearsay will have very limited practical significance—especially as law enforcement professionals learn how to avoid that characterization.