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# The (Futile) Search for a Common Law Right of Confrontation: Beyond *Brasier's* Irrelevance to (Perhaps) Relevant American Cases

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**THE (FUTILE) SEARCH FOR A COMMON  
LAW RIGHT OF CONFRONTATION:  
BEYOND *BRASIER*'S IRRELEVANCE TO  
(PERHAPS) RELEVANT AMERICAN CASES**

*Randolph N. Jonakait\**

INTRODUCTION

Recent interpreters of the Sixth Amendment's Confrontation Clause have "Frankensteined" *Rex v. Brasier* back into new life. For over two centuries, no one seems to have thought the 1779 English case important for understanding the U.S. Constitution, but now some see *Brasier* as infusing fresh content into the Sixth Amendment's right of confrontation.

*Crawford v. Washington*<sup>1</sup> first breathed the life back into *Brasier*. Even though the Framers of the Constitution hardly discussed it,<sup>2</sup> *Crawford* asserted 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."<sup>3</sup> This assertion assumes

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<sup>1</sup> 541 U.S. 36 (2004).

<sup>2</sup> See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995) [hereinafter, *The Origins of the Confrontation Clause*]. "The origins of the Confrontation Clause are murky. Early American documents almost never mention the right, and the traditional sources for divining the Framers' intent yield almost no information about the Clause." *Id.*

<sup>3</sup> *Crawford*, 541 U.S. at 54. See also *id.* at 43 (noting that "The founding generation's immediate source of the [confrontation] concept . . . was the common law"). *Id.*

that there was a common law right of confrontation and implies that cases can be found that shed light on this common law right.<sup>4</sup>

For some who accept these assumptions, *Brasier* is such a ruling, and although not mentioned by the Supreme Court in the eighteenth, nineteenth or twentieth centuries, the Court's two recent Confrontation Clause cases have *Brasier* references,<sup>5</sup> as do briefs to the Court and academic discussions.<sup>6</sup> Fairly read, however, *Brasier* says nothing about the Confrontation Clause. If a common law right of confrontation is to be found, we must look elsewhere for the content of that right.

Part I of this Article identifies the most straightforward reading of *Rex v. Brasier*. The decision was based on the principle that out-of-court statements from an incompetent witness could not be admitted in a criminal trial. The case says nothing about the hearsay rule generally, hearsay exceptions, or the right of confrontation.

Part II discusses a Framing-Era American case, *State v. Baynard*,<sup>7</sup> that is quite similar to, and consistent with *Brasier*. *Baynard* excluded out-of-court statements from a witness who would have been incompetent to testify in court, and it confirms that *Brasier* said little, if anything, about a right of confrontation. *Baynard* does, however, indicate that American courts of the Framing Era had a general prohibition on hearsay.

Part III contends that if Framing Era views are to control the

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<sup>4</sup> See Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 227 (2005):

[*Crawford*] has assumed that the Confrontation Clause was incorporating a common law right of confrontation; therefore, an English common law right of confrontation must be discoverable. The cited English cases are assumed to be the most relevant ones for determining the English right, and then a right of confrontation is found in them. Without those assumptions, that right is not apparent.

*Id.*

<sup>5</sup> See *infra* at note 13.

<sup>6</sup> See *infra* at notes 11-15, 19.

<sup>7</sup> 1794 WL 184 (Del. O. & T. 1794).

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meaning of today's Confrontation Clause, it is American views from that era that are the most important, and the best sources of American viewpoints and ideas are American cases, not English cases. This section will examine in detail one such case, *The Ulysses*,<sup>8</sup> while briefly referring to other, similar cases that rule on the admissibility of out-of-court statements, and will explore how American courts in the Framing Era enforced a general prohibition on hearsay and recognized only limited hearsay exceptions.

I. *REX V. BRASIER*

In the 1779 case of *Rex v. Brasier*, Brasier was convicted of assault with intent to commit rape of a girl under seven years old. The girl did not testify and "was not sworn or produced as a witness on trial." Instead, the girl's mother and a woman who lodged with the mother testified that the girl "immediately on her coming home, told all the circumstances of the injury which had been done her. . . ." The case went to the Twelve Judges,<sup>9</sup> who rendered a unanimous, single-paragraph opinion, concluding that "the evidence of the information which the infant, had given to her mother the other witnesses, ought not to have been received." The court's full reasoning stated:

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

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<sup>8</sup> 24 F.Cas. 515 (C.C.D. Mass. 1800) (No. 14,300).

<sup>9</sup> See John Langbein, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 212-13 (2003). Langbein writes:

When a point of difficulty arose that a trial judge was reluctant to decide on his own, especially when capital sanctions were involved and the convict would otherwise be promptly executed, the judge could defer sentencing and refer the question to a meeting held back in London of all the judges, commonly twelve, of the three common law courts.

*Id.*

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 to take an oath their testimony cannot be received. The 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.<sup>10</sup>

Certainly, at first glance, the case is not an application of the common law right of confrontation. The court neither said that it was applying such a right, nor did the court indicate that such a right existed. The opinion gave no inkling that the statement was inadmissible because it had not been confronted, or that its admission would deny the accused cross-examination. Cross-examination and confrontation go without mention, and the opinion does not even refer to the disputed evidence as hearsay. The case made no general pronouncements about out-of-court statements, much less about hearsay exceptions.

It seems to take a highly creative, and perhaps a highly anachronistic, eye to find a confrontation meaning in *Brasier*.<sup>11</sup> Instead, the clearest rules from the case are that there is no fixed age at which a child can be sworn in to testify and that a child under seven years old can be sworn in to testify if the trial court's "strict examination" reveals that she understands the nature and consequences of an oath.<sup>12</sup>

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<sup>10</sup> The decision concludes by noting that the "prisoner received a pardon. . . ." See generally, *King v. Brasier*, 1 Leach 199 (K.B. 1779).

<sup>11</sup> See *Davis v. Washington*, Brief for Petitioner, 2005 U.S. S.Ct. Briefs LEXIS 965, 54, stating about *Brasier* that "[i]t is hard to miss the confrontation rhetoric" in it.

<sup>12</sup> *Brasier* has been cited by American courts for the proposition that a

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*Brasier* clearly indicates that it was improper to admit the child's out-of-court statements. The court's rationale, however, cannot be meaningfully ascribed without answering now unanswerable questions. For example, had the child been produced at trial, and the court examined her and concluded that she could be sworn, would her out-of-court statements have been admissible?<sup>13</sup>

We cannot know whether the court was declaring that what today would be known as an excited utterance was inadmissible. Statements were made to the mother and the lodger "immediately" upon the girl coming home, but the opinion does not say exactly how long after the assault the girl made these statements, and whether the assertions would today qualify as an excited utterance exception to the hearsay rule is unclear.<sup>14</sup>

The facts point out the lack of substantial corroboration for the girl's statements by stating that "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, on seeing him the next day, had

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child's ability to take an oath is not dependent upon a fixed age. *See, e.g.*, *State v. Edwards*, 79 N.C. 648, 650 (1878); *People v. Bernal*, 10 Cal. 66, 67 (1858).

<sup>13</sup> The brief for *Davis* in *Davis v. Washington* contended that when the Constitution was adopted, evidence of a fresh complaint of a sexual assault was not admissible unless the victim testified. To support that proposition, the brief referred to *Brasier*, saying "Thus, for instance, the King's Bench in 1779 held that an alleged victim's complaint made to her mother 'immediately upon coming home' from an alleged assault was inadmissible because the victim was not sworn or produced as a witness on the trial." *Davis v. Washington*, Brief for Petitioner, 2005 U.S. S.Ct. Briefs LEXIS 965, \*53-54. In the reply brief, *Davis* asserted that *Brasier* held that the "children's out-of-court statements were admissible only if they testified." *Davis v. Washington*, Reply Brief for Petitioner, 2006 U.S. S.Ct. Briefs LEXIS 305, at \*18.

<sup>14</sup> *Cf.* *Hammon v. Indiana*, Brief for Petitioner, 2005 U.S. S.Ct. Briefs LEXIS 949, 45, which concludes that *Brasier's* holding demonstrates that "at the time of the Framing, there was no special rule allowing admissibility of accusatorial statements because they were made under stress of excitement." *Id.* at 45.

declared that he was the man. . . .” There is no way to tell why the court put such an emphasis on the absence of confirming evidence, or whether additional corroboration would have made the statement admissible.

The opinion only states that the girl was neither sworn nor produced “on the trial.” *Brasier* does not mention whether the girl was produced and sworn at a pretrial proceeding. If the opinion was indicating anything about the about the admissibility of sworn, pretrial statements, we cannot tell.

*Brasier* did state that “testimony” not under oath could not be received and that if children “are found incompetent to take an oath, “their testimony cannot be received.”<sup>15</sup> The court then concluded that the out-of-court statements should not have been admitted. Perhaps the court was equating hearsay with “testimony.”<sup>16</sup> If so, *Brasier* might have modern importance because *Crawford*’s reading of common-law history led it to conclude that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused . . . .”<sup>17</sup> *Crawford* went on to conclude that the Confrontation Clause’s core concern was with statements used against an accused akin to those from an *ex parte* deposition or examination, which the Court labeled “testimonial,” and held that out-of-court testimonial statements of an absent declarant can only be admitted if the accused had had an opportunity to cross-examine the declarant.<sup>18</sup> Thus, if *Brasier* was equating the girl’s statements with unsworn

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<sup>15</sup> See *Hammon v. Indiana*, Brief for Petitioner, 2005 U.S. S.Ct. Briefs LEXIS 949, 44.

<sup>16</sup> See *id.* (“Strikingly, and explicitly, the judges referred to the girl’s statement as testimony.”); *Hammon*, Reply Brief for Petitioner, 2006 U.S. S.Ct. Briefs LEXIS 329, 16 (noting that *Brasier* “characteriz[ed] the out-of-court accusation made by the child . . . as testimonial . . . and so exclud[ed] it). See also Richard D. Friedman, *Crawford*, *Davis*, and *Way Beyond*, 15 J.L. & POL’Y 553, 564 (2007) (referring to girl’s statement as “testimonial”).

<sup>17</sup> *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

<sup>18</sup> *Id.* at 51-52.

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testimony, and in doing so was elucidating a common-law right of confrontation, the case might tell us something about what should be currently considered testimonial.<sup>19</sup>

The assumptions necessary to reach this modern meaning, however, ought to give substantial pause. Occam's razor suggests that the simplest explanation should be accepted, and the simplest explanation for *Brasier* is that it was only holding that the attempted end-run around the competency rules by admitting the out-of-court statements from one who was not shown to be a competent witness was not valid. The opinion says nothing about the admissibility of hearsay from a witness who is capable of taking an oath,<sup>20</sup> and does not say anything at

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<sup>19</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006), did not state a comprehensive definition of "testimonial" but did conclude:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecutions.

*Id.* The Court rejected Davis' reliance on *Brasier* because it did not involve a statement made during an ongoing emergency, concluding, "The case would be helpful to Davis if the relevant statement had been the girl's screams for aid as she was being chased by her assailant. But by the time the victim got home, her story was an account of a past event." *Id.* at 2277.

Chief Justice Rehnquist, concurring in the result in *Crawford*, cited *Brasier* for the proposition that "[u]nder common law, although the courts were far from consistent, out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based." *Crawford*, 541 U.S. at 69.

<sup>20</sup> *Cf.* *Hammon v. Indiana*, Brief for Petitioner, *supra* note 14, at 44 (noting that "the manifest premise of the judges' discussion was that if the speaker had been an adult it would have been plainly improper for other persons to relay her accusations—her 'testimony'—to court. . .") *Id.* See also Richard D. Friedman, *Crawford, Davis, and Way Beyond*, 15 J. L. & POL'Y 553, 565 (2007) (noting that "[a] premise of the [*Brasier*] debate was that if she had been an adult the statement could not have been used. . .").



all about the content of the Confrontation Clause.

The crucial question, of course, is not what *Brasier's* rationale truly was, but how Americans would have treated a comparable situation in the Framing Era. If a conception of the common law was constitutionalized in the Confrontation Clause, it would have been the American conception of that law. And while attention has been paid to the English case, none seems to have been paid to a quite similar Framing-Era American case, the Delaware decision of *State v. Baynard*.<sup>21</sup> In *Baynard*, hearsay was excluded not because it did not fit into an exception and not because it was not confronted, but because the out-of-court declarant was incompetent to testify at the trial.

## II. *STATE V. BAYNARD*

In *Baynard*, a prosecution witness in a 1794 murder trial testified that he had a conversation with the deceased on the evening of the killing that concerned the deceased's going to the defendant's house. The defendant Baynard "objected to this evidence as hearsay. . . ." <sup>22</sup> The defense counsel argued that the out-of-court statements did not fall within any hearsay exception, including explanatory evidence and dying declarations.<sup>23</sup>

The prosecutor responded that the hearsay was being offered,

not as in every respect regular evidence in itself, but  
as it would come in as introductory to that which was

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<sup>21</sup> 1794 WL 184 (Del.O. & T. 1794).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* The attorneys for the defendant contended that:

it is illegal, considered as a hearsay evidence. It comes within none of the exceptions in which hearsay evidence is admitted. It cannot be considered as explanatory or illustrative of other evidence, for none has yet been given. It cannot be admitted as relating the declarations of a dying man, because at the time the person who is since dead . . . could have had no contemplation of the future accident by which he was deprived of his life.

*Id.*

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good legal evidence. . . . Very frequently narratives would be quite unintelligible, if it were not permitted to relate circumstances, which though illegal as substantive evidence, may tend to introduce and explain what is admissible.<sup>24</sup>

The court agreed with the defense that hearsay was generally inadmissible, but also seemed to indicate that the particular hearsay at issue might ordinarily be admissible: “Though the rule be general that hearsay evidence is illegal, yet this rule is subject to many exceptions. It would frequently be impossible to take advantage of legal evidence, without an occasional admission of hearsays to explain a narrative of facts.”<sup>25</sup>

This looks very much like a modern evidentiary debate. The defense objects to an offered out-of-court statement as hearsay and contends that it must be excluded since it does not fit into any exception. The prosecution replies that the statement is not being offered as “substantive” evidence, but that it should be admitted solely to complete a narrative—an argument that seems to say that it was not being offered for the truth of the matter asserted. This call and refrain clearly emanate from the scripture

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*1. In addition, the court stated, “It is proper also to give his preface to his story, in most cases without interruption.” *Id.* See generally Jonakait, *supra* note 2, at 161 (discussing an 1800 New York murder trial, stating that witnesses generally started their testimony not by responding to questions, but by delivering a narrative, which was sometimes interrupted by a judge or opposing counsel, but the interruptions seem to have been limited to clarifying ambiguities in the narrative and at the conclusion of the narrative, however, questions and answers took over like in the modern format).

See also Thomas Y. Davies, *Not “The Framers’ Design:” How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause*, 15 J. L. & POL’Y 349, (2007) (discussing the contention that hearsay often appeared in eighteenth-century English trials and concluding, “[b]ecause 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.”).

that hearsay is generally not admitted, a proposition so clear in *Baynard* that it went unchallenged by the prosecutor and was readily accepted by the court. The case further indicates that the rule was considerably developed by the time of the case, for all the participants agreed that there were accepted exceptions to the general ban that went beyond dying declarations. Indeed, the court noted that hearsay “is subject to *many* exceptions.”<sup>26</sup>

Even though the *Baynard* court suggested that the offered hearsay might ordinarily be admissible, the court excluded the evidence because of the second ground tendered by the defense, which was that since the decedent-declarant was a slave, he could not have testified at the trial against the white defendant, and therefore his hearsay should not be admitted:

[I]t is illegal evidence as proceeding originally from the mouth of a Negro, and now offered against a white person in the trial of a criminal charge of a capital nature. It would be absurd to receive that as evidence at second hand which could not be received, even on oath administered in court from the original person.<sup>27</sup>

The court agreed, first noting that state laws had limited the privileges of blacks<sup>28</sup> and then concluding:

While these laws and this system continue in force, it

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<sup>26</sup> *State v. Baynard*, 1794 WL 184, \*1 (Del.O. & T. 1794)(emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> The court listed some of the laws:

Many of our laws recognize the servile state of Negroes among us and seem to require them to be deprived of many privileges enjoyed by white persons. By a law made very early after the settlement of our government, Negroes were not allowed the trial by jury, nor to carry arms, meet in companies, etc. . . . An additional penalty is inflicted on the criminal intercourse of the sexes. . . . No Negro can be employed to whip a white person. . . . By our Constitution, . . . suffrages at elections are confined to free white persons.

*Id.* at \*1.

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would be both illegal and impolitic to admit the testimony of Negroes in any cases whatever wherein white persons are interested . . . . Therefore the witness can not give in evidence anything which he heard from Negro Richard.<sup>29</sup>

A creative interpretation of *Baynard* could maintain that since the court concluded that the slave could not have testified in court, and since it held that his hearsay could not be admitted, the court was in essence determining that the out-of-court statements were “testimonial,” much as a creative interpretation of *Brasier* contends. But of course, the court’s decision did not depend upon the character of the hearsay. Indeed, the court suggested that the same hearsay from a white decedent may have been admissible, and the hearsay was not excluded because it was “testimonial.” The court’s decision indicates nothing about when hearsay was “testimonial” or that anything depended on such a label. While it can be deduced that hearsay that “explain[ed] a narrative of facts” was then admissible as were dying declarations, *Baynard* says nothing about the admissibility of other out-of-court statements. The case was not about the right of confrontation, a general necessity for

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<sup>29</sup> *Id.* at \*1. The Delaware courts did not always exclude blacks from testifying against whites in criminal cases. *See* *State v. Bender*, 1793 WL 548 (Del.Quar. Sess.). Where a white man was charged with assaulting a free black woman, the court noted that Delaware statutes prohibited free blacks from testifying against whites but also granted free blacks the right “to obtain redress in law and equity for any injury to their person or property.” *Bender*, 1793 WL 548 at 1. The court concluded that a criminal charge was a method of seeking such redress, and where the free black person was the only witness to the assault, she could testify. The court continued, “[W]e do not mean to say that a Negro is a witness between two whites, nor in cases like the present one when other proof can be procured, but only in the case where justice must otherwise fall.” *Bender*, 1793 WL 548 at \*1. The case is also reported at *State v. Bender*, 1793 WL 550 (Del.Quar.Sess.); *State v. Bender*, 1793 WL 551 (Del.Quar.Sess.); *State v. Bender*, 1793 WL 554 (Del.Quar.Sess.); and *State v. Bender*, 1794 WL 556 (Del.Quar.Sess.) *But cf.* *State v. Farson*, 1794 WL 570 (Del.Quar.Sess.) (noting that a free black called by defendant and charged with assaulting a white person was prohibited from testifying).

an opportunity for cross-examination, or whether the hearsay at issue would otherwise have been admissible; rather, the case concerned witness competency. The court concluded, similarly to *Brasier*, that if a person would not have been a competent in-court witness, then that person's out-of-court statements were not admissible.<sup>30</sup> *Baynard*, an American product of the Framing Era, says little, if anything, about the right to confrontation and confirms that *Brasier* said even less.

While these two cases are not truly informative about the Framing Era views that led to the Confrontation Clause, that does not mean that examinations of early cases should cease if that age's understandings are held to control modern interpretations of confrontation. The real goal should be not to gain a better understanding of the English views, but of American conceptions of the proper use of out-of-court

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<sup>30</sup> *Baynard*, 1794 WL 184 at \*1. See also *Respublica v. Langcake and Hook*, 1795 WL 708 (Pa.). In a trial for "maihem (*sic*) and assault and battery," the defense sought to admit as a dying declaration the out-of-court statements of the father of one of the defendants. *Respublica*, 1795 WL 708 at \*1. The court concluded that hearsay was generally inadmissible but that there were exceptions. Among the exceptions were "the declarations of the deceased person on an indictment for murder, founded principally on the necessity of the case." *Respublica*, 1795 WL 708 at \*2. Apparently the court did not limit this principle just to the declarations of the victim of the homicide, or at least the court did not find the father's declaration inadmissible on that ground. Instead, the court refused to admit the evidence because the necessary necessity was absent, "there having been several witnesses present at the different transactions." *Respublica*, 1795 WL 708 at \*2. The court, however, went on to find an independent ground for exclusion, one that mirrored the rulings in *Brasier* and *Baynard*. The court noted that the declarant Thomas Langcake had been bound over as one of the participants in the crime and that he would have been indicted if he had not died before the indictments were returned. If indicted he would have been an interested party and could not have testified. The court concluded, "If indicted and alive, Thomas Langcake could not have been admitted as a witness to disprove the present charge. His declarations shortly before his death surely cannot be received in evidence. . . ." *Respublica*, 179 WL 708 at \*2. Once again, if the declarant would have been an incompetent in-court witness, his hearsay could not be admitted. See generally *Respublica*, 179 WL 708.

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statements in criminal trials. The Framers could only have put their own views into the Sixth Amendment.

English cases may tell us something about that American understanding, but it would not be surprising in a world of little and difficult communication across the sea that American views would not be precisely the same as English notions. Furthermore, as I have contended elsewhere,<sup>31</sup> American criminal procedure had diverged in significant ways from English procedure by the time of the Constitution to provide Americans with a more robust adversary system than England. The Sixth Amendment, at least in part, rejected English procedures and constitutionalized practices that had already emerged in the colonies and new states.<sup>32</sup> If the Confrontation Clause's purpose was to help ensure a fast-emerging American adversary system,<sup>33</sup> then American sources must be especially examined, and so far the historical debates engendered by *Crawford* and *Davis* have not truly focused on the American law of the period.

Unfortunately, relevant and available American case law from the Framing Era about evidentiary practices in criminal cases is slight,<sup>34</sup> but the information that does exist should be weighed for what light it can bring to the American use of out-of-court statements.

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<sup>31</sup> See Jonakait, *The Origins of the Confrontation Clause*, *supra* note 2, at 108-19.

<sup>32</sup> For example, the Sixth Amendment guarantees a right to counsel when that right did not exist in England. *See id.* at 94-96. *See also* U.S. CONST. amend. VI.

<sup>33</sup> See Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 622 (1988) ("correctly interpreted, the confrontation clause . . . is one of a bundle of rights that assures the accused the protection of our adversary system. It assures the accused the right to the adversarial testing of the prosecution's evidence").

<sup>34</sup> Cf. Randolph N. Jonakait, "Witnesses" in *the Confrontation Clause: Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 197 (2006) (noting that "we cannot say what hearsay law really was in the United States in 1789").

III. *THE ULYSSES*

*The Ulysses* stands as a rare example of American case law from the Framing Era which concerns evidentiary practices in criminal cases.<sup>35</sup> The case involved Captain Lamb, a cruel and incompetent Captain, or at least that is what the mutineers maintained. Eight months after *The Ulysses*, a merchant ship, had sailed from Boston, the crew revolted, put the captain in irons, and placed first officer John Salter in command. Ten days after the revolt the ship arrived on the west coast of North America where two other Boston captains interceded, and Lamb was restored to command. When *The Ulysses* returned to Massachusetts, three officers and two seamen were indicted “for feloniously confining the master of *The Ulysses*, and endeavoring to excite a revolt in the ship.”<sup>36</sup>

Although the defense contended that the defendants’ actions were justified, the jury convicted the charged officers and seamen.<sup>37</sup> While these events have little significance today, the court’s opinion contains a long footnote about evidentiary determinations made during the trial. These rulings by an American federal court, which gave no indication that it was making new law, less than a decade after the adoption of the Sixth Amendment, should be of interest since many concerned hearsay issues and perhaps say something about Framing Era views of confrontation.<sup>38</sup>

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<sup>35</sup> *The Ulysses*, 24 F.Cas 515 (C.C.D. Mass. 1800) (No. 14,300).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 516.

<sup>38</sup> Of course, *The Ulysses*, decided after the Sixth Amendment was adopted, could not have been an inspiration for the Confrontation Clause, but the views held in 1800 were unlikely to differ significantly from those held but a few years earlier. Cases like *The Ulysses* would seem to reflect the common understandings of the law in the Framing Era. This mirrors an argument that *Brasier* has importance for interpreting confrontation even if the Framers were unaware of it. See Davies *supra* note 25, at 89 (noting that *Brasier* “and all other cases first reported in Leach’s Crown Cases were published too late to have come the Framers’ attention prior to the framing of the Confrontation Clause in 1789”). Champions of *Brasier*, however,

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The starting point for *The Ulysses*, as it was for *Baynard*, was the general inadmissibility of out-of-court statements, although the federal court announced the prohibition in somewhat disguised fashion. The *Ulysses* court stated, "What others said, when the defendants were not present to contradict, is no testimony."<sup>39</sup> Hearsay, in other words, was usually banned.

While prohibiting most out-of-court statements, the court's ruling leaves open the possibility that something like tacit admissions were admissible, and clearly at least some of the defendants' direct admissions could be entered into evidence. The court stated, "If the defendants, before the accusation, were said to have used expressions, which they did not deny, it is good evidence, because it is a confession, that they did utter the expressions."<sup>40</sup>

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maintain that it is important because it indicates the common understanding of the law in the Framing Era. See Friedman, *supra* note 16, at 116. Friedman notes that:

We should not be distracted by the question of whether *Brasier* was known in the United States at the time the Sixth Amendment was drafted or adopted. In the respect relevant to the inquiry here, *Brasier* makes no new law. Rather, its significance is that it reflects the common understanding of the time.

Friedman, *supra* note 16, at 116. Surely, however, American cases tell us what the relevant views were better than English decisions. See generally Friedman, *supra* note 16, at 116.

<sup>39</sup> The *Ulysses*, 24 F.Cas. at 516 n.2. Other courts of that era also stated that hearsay was not generally admissible in criminal cases. See *United States v. Robins*, 27 F.Cas. 825, 837 (D.S.C. 1799) (noting that hearsay is not admissible in cases "affecting . . . life or limb . . .").

<sup>40</sup> The *Ulysses*, 24 F.Cas. 515, 516 n.2 (C.C.D. Mass. 1800) (No. 14,300). One issue concerning an admission in *The Ulysses* depended on whether statements could be attributed to a defendant, but after concluding that they could be, the statements were admitted and the court found that:

It was doubted whether the log book was the record of the mate, or of the captain. Captains of vessels were produced, who testified, that the log book is always considered as a record of truth; that it is the duty of a mate to keep one for the inspection of the owners of the ship; the mate is not bound to insert therein



The court also noted, "It was not permitted, that witnesses should testify, to what others said of the defendants, unless they were present. It was not permitted to testify, what others said, respecting expressions, used by defendant, unless they were present."<sup>41</sup> The court was limiting the use of out-of-court statements, but there is some ambiguity in the limitation. Perhaps the court was stating that hearsay could be admitted only if the in-court declarant was present when the hearsay was uttered. If so, the rulings prohibited multiple hearsay statements but nothing more. That interpretation would conflict with the ruling that statements made outside the presence of the defendant were not permitted.<sup>42</sup> Instead, the second ruling more sensibly says that hearsay reports of defendants' admissions were not admissible unless the in-court witness also heard the admissions. The "they" refers to "witnesses," not "others." The key phrase in the first statement is "what others said of the defendants," which apparently means hearsay reports of the defendants' actions. The court, to be consistent with its general ban on out-of-court statements, was ruling that the in-court witness could report hearsay only if the in-court witness had firsthand knowledge of the defendants' actions reported in the hearsay.

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any thing false, even though commanded by the captain, and therefore a log book may be taken as the confession of the mate.

*Id.*

In *State v. Wells*, 1790 WL 349 (N.J.), the court recognized that admissions could be powerful evidence and should be admitted. The court rejected the defendant's contention that evidence of his oral confession should not be admitted because his written confession had already been introduced, concluding that if the defense position were adopted:

this monstrous consequence would ensue, that if a criminal had twenty times acknowledged the commission of a fact, and should afterwards refuse to confess it, upon an examination before the justice, for the very purpose of preventing any proof of his former acknowledgments, he would, by his own act, defeat the ends of justice.

*Wells*, 1790 WL 349 at \*4.

<sup>41</sup> 24 F.Cas. at 516 n.2.

<sup>42</sup> See *supra* note 32 and accompanying text.

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Both rulings appear to permit the hearsay only when the out-of-court statements would corroborate what the in-court witness testified to. This conclusion is buttressed by the court's specific ruling that admitted prior out-of-court statements of an in-court witness not just to impeach,<sup>43</sup> but also to corroborate the witness. The court stated, "Evidence to show, that a witness has given an account of a transaction, similar to what he has testified, is good corroboration of his testimony. And so vice versa."<sup>44</sup>

*The Ulysses* court also made a number of rulings about depositions that undercut *Crawford's* conclusion that a deposition could be validly admitted in the Framing Era if the defendant had the opportunity to cross-examine the witness at the statement's taking and if the declarant were unavailable. *The Ulysses* court stated a different general proposition about depositions: "In criminal prosecutions, depositions are not admitted as regular evidence, unless by mutual consent."<sup>45</sup> A

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<sup>43</sup> See also *State v. Norris*, 1796 WL 327, at \*4 (N.C. Super.L & Eq. 1796) (describing where a prosecutor was allowed to impeach his own witness with prior statements).

<sup>44</sup> *The Ulysses*, 24 F.Cas. 515, 516 n.2 (D. Mass. 1800). The court, however, did not allow all impeachment by prior statements. It was claimed that the witness P. Robinson "had told the American consul, in Canton, a story differing in some considerable circumstances from the testimony which had given in court." *Id.* The court, however, would not allow questioning about this, stating "he was not bound to criminate himself." *Id.* On the other hand, Robinson's account of the events written shortly after the captain's reinstatement was admitted to corroborate his in-court testimony. *Id.*

<sup>45</sup> *Id.* Some Framing Era cases did not admit defendant's statements made in an examination before trial if the statements were not properly recorded. See, e.g., *State v. Grove*, 1794 WL 80 (N.C. Super. L. & Eq. 1796) (noting that a defendant's examination before a magistrate was not admitted because it was not recorded within two days) and *United States v. Maunier*, 26 F.Cas 1210 (C.C.D.N.C. 1792) (describing how a defendant's examination before trial was not admitted because it was not signed by the prisoner). See also *State v. Wells*, 1 N.J.L. 424, 1790 WL 349, at \*4 (N.J. 1790) (noting that the court takes "the law to be, that parole evidence of the confession before the justice would be improper. . ."). But see *State v. Irwin*, 1794 WL 105, at \*1 (N.C. Super. L. & Eq. 1794), where the court

concern over cross-examination was part of the animating force for this mutual-consent rule. In *The Ulysses*, parties had agreed to the taking of a deposition from one Sturges, but after its apparent completion, “some addition was made to it.” The prosecutor John Davis objected to the deposition’s admission, and the court excluded the evidence, stating, “Though this addition might have been true, yet Mr. Davis had no opportunity to cross-examine Sturgis on this point.”<sup>46</sup>

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admitted defendant’s confession before a Justice of the Peace even though it was not properly recorded by the Justice. The court stated:

There is certainly an impropriety in saying, that evidence may be received of a confession made before a private man, and that the same confession made before a Justice shall not, because he hath omitted to perform his duty. . . . [I]f the justice should not do his duty . . . , that shall not be of so much prejudice to the state that the evidence shall be lost.

*Irwin*, 1794 WL 105, at \*2.

<sup>46</sup> *The Ulysses*, 24 F.Cas. 515, 516 n.2 (D. Mass. 1800). Other cases from the era indicated the importance of cross-examination and its connection to hearsay. *See, e.g.*, *State v. Webb*, 1794 WL 98 (N.C. Super. L. & Eq. 1794), where the court refused to admit a deposition not because it was labeled “testimonial” evidence but because of the “rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine. . . .” *Webb*, 1794 WL 98, at \*1.

One court of the era recognized that out-of-court statements should be admitted when cross-examination of the absent declarant would have been to no purpose. *Schwartz v. Thomas*, 1795 WL 529 (1795). In a slander action, the court admitted a letter from an absent declarant indicating that he had heard of the slander. The proponent of the letter said it was offered not for showing that the defendant had uttered the slander but to prove the extent of damages by establishing that the slander had spread. One of the judges concluded, “If the letter had not only stated that the report was known to the writer but had also averred that the plaintiff[-in-error] had *propagated the report*, such averment would have been inadmissible to prove this latter fact. . . .” *Schwartz*, 1795 WL 529, at \*3. Since, however, cross-examination of the letter writer could not have undercut the probative force of the letter to show the slander’s circulation, the letter was admissible. The judge stated:

that the report had circulated so as to come to the knowledge of the writer, is as clearly established by the letter itself, as if he had deposed to the same effect . . . , and no cross examination

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Even when there was an opportunity for cross-examination at the deposition, however, a deposition was still not admissible without mutual consent. Defendant Salter had offered a deposition from someone not named. The court noted that the deponent had relevant evidence, and the defendant had no legal method of detaining the deponent. This time no mention was made that the prosecutor had been denied the opportunity to cross-examine the deponent, but even so, the court indicated that it could not admit the deposition without the prosecutor's consent. The court simply stated, "I have said, depositions are not legal evidence in criminal prosecutions."<sup>47</sup> The court, however, did show a concern that the defendant received a fair trial and obtained the prosecutor's consent. The opinion noted,

If the attorney for the district will not agree to the admission of this deposition, the cause must be continued. A similar determination of Lord Mansfield was quoted, in which he was said to have asserted, if the deposition were not admitted, the cause should be continued forever. The attorney agreed.<sup>48</sup>

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could possibly do away a conviction that he who spoke of the report, had heard it.

*Schwartz*, 1795 WL 529, at \*3. The other judge similarly concluded:

this case is very different from what it would have been, had the letter been produced to prove the speaking of the words, or the propagation of the report by the defendant. In the one case the party might have derived benefit from the cross examination of the writer, in the present case, it would have been impossible.

*Schwartz*, 1795 WL 529, at \*4.

<sup>47</sup> 24 F.Cas. at 516, n.2.

<sup>48</sup> *The Ulysses*, 24 F.Cas. 515, n.2 (D. Mass. 1800). *See also* *United States v. Moore*, 26 F.Cas. 1308 (D. Pa. 1801), where the defendant was charged with a shipboard manslaughter. Defense asked for the trial to be delayed because two witnesses had shipped out again but were expected back at the next court term. The defense lawyers said that they had proposed to the prosecutor that depositions of the witnesses be taken where the prosecutor could have cross-examined, but the prosecutor refused to participate in the deposition. The prosecutor opposed the continuance stating that the defense should have moved to have their witnesses bound over as he had done with a

Another ruling on depositions stated, “Where there are several defendants, and one consents to the taking of a deposition, that deposition may not affect the other defendants, who did not consent to the taking of the deposition.”<sup>49</sup> A deposition was not admissible simply because the accused might have been cross-examined at a deposition, for presumably if the defendants had consented, they would have been able to cross-examine at the out-of-court proceeding. Instead, the mutual consent did more than simply preserve cross-examination; it allowed the parties to choose to have the cross-examination in front of the jury.<sup>50</sup>

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number of prosecution witnesses, concluding that a trial delay would be unfair to the prosecution witnesses who were jailed pending the trial. After arguments about whether the defense would have had the authority to have their witnesses committed, the court continued the trial and ordered the release of the prosecution witnesses on the condition that their depositions be taken with the opportunity for defense cross-examination at the depositions. *See generally Moore*, 26 F.Cas. 1308.

<sup>49</sup> 24 F.Cas. at 516, n.2.

<sup>50</sup> *The Ulysses*, 24 F.Cas. 515, n.2 (D. Mass. 1800). Defense attorneys of that era were arguing not just the importance of cross-examination, but the importance of cross-examination in front of the jury deciding the case. *See United States v. Moore*, 26 F.Cas. 1308 (D. Pa. 1801), where after the court suggested that depositions of prosecution witnesses could be taken, defense counsel responded:

We have great objections to the depositions of these sailors. We wish to examine them in court and before the jury. We have good reason to suspect a conspiracy among them to fix this crime on the defendant. They have evinced the greatest heat and resentment towards him. A viva voce examination before the jury is necessary to our safety. On depositions, though we cross-examine, we shall lose the manner, appearance, temper, &c., of the witnesses, so important in weighing their credit.

*Moore*, 26 F.Cas. at 1308. *See also United States v. Smith*, 3 Wheeler C.C. 100, 27 F.Cas. 1192, 1218 (D. N.Y. 1806), where defense counsel refused to consent to a commission examining absent witnesses and insisted on the importance of cross-examination in front of the jury, stating:

Even in civil cases, I have more than once had occasion to lament the inroads that are made upon oral testimony, by the increased use of written depositions; and I am convinced that the

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Perhaps most important in light of *Crawford*, the court nowhere indicated that the “testimonial” factor weighed into its decisions whatsoever, or that the court was even aware of such a concept. Indeed, the last of the court’s rulings on hearsay indicated that nothing depended on whether the out-of court statements were “testimonial” or not. The court stated, “Where a private journal was produced, that journal may be used against its author, but not against the other defendants.”<sup>51</sup> A private journal is not the product of interrogation, much less governmental questioning. It bears little if any resemblance to an *ex parte* affidavit or deposition. Even though today it would be “nontestimonial” hearsay and could be admitted without violating the Confrontation Clause, it was not admissible against those who had not written it. That ruling, of course, followed from the court’s general proposition that hearsay was not admissible; that is “what others said [including another defendant], when the defendants were not present to contradict, is no testimony.”<sup>52</sup>

*The Ulysses* says nothing directly about the right of confrontation, but it does show a Framing Era court’s concern about the use of out-of-court statements in a criminal case. Most important was its general prohibition of such evidence. The court allowed breaches to the ban, but they were quite limited with the court only permitting admissions, depositions taken by mutual consent, and out-of-court statements that would corroborate or impeach in-court testimony.<sup>53</sup>

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latter frequently prevent the discovery of truth. Everyone knows that when a witness is examined in open court, the manner in which he answer, and the manner in which he declines to answer, are matters of public observation; and that cross-examination may draw out more than could be obtained by studied and written answers to written interrogatories.

*Smith*, 27 F.Cas. at 1215.

<sup>51</sup> *The Ulysses*, 24 F.Cas. at 516, n.2.

<sup>52</sup> *Id.*

<sup>53</sup> At least one American judge cast doubt about the admissibility of a deposition even if it had been properly taken. See *State v. Moody*, 1798 WL 93 (N.C. Super. L. & Eq.), where in a murder trial, statements made by the

Of course, the case does not state whether excited utterances about an ongoing emergency from an absent declarant were admissible or not. The case is silent on the distinction drawn in *Davis*,<sup>54</sup> but the case certainly undercuts the notion that the

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deceased on the day after he was wounded to a Justice of the Peace were offered as dying declarations. Since, however, the declarant did not die until weeks later, the court did not admit the statements because they were not made when the declarant was without hope of life. Judge Haywood, however, suggested that the statements might be admissible as an examination under oath before a Justice of the Peace. The defense attorney objected that the declarant was first examined and then later sworn to the truth of the contents, rather than being sworn before he was examined. Judge Haywood, "thinking there might be something in [the defense] objection, did not insist upon receiving the testimony." *Id.* at \*1. While this might indicate that a deposition could be admitted when the proper forms were followed, the other judge gave broader grounds for the exclusion, which would have prevented its admission even if the deposition had been properly taken. Judge Stone stated, "I cannot think this paper is receivable at any rate; how is it possible a man can be a witness to prove his own death?" *Id.*

<sup>54</sup> The fact that courts had expressed concerns over admitting hearsay does not mean that courts did not also admit hearsay without reporting an explanation. *See, e.g., State v. Negro George*, 1797 WL 403 (Del.Quar.Sess.) (describing where the report summarizes the testimony of many witnesses some of whom report the out-of-court statements of others). Thus, a prosecution witness testified that the owner of the defendant slave stated shortly after the crime that he (the owner) believed the defendant had been on the plantation at the relevant time. The reported opinion does not indicate any objection to this hearsay, but the owner's declaration was exculpatory, and the owner later testified to the same effect. The prosecution witness, however, also testified that defendant's mother stated that the defendant had shoes, an important issue because shoe prints had been found near the crime scene. This hearsay, however, seems to have been an explanation of the in-court testimony of how the witness came to compare the defendant's shoes to the imprints at the scene. The witness testified that after the mother's statement, the defendant produced his shoes, and the witness told the jury about the comparison he made. The hearsay was not the central evidence for the prosecution, which relied on the identification of the victim. *Id.*

*See also State v. Lough*, 1803 WL 750 (Del Quar.Sess.) (noting that in a trial for horse stealing, a witness said that when he saw the horse someone else told him that it was stolen and the evidence was not crucial because the owner of the horse had already testified as to its theft).

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admissibility of hearsay in the Framing Era depended on whether or not out-of-court statements were “testimonial.” Indeed, the court gave no indication that the court was even aware of such a distinction.

Perhaps most important, nothing in *The Ulysses* or any of the other cases cited here or that have been discussed in the aftermath of *Crawford* and *Davis* demonstrate that Framing Era prosecutions were upheld or even undertaken when the crucial evidence against the accused was an out-of-court statement of an absent witness, whether or not that hearsay was “testimonial.” The thought of such prosecutions never seems to have even occurred then.<sup>55</sup>

What *The Ulysses* and the various cases previously discussed suggest is that American courts were seeking to provide fair, adversarial trials, and decisions about the use of out-of-court statements were just part of that concern. What *The Ulysses* should really teach is that the hearsay determinations of the Framing Era cannot be meaningfully analyzed apart from an analysis of the evolving criminal trial system as a whole, and that the Confrontation Clause should not be interpreted as if it can be segregated from related provisions in the Constitution.<sup>56</sup>

## CONCLUSION

If a common law right to confrontation existed, it cannot be found in *Rex v. Brasier*, as some have contended. That case articulates no general principles about hearsay or confrontation. The similar American case of *State v. Baynard*, however, does suggest that in American courts during the Framing Era courts were announcing that hearsay was generally inadmissible, and *The Ulysses* further indicates that hearsay exceptions in American courts during that period were limited. Most

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<sup>55</sup> See *supra* note 54.

<sup>56</sup> See Jonakait, *supra* note 2, at 198 (noting that *Crawford*'s definition of “witnesses” in the Confrontation Clause conflicts with the use of that term in other parts of the Constitution and “*Crawford*'s analysis ignores confrontation's Sixth Amendment context.”).



important, however, for the modern eye, none of the discussed cases show any concern over a distinction between “testimonial” and “nontestimonial” hearsay.

Perhaps the approach of *Crawford* and *Davis* is a good one, but it is not one that has proven support from the historical record. We cannot know if the Framers of the Confrontation Clause would have found the distinction that the Court has articulated between the companion cases in *Davis* important, because the Framers, for practical purposes, said nothing about how they viewed that constitutional provision. But nothing in the historical record so far brought forth indicates that the distinction would have made any sense to them at all. Instead, what *Crawford* and *Davis* have done, it seems, is to launch something like a new common law of evidence where the language of those decisions has to be parsed without real reference to history or Sixth Amendment principles, for guidance on how new cases should be decided.