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Anthony J. Franze

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**THE CONFRONTATION CLAUSE
AND ORIGINALISM:
LESSONS FROM *KING V. BRASIER***

*Anthony J. Franze**

“Marry, Sir, they have committed false report”

—WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, act 5, sc. 1.

INTRODUCTION

When a national children’s rights organization asked me to draft an amicus brief in *Davis v. Washington*¹ to alert the Supreme Court to the impact its decision interpreting the Confrontation Clause may have on child abuse prosecutions, I had no idea it was going to thrust me back in time to the laws and practices of seventeenth and eighteenth century England. It was not long, however, before I made the acquaintance of Sir

* Attorney, Arnold & Porter LLP, Washington, D.C.; Adjunct Professor of Law, Michigan State University College of Law. The author thanks Brooklyn Law School for inviting him to participate in this symposium. He also thanks symposium participant Professor Thomas Davies, for providing guidance on historical sources and invaluable comments on this article. Thanks also to Professor Sheila B. Scheuerman and Professor Daniel Barnhizer for comments on earlier drafts. Additional thanks to Kathleen Prince from MSU’s library and Ann Greenwood from Arnold & Porter LLP’s London office library for research assistance. All errors, of course, are solely those of the author. The views expressed herein are solely those of the author and not those of Arnold & Porter LLP or any of the firm’s clients.

¹ 126 S. Ct. 2266 (2006). The *Davis* decision addressed two cases argued in tandem, *Washington v. Davis*, 111 P.3d 844 (Wash. 2005) (en banc) and *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005). This article refers to the cases collectively as “*Davis*.”

Walter Raleigh, the Privy Council, and the Marian statutes. History, I was reminded, has become central to confrontation doctrine since the Supreme Court's 2004 decision in *Crawford v. Washington*.² And not just any history. Justice Scalia, writing for the *Crawford* majority, made clear that what matters is the "original meaning" of the Confrontation Clause—an interpretation "faithful to the Framers' understanding."³

In *Crawford*, the defendant was tried for attempted murder, and the Court addressed whether the admission of a recorded statement by the defendant's wife, who did not testify at trial because of a state law marital privilege, violated the defendant's Sixth Amendment confrontation right.⁴ Finding the existing confrontation framework "unpredictable," "amorphous," and inconsistent with "historical principles,"⁵ the *Crawford* Court crafted a new confrontation test that distinguishes between "testimonial" and "nontestimonial" hearsay:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay

² 541 U.S. 36 (2004).

³ *Id.* at 59-60.

⁴ *Id.* at 38, 40, 68.

⁵ *Id.* at 60-63. In *Crawford*, the Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which "condition[ed] the admissibility of all hearsay evidence on whether it falls under a 'firmly rooted hearsay exception' or bears 'particularized guarantees of trustworthiness.'" *Id.* at 60 (quoting *Roberts*, 448 U.S. at 66). The Court determined that the *Roberts* framework conflated the constitutional requirements with the law of hearsay, strayed from historic principles, and was inherently flawed:

[The *Roberts* reliability] framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations. Reliability is an amorphous, if not entirely subjective, concept The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.

Id. at 63; accord *Whorton v. Bockting*, 127 S. Ct. 1173, 1179 (2007) (discussing *Crawford* overruling *Roberts* in the context of finding that the *Crawford* rule could not be applied retroactively).

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law Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.⁶

Two years later, *Davis* presented the Court's first opportunity to define the parameters of "testimonial," something *Crawford* expressly left "for another day."⁷ At issue in *Davis* was whether a recording of a 911 call as well as an affidavit and hearsay statements made during a police interview admitted at trial in two domestic violence cases were "testimonial."⁸ Adhering to *Crawford*'s originalist approach,⁹ the parties' and amici's briefs in *Davis* focused on framing-era history.

Nearly all of the *Davis* briefs¹⁰ discussed a 1779 child rape

⁶ *Crawford*, 541 U.S. at 68.

⁷ *Id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'").

⁸ *Davis v. Washington*, 126 S. Ct. 2266, 2270-73 (2006) (describing background of *Washington v. Davis*, 111 P.3d 844 (Wash. 2005) (en banc) and *Hammon v. Indiana*, 829 N.E.2d 444 (Ind. 2005), which were argued in tandem and decided in one opinion).

⁹ *Crawford*, 541 U.S. at 68.

¹⁰ See Brief of Petitioner Hershel Hammon, *Davis*, 126 S. Ct. 2266 (No. 05-5705), 2005 WL 3597706; Brief of Respondent, *Davis*, 126 S. Ct. 2266 (No. 05-5705), 2006 WL 271825; Reply Brief of Petitioner Hershel Hammon, *Davis*, 126 S. Ct. 2266 (No. 05-5705), 2006 WL 615151; Brief for Petitioner, *Davis*, 126 S. Ct. 2266 (No. 05-5224), 2005 WL 3598182; Brief of Respondent, *Davis*, 126 S. Ct. 2266 (No. 05-5224), 2006 WL 271825; Reply Brief for Petitioner, *Davis*, 126 S. Ct. 2266 (No. 05-5224), 2006 WL 542177. For the amici briefs that discuss *Brasier*, see Brief for the United States as Amicus Curiae Supporting Respondent, *Davis*, 126 S. Ct. 2266 (No. 05-5224), 2006 WL 303911; Brief for the States of Illinois et al. as Amici Curiae in Support of Respondents, *Davis*, 126 S. Ct. 2266 (Nos. 05-5224, 05-5705), 2006 WL 303912; Brief of Amicus Curiae, the National Association of Counsel for Children (NACC) in Support of Respondents, *Davis*, 126 S. Ct. 2266 (Nos. 05-5224, 05-5705), 2006 WL 284227. The author was counsel of record for amicus NACC and would like to thank Professor Thomas D. Lyon of the University of Southern California Law School as well as Raymond LaMagna and Jacob Smiles for their contributions to the brief, including some of the initial research on *Brasier* discussed in this article.

case, *King v. Brasier*.¹¹ In *Brasier*, Mary Harris, a child under seven years old, “immediately on her coming home,” told her mother and a woman lodging in the home that the defendant had sexually assaulted her.¹² At the defendant’s trial for assault with intent to commit a rape, the child “was not sworn or produced as a witness.”¹³ Mary’s mother and the lodger, however, testified that Mary told them she had been assaulted and had identified the defendant as the perpetrator. The jury convicted the defendant,¹⁴ but the trial judge referred the case to the Twelve Judges for review, a practice analogous to a modern day appeal.¹⁵ The Twelve Judges unanimously reversed the conviction, holding that “no testimony whatever can be legally received except upon oath” and “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.”¹⁶

The defendants in *Davis* naturally argued that *Brasier* proved, at common law, hearsay statements made “immediately” after an assault were characterized as “testimony” forbidden from evidence.¹⁷ Thus, they reasoned, *Brasier* showed that the 911 call and statements to the police—even if considered excited utterances—would be “testimonial” and barred from evidence in 1779, over a decade before ratification of the Confrontation Clause in 1791.¹⁸

¹¹ 168 Eng. Rep. 202, 1 Leach 199 (K.B. 1779).

¹² *Id.* at 202, 1 Leach at 200.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ As Professor Langbein has explained, “[w]hen a point of difficulty arose that a trial judge was reluctant to decide on his own . . . 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.” JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 212-13 (2003).

¹⁶ *Brasier*, 168 Eng. Rep. at 202-03, 1 Leach at 200.

¹⁷ *See infra* text accompanying notes 31-35.

¹⁸ *Id.* Although the Supreme Court often treats “original meaning” as an inquiry into the generally accepted meaning that a provision in the Bill of Rights had at the time of ratification in 1791, some argue that 1789, the date the Sixth Amendment was framed, is the appropriate cut-off date. *See infra*

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Writing for the *Davis* majority, Justice Scalia found no need to address any spontaneous declaration exception to confrontation and instead adopted a new standard for “testimonial”—limited to the situations presented—that focused on whether the “primary purpose” of the out-of-court statement was to assist police in responding to an “ongoing emergency.”¹⁹ Justice Scalia’s opinion, however, did briefly mention *Brasier*,²⁰ implicitly suggesting that the case may be instructive to confrontation issues in other contexts, including one of the principal questions *Davis* left unresolved: whether statements made to private individuals rather than government officials can ever be “testimonial.”²¹

notes 152-54 and accompanying text.

¹⁹ *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). In *Davis*, the Court adopted the following test, limiting it to the factual contexts presented in the cases:

Without attempting to produce an exhaustive classification of all conceivable statements . . . it suffices to decide the present cases to hold as follows: 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 that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. The Court held that the 911 recording admitted against defendant *Davis* was nontestimonial under this test because, “the circumstances of [the victim’s] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.” *Id.* at 2277. The Court found the affidavit and hearsay admitted against defendant *Hammon*, however, was “testimonial” since it was “entirely clear from the circumstances that the interrogation was part of an investigation into possibly past criminal conduct There was no emergency in progress Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime” *Id.* at 2278.

²⁰ *Id.* at 2277.

²¹ In *Davis*, the Court expressly declined to address whether statements to non-law enforcement personnel can ever be testimonial: “For the purposes of this opinion (and without deciding the point), we consider [911 operators’]

Part I of this article traces the common law before and after *Brasier* and argues that the case has no place in confrontation doctrine, under an originalist approach or otherwise.²² When read in context, *Brasier* is not about confrontation at all. Rather, the case concerns unique framing-era law governing the competency of children to take the oath and give sworn—or unsworn—testimony at trial.²³ More fundamentally, the report of *Brasier* discussed in *Davis* could not have influenced the Framers’ understanding of confrontation because it was not in print until 1815, over two decades after the framing and ratification of the Sixth Amendment. The 1815 report was a revised version of reports of the case in print from 1789 until 1799. The earlier versions made no mention of any hearsay and, indeed, reported that the child testified at trial, essentially taking the case outside the realm of confrontation.²⁴

It is plausible, moreover, that the Framers would not have been aware of any report of *Brasier* and—given the legal authorities that were available in framing-era America—would have understood that hearsay accounts by parents, doctors, and acquaintances concerning statements made by child sexual abuse victims would be admissible in criminal trials without regard to whether the statements would now be considered “testimonial” or “nontestimonial.”²⁵

Part II argues that *Brasier* serves as an apt case study on some of the practical limits of originalism as a basis for criminal procedure.²⁶ That the entire debate over *Brasier* is based on a

acts to be acts of the police. As in *Crawford*, therefore, our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’” *Id.* at 2274 n.2 (citation omitted).

²² See *infra* Part I.C-D.

²³ See *infra* Part I.C.1.

²⁴ See *infra* Part I.C.2.

²⁵ See *infra* Part I.C.2.

²⁶ *Crawford* prompted additional scholarship concerning the longstanding debate over originalism. For articles critical of originalism or history in *Crawford*, see generally 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*

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report of the case that did not exist in 1791—and that the original report eluded the parties, the Solicitor General’s office, amici, and the Supreme Court in *Davis* as well as most academics who have analyzed the case over the years—raises questions about a framework that essentially requires lawyers and judges to become amateur historians. To be sure, originalists readily acknowledge that there may be difficulties in determining original meaning and applying it to modern circumstances.²⁷ Even so, that may discount the *practical* reality that criminal lawyers in the trenches—and the judges deciding these issues—cannot reasonably be expected to have the time to find, much less trace the origins of, each and every common law case that seems significant to the confrontation issue before them. That is particularly the case given that many historical sources are not readily available without resort to specialized

Clause, 15 J.L. & POL’Y 349 (2007) [hereinafter Davies, *Not the Framers’ Design*]; Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 105, 156-62 (2005) [hereinafter Davies, *What Did the Framers Know*]; Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry*, 72 BROOK L. REV. 557 (2007) [hereinafter Davies, *Revisiting Fictional Originalism*]; Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209 (2005); 30A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6371.2 (Supp. 2006); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219 (2005); Rodger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK L. REV. 35 (2005). For views supporting originalism or the history in *Crawford*, see Robert Kry, *Confrontation under the Marian Statutes: A Response to Professor Davies*, 72 BROOK L. REV. 493 (2007); Stepanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005).

²⁷ E.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 45-46 (Princeton Univ. Press 1997) (“The difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution changes The originalist, if he does not have all the answers, has many of them. The Confrontation Clause, for example, requires confrontation.”).

subscription databases or rare book collections. Given the nature of the sources, it may even be possible for advocates with time and resources to construct a compelling case of “original meaning” for either side of an issue.

All of this is not to say that history is irrelevant to an understanding of confrontation or other rights. Nor is the fact that a legal framework is difficult to apply necessarily a sound basis to abandon it. Still, the question remains whether the real-world limitations of anchoring a legal framework rigidly to “original meaning” will result in shorthand legal tests, selective advocacy, results-oriented decision-making, and the very “unpredictable” and “amorphous” framework *Crawford* sought to replace.

I. MUCH ADO ABOUT *BRASIER*

A. *The Brasier Case*

The *Brasier* case as set forth in the English Reports and discussed by the litigants and Supreme Court in *Davis* is short enough to set forth in full:

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Buller, at the Spring Assizes for Reading, in the year 1779, on the trial of an indictment for an assault with intent to commit a rape on the body of Mary Harris, an infant under seven years of age.

The case against the prisoner was proved by the mother of the child, 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

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she was not sworn or produced as a witness on the trial.

The prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in Dyer's Reports (Dyer, 303, b, in marg; 1 Hale, 302, 634; 2 Hale, 279; 11 Mod. 228; 1 Atkins, 29; Foster, 70; 2 Hawk. 612; Gilb. L. E. 144); for these notes having been made by Lord Chief-Justice Treby, are considered of great weight and authority; and it was submitted to the Twelve Judges, Whether this evidence was sufficient in point of law?

The Judges assembled at Serjeants'-Inn Hall 29 April 1779, were unanimously of opinion, 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 (see *White's case*, *post*, 430, Old Bailey October Session, 1786), 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.—The prisoner received a pardon (see the case of *Rex v. Travers*, 2 Strange, 700).²⁸

²⁸ King v. Brasier, 168 Eng. Rep. 202, 202-03, 1 Leach 199, 199-200 (K.B. 1779). As discussed *infra* notes 110-13 and accompanying text, the report on *Brasier* changed over time. The litigants and Court in *Davis* cited only the version reprinted in the English Reports.

B. How Brasier Became a Topic of Debate

Only recently did *Brasier* become a significant topic of confrontation discourse. It was not cited by the *Crawford* majority²⁹ and for the two years following *Crawford*, little was said in cases or commentary about *Brasier*.³⁰

In *Davis*, however, the defendants argued that *Brasier* supported reversal of their convictions, each focusing primarily

²⁹ Chief Justice Rehnquist, however, cited *Brasier* in his concurring opinion. *Crawford v. Washington*, 541 U.S. 36, 69-70 (2004) (Rehnquist, C.J., concurring). Chief Justice Rehnquist used *Brasier* to support his argument that the majority's "distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine." *Id.* at 69. Specifically, Chief Justice Rehnquist cited *Brasier* for the proposition that at common law "out-of-court statements made by someone other than the accused and not taken under oath . . . were generally not considered substantive evidence upon which a conviction could be based." *Id.* Chief Justice Rehnquist reasoned that the Framers thus would not have considered these statements in the same league as statements given under oath and likely would not have had the same concerns about the admission of unsworn statements, even "testimonial" ones. *See id.* at 70-71 & n.4 ("[I]t is far from clear that courts in the late 18th century would have treated unsworn statements, even testimonial ones, the same as sworn statements.").

³⁰ Westlaw's legal databases from the date *Crawford* was decided in March 2004 until certiorari was granted in *Davis* in October 2005 reveal no citations or discussions of *Brasier*. On *Confrontation Blog*, however, Professor Richard D. Friedman noted,

I have been commenting on very recent cases, but here is *R. v. Brasier*, 1 Leach 199, 168 E.R. 202, a case from 1779 that has been much cited over the years. It bears on the treatment not only of fresh accusations but also of statements made by children and of accusations made to private care-givers. The report is as it stands in the English Reports, later annotations and all.

See R. v. Brasier—a classic case from 1779, http://confrontationright.blogspot.com/2005_12_01_archive.html (Dec. 24, 2005, 04:15 EST). After the Supreme Court granted certiorari in *Davis*, a justice on the Montana Supreme Court issued a dissenting opinion citing *Brasier*, among other sources, in support of the view that statements can be testimonial even if made to a non-government official or agent. *See State v. Mizenko*, 127 P.3d 458, 481 (Mont. 2006) (Nelson, J., dissenting).

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on the Twelve Judges' determination that "no testimony whatever can be legally received except upon oath"³¹ and "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."³² These statements, the defendants argued, proved two main propositions. First, that the out-of-court accusatory statements made by young Mary Harris over a decade before the Confrontation Clause's ratification were characterized as "testimony" and should not have been admitted in evidence at trial. Second, Mary Harris's hearsay statements were excluded even though they were made "immediately" after the alleged offense, refuting any "excited utterance" or spontaneous declaration exception to confrontation at common law. Defendant Hammon made a more expansive argument, suggesting that *Brasier* showed that statements made to non-government personnel can be "testimonial" and fall within the scope of the Confrontation Clause:

The manifest premise of the judges' discussion [in *Brasier*] 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 *Brasier* clearly reflects the law of its time, and it held squarely against admissibility notwithstanding the presence of several factors, absent in [this] case, that might have been argued to point the other way—the demonstration of immediacy, and the facts that the speaker was a child, that her audience was not government officials, and that she was not responding to questioning.

Thus, at the time of the Framing, there was no special rule allowing admissibility of accusatorial statements because they were made under the stress of excitement.³³

³¹ King v. *Brasier*, 168 Eng. Rep. 202, 202, 1 Leach 199, 200 (K.B. 1779).

³² *Id.* at 203, 1 Leach at 200.

³³ Brief of Petitioner Hershel Hammon, *supra* note 10, at *27-28

In response to arguments by amici, both defendants acknowledged that eighteenth century trials in London's Old Bailey court reflected repeated instances where child hearsay concerning sexual abuse was admitted into evidence.³⁴ Each, however, argued that *Brasier* "changed the rules, holding that sufficiently mature children could testify at trial, characterizing the out-of-court accusation made by the child there as testimonial, and so excluding it."³⁵

(footnote omitted). Hammon's reply brief reiterated that *Brasier* illustrated "a non-controversial understanding that (putting aside the age of the child) the accusation was testimonial in nature" Reply Brief of Petitioner Hershel Hammon, *supra* note 10, at *8 n.9. Hammon also acknowledged, however, that "[h]ow this history should now affect admission of statements made by children is, of course, a question that this Court need not reach here. Other considerations as well, not presented here, might affect how the confrontation right is applied with respect to child witnesses." *Id.* at *8 n.10 (citing Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1280-85 (2003)). Hammon's counsel, Professor Friedman, as well as other academics, have recognized that different considerations may apply when the statements are by children. See Richard D. Friedman, *Grappling With the Meaning of "Testimonial,"* 71 BROOK. L. REV. 241, 272-73 (2005); Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 249-52 (2002); see also Brief Amicus Curiae of Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park, in Support of Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958, at *22 n.12; Brief Amicus Curiae of the ACLU and the ACLU of Virginia, in Support of Petitioner, *Lilly v. Virginia*, 527 U.S. 116 (1999) (No. 98-5881), 1998 WL 901782, at *26 & n.44. Though the history surrounding *Brasier* suggests that out-of-court statements of children should receive special treatment under the Confrontation Clause, that issue is beyond the scope of this article.

³⁴ Reply Brief of Petitioner Hershel Hammon, *supra* note 10, at *8; Reply Brief for Petitioner [Davis], *supra* note 10, at *9.

³⁵ Reply Brief of Petitioner Hershel Hammon, *supra* note 10, at *7-8; *accord* Reply Brief for Petitioner [Davis], *supra* note 10, at *9 ("The NACC brief (at 19-21), mentions other Old Bailey cases involving children's statements to family members, but the King's Bench implicitly disapproved these cases in [*Brasier*]. There, the full King's Bench held that children's out-of-court accusations were admissible *only if they testified*. Since the victim there had not been, in fact, 'sworn or produced as a witness at trial,' her

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The Court in *Davis* did not address any of these arguments. It did, however, make one reference to *Brasier*. Responding to defendant Davis's argument that *Brasier* supported treating the victim's statements to the 911 operator as testimonial, the Court said that *Brasier* "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 past events."³⁶

Professor Friedman, counsel for one of the defendants in *Davis* and a leading confrontation scholar, has interpreted this reference in *Davis* as an "apparent endorsement" of *Brasier*.³⁷ Friedman argues that the reference is significant because "neither the immediacy of the statement, the youth of the declarant, nor the private status of the audience removes the statement from the protections of the confrontation right, and that is as it should be."³⁸

Already, a state high court has relied on the Court's reference to *Brasier* to support its holding that statements to non-law enforcement personnel can be "testimonial":³⁹

[I]n *Davis* the Court cited as authority decisions suggesting that statements made to non-law-enforcement individuals may be testimonial and also be subject to Confrontation Clause limitations Furthermore, the Court said that readers should not infer from the opinion that "statements made in the absence of any interrogation are necessarily

accusatory statement was inadmissible.").

³⁶ *Davis v. Washington*, 126 S. Ct. 2266, 2277 (2006).

³⁷ Richard D. Friedman, *We Really (For the Most Part) Mean It!*, 105 MICH. L. REV. FIRST IMPRESSIONS 1, 5 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/friedman.pdf>.

³⁸ *Id.* at 5; accord Richard D. Friedman, Crawford, Davis, and Way Beyond, 15 J.L. & POL'Y 553, 564 (2007) ("[N]otwithstanding the immediacy of the report—and notwithstanding the facts that the declarant was a young child and that her audience included no law enforcement officers—the statement was testimonial. Significantly, that is just how the *Brasier* court referred to the child's accusation, as testimony.").

³⁹ See discussion *supra* note 21.

nontestimonial.” Until the U.S. Supreme Court holds otherwise, we interpret the Court’s remarks to imply that statements made to someone other than law enforcement personnel may also be properly characterized as testimonial.⁴⁰

What *Brasier* means, therefore, is not simply a matter of academic debate. But to understand the true meaning of the case (to the extent possible), it must be read in the context of the law of the time.

C. *What Brasier Really Means (Probably)*

Though academics debate the nuances of “originalism,” the Supreme Court often treats “original meaning” as an inquiry into the generally accepted meaning that a provision in the Bill of Rights had at the time of ratification in 1791.⁴¹ In *Crawford*, the Court examined the laws and practices of sixteenth through eighteenth century England, as well as early post-ratification state decisions that “shed light upon the original understanding of the common law right.”⁴² Though *Davis* arguably retreated somewhat from *Crawford*’s detailed historical focus,⁴³ the Court still sought to divine how the common law would treat the out-of-court statements at issue.⁴⁴

If the same analysis is applied to *Brasier*, the relevance of the case to the Sixth Amendment confrontation right largely collapses. Contextually, the *Brasier* statement, “no testimony whatever can be legally received except upon oath,”⁴⁵ did not

⁴⁰ *West Virginia v. Mechling*, 633 S.E.2d 311, 323 n.10 (W. Va. 2006) (citations omitted).

⁴¹ Davies, *What Did the Framers Know*, *supra* note 26, at 105, 156-62 (noting that Supreme Court opinions often refer to the 1791 ratification date but sometimes instead refer to the “framing” or “drafters” and 1789).

⁴² 541 U.S. 36, 49 (2004).

⁴³ *Cf. Davis v. Washington*, 126 S. Ct. 2266, 2278 n.5 (2006) (“Restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction.”).

⁴⁴ *Id.*

⁴⁵ 168 Eng. Rep. 202, 202, 1 Leach 199, 199 (K.B. 1779).

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characterize the child's hearsay statements as "testimony," or, for that matter, even refer to the child's statements at all. Further, the testimony of the child's mother and the lodger did not appear in any report until well after ratification, rendering post-ratification interpretations of *Brasier* on hearsay mostly irrelevant.

1. *The Law Leading Up to Brasier*

To understand *Brasier*, the case must be read in the context of seventeenth and eighteenth century English law governing child competency. Before *Brasier*, courts followed a general rule that a child under nine years old was incapable of taking the oath and giving sworn testimony—effectively an irrebuttable presumption of incompetency. A leading case on the issue was *Rex v. Travers*, decided in 1726 (but first reported in 1755).⁴⁶ There, the defendant was indicted for the rape of a six-year-old girl, a capital offense.⁴⁷ In the defendant's first trial, the judge refused to swear the child as a witness, and the defendant was acquitted.⁴⁸ Based on the same alleged conduct, the defendant was then re-indicted for "assault with intent to ravish," a misdemeanor and non-capital offense.⁴⁹ The *Travers* court

⁴⁶ 93 Eng. Rep. 793, 2 Strange 700 (K.B. 1726). The first two volumes of the Strange reporter were published in 1755. W. HAROLD MAXWELL AND LESLIE F. MAXWELL, A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS, ENGLISH LAW TO 1800 309 (2d ed. 1955).

⁴⁷ 93 Eng. Rep. at 793, 2 Strange at 700.

⁴⁸ *Id.*

⁴⁹ *Id.* The indictment for a lesser offense after an acquittal was permitted during that time. As one commentator who studied rape trials during the eighteenth century explained:

A court could try the rape defendant on either a felony or a misdemeanour charge, but not on both in the same trial. This position had its support in the rule that those accused of felonies, unlike those accused of treason or misdemeanours, had, in theory at least, *no* right to be defended by counsel [T]he felony/misdemeanour rule was applied quite rigorously in the Old Bailey from the middle of the [eighteenth] century on

. . . .

considered whether the same general rule that prohibited children under nine years old to be sworn in capital cases also applied in trials for misdemeanor offenses.⁵⁰ Chief Judge Raymond held that the same presumption of incompetency applied:

[A] person who could not be a witness in the one case, could not in the other. The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong: no person has ever been admitted as a witness under the age of nine years, and very seldom under ten.⁵¹

Under the rules of double jeopardy which prevailed at the time, a defendant acquitted on a capital charge *could* subsequently be tried for the same fact, if the subsequent charge was non-capital. Those acquitted of rape could be, and sometimes were, tried for the misdemeanour of assault with intent to commit rape.

Antony E. Simpson, *Vulnerability and the Age of Female Consent: Legal Innovation and Its Effect on Prosecutions for Rape In Eighteenth-Century London*, in *SEXUAL UNDERWORLDS OF THE ENLIGHTENMENT 181, 187-90* (G.S. Rousseau & Roy Porter eds., Manchester Univ. Press (1987)).

⁵⁰ *Travers*, 93 Eng. Rep. at 793-94, 2 Strange at 700-01.

⁵¹ *Id.* at 794, 2 Strange at 701. Two arguments were made in favor of allowing the child to be sworn:

[1] Hale's P.C. says, that the examination of one the age of nine years has been admitted: and [2] a case at the Old Bailey 1698, was cited, where upon such an indictment as this, Ward Chief Baron admitted one to be a witness, who was under the age of ten years, after the child had been examined about the nature of an oath and had given a reasonable account of it.

Id., 2 Strange at 700-01. Chief Judge Raymond appeared to respond to each point, first by refuting reliance on the 1698 Old Bailey case that reportedly allowed a child to testify on the ground that a later Old Bailey case prohibited unsworn testimony. Raymond noted that in a 1704 case, "this point was thoroughly debated in the case of one Steward, who was indicted upon two indictments for the rapes upon children" and the court barred the alleged victims aged ten and six years old from taking the oath. *Id.* at 794, 2 Strange at 701. He next noted that the only support existing for swearing a ten-year-old was Hale's treatise. *Id.* These points are relevant because the reporter annotations in *Brasier* cite to *Travers* and Hale. See *King v. Brasier*, 168

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The court held that the child was not permitted to testify and “there not being evidence sufficient without her, the defendant was acquitted.”⁵²

The *Travers* case is relevant not only for its explicit holding establishing an irrebutable presumption of incompetency for children under a particular age, but also for its implicit holding on a companion issue: whether an incompetent child could provide testimony *unsworn*. Specifically, throughout the eighteenth century, debate and confusion existed over whether children who were incompetent to take the oath should nevertheless be permitted to testify unsworn in certain types of cases. The issue appears to have been prompted by an influential treatise of the era, Sir Matthew Hale’s *The History of the Pleas of the Crown*.⁵³ Hale argued that children presumed incompetent to take the oath should be allowed, at least in child sexual abuse cases, to testify unsworn.⁵⁴ Hale gave two principal reasons for allowing unsworn testimony. First, in a point with modern relevance,⁵⁵ he argued that unsworn testimony should be allowed

Eng. Rep. 202, 202-03, 1 Leach 199, 200 (K.B. 1779); *see also infra* note 108 and accompanying text. Finally, it is notable that a reporter’s footnote annotation in *Travers* references *Brasier. Travers*, 93 Eng. Rep. at 794 n.1, 2 Strange at 701 n.1 (“(1) Sed vide *Brazier’s case*, where an infant of 5 years old was held a good witness by all the Judges, she appearing to be acquainted with the nature of the obligation of the oath.”).

⁵² *Travers*, 93 Eng. Rep. at 794, 2 Strange at 701.

⁵³ 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* [THE HISTORY OF THE PLEAS OF THE CROWN] 634 (London, Prof’l Books Ltd. 1971) (1736).

⁵⁴ *Id.* Hale noted that unsworn testimony would not be sufficient to convict, but should be heard to provide the court information. *Id.* (“But if it be an infant of such tender years, that in point of discretion the court sees unfit to swear her, yet I think she ought to be heard without oath to give the court information, tho singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable”); *accord* 2 HALE, *supra* note 53, at 279 (“But in many cases 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”).

⁵⁵ *See, e.g.*, *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (“Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”).

because “[t]he nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed”⁵⁶ Second, and most notably, Hale argued that children should be permitted to testify unsworn because the law permitted admission of hearsay of children reporting abuse, so courts may as well hear from the children directly:

Because if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it as second-hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered.⁵⁷

Hale’s treatise, written sometime before 1676, but not published until 1736,⁵⁸ was cited repeatedly for his arguments in favor of hearing unsworn testimony from child victims. Both William Blackstone and Francis Buller, who were among the Twelve Judges who decided *Brasier* in 1779, cited Hale’s arguments in their respective treatises. Various editions of Blackstone’s Commentaries from the first edition (of the relevant volume) in 1769 until the 1783 ninth English edition that was changed to reflect *Brasier*,⁵⁹ provided as follows:

⁵⁶ 1 HALE, *supra* note 53, at 634.

⁵⁷ *Id.* at 634-35. Although advocating that courts allow child witnesses to testify unsworn, Hale stated that concurrent proof was still required to prove the offense and that sworn or unsworn testimony alone was insufficient to convict a defendant of rape. *Id.* at 635 (“But in both these cases, whether the infant be sworn or not, it is necessary to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant.”).

⁵⁸ *E.g.*, P.R. Glazebrook, *Introduction* to 1 HALE, *supra* note 53.

⁵⁹ *See* discussion *infra* text accompanying note 117 (quoting 1783 ninth English edition that was updated to discuss *Brasier*).

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[I]f the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath; and, even if she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offence being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses: and, secondly, because the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so.⁶⁰

⁶⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 214 (1st ed. 1769). The English first edition of volume four, which contained the quoted passage, was published in 1769. This passage remained in subsequent editions until the English ninth edition of volume four, published in 1783, which was updated to discuss *Brasier*. 1 MAXWELL & MAXWELL, *supra* note 46, at 27-28. This English 1783 ninth edition was the last to contain Blackstone's alterations before he died.

The American first edition of Blackstone's Commentaries, published in Philadelphia in 1772, was the same as the first 1769 English edition of volume four, and contained the passage quoted. The next American edition was published in Worcester in 1790 and was the same as the 1783 English ninth edition, which contained Blackstone's final alterations and revision discussing *Brasier*. ELDON REVARE JAMES, A LIST OF LEGAL TREATISES PRINTED IN THE BRITISH COLONIES AND THE AMERICAN STATES BEFORE 1801 16-17 (Harvard Univ. Press 1934).

By most accounts, however, before the first American edition was ever published in 1772, over 1,000 copies of prior English editions were imported into the colonies. Randy J. Holland, *Anglo-American Templars: Common Law Crusaders*, 8 DEL. L. REV. 137, 148 (2006); accord Steve Sheppard,

Similarly, the various editions of Buller's treatise, *An Introduction to the Law Relative to Trials at Nisi Prius*,⁶¹ cited Hale from the 1772 edition until it was updated in the 1790 edition to discuss *Brasier*,⁶² for the possibility that courts might receive unsworn testimony from children:

[I]t seems to be settled, that a Child under the Age of ten shall in no Case be admitted; but after that Age,

Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall, 82 IOWA L. REV. 547, 561 (1997) ("The Commentaries were an immediate success in America. Robert Bell, a Philadelphia printer, sold subscriptions for fifteen hundred copies throughout America, even though Americans had already bought more than one thousand copies of English editions For the next five decades, scores of annotated Commentaries poured forth." (footnotes omitted)); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5 (1996) ("One thousand copies of the English edition of Blackstone were sold in the American Colonies before the first American edition appeared in 1772. This edition supplied another 1400 sets at a substantially lower price; and one year before the Declaration of Independence, Edmund Burke remarked in Parliament that nearly as many copies of the Commentaries had been sold on the American as on the English side of the Atlantic." (footnotes omitted)). The Commentaries unquestionably influenced the Framers. See, e.g., Alschuler, *supra* at 2 ("[A]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone's Commentaries]." (citations omitted)); Reid v. Covert, 354 U.S. 1, 23 (1957) ("[T]wo of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone . . . exerted considerable influence on the Founders"). It is likely that at the time of the framing any number of editions were in use. For an example of the numerous and tangled history of the various editions, see generally *The Law Library Microform Consortium* at http://www.llmc.com/yale.htm#page_11 (bibliography of Yale's Blackstone Collection).

⁶¹ This treatise was actually a revision of Henry Bathurst's *The Theory of Evidence* (1761), which Bathurst later republished in expanded form in 1767 in *An Introduction to the Law Relative to Nisi Prius*. Buller was Bathurst's nephew and took over the treatise under his own name in 1772. There were multiple editions over the next several decades. See LANGBEIN, *supra* note 15, at 212 n.150; T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 531 n.238 (1999).

⁶² See *infra* text accompanying note 129 (quoting 1790 edition that was updated to discuss *Brasier*).

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if the Child appear to have any Notion of the Obligation of an Oath, after there has been a Foundation laid by other Witnesses to induce a Suspicion, the Child shall be admitted to prove the Fact. Doubtless the Court will more readily admit such a Child in the Case of a personal Injury (such as Rape) than on a Question between other Parties; and perhaps, in Such Case, would even admit the Infant to be examined without Oath [margin cite to Hale]; for certainly there is much more Reason for the Court to hear the Relation of the Child, than to receive it at second hand from those that heard it say so. In Cases of foul acts done in secret, where the Child is the Party injured, the repelling their Evidence entirely is, in some Measure, denying them the Protection of Law⁶³

Hale's argument also made its way into criminal trials. In *Omychund v. Barker*⁶⁴ in 1744 (first reported in 1765), for example, counsel cited Hale as support for the proposition that unsworn testimony can be received in evidence.⁶⁵ The judges rejected the argument on the ground that Hale's rule had not been followed in trials in London's Old Bailey court.⁶⁶

The Old Bailey trials,⁶⁷ however, reflect otherwise. In child

⁶³ FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 288-89 (London, W. Strahan & M. Woodfall Printers to the King) (1772).

⁶⁴ 1 Atk. 21 (K.B. 1744). The first three volumes of the Atkyns reporter were published in 1765. 1 MAXWELL & MAXWELL, *supra* note 46, at 344.

⁶⁵ *Omychund*, 1 Atk. at 29.

⁶⁶ *Id.* ("Lord Chief Justice *Lee* interrupted the Attorney General, and said, it was determined at the *Old Bailey* upon mature consideration, that a child should not be admitted as evidence without oath. Lord Chief Baron *Parker* likewise said, it was so ruled at *Kingston* assizes before Lord Raymond, where upon an indictment for a rape he refused the evidence of a child without oath."). The latter is a reference to the *Travers* case. See *supra* text accompanying notes 46-52.

⁶⁷ "The Old Bailey was the London-area equivalent of the provincial assize court." LANGBEIN, *supra* note 15, at 17. The court had a heavy caseload:

rape prosecutions, the Old Bailey Session Papers⁶⁸ report trials from 1678,⁶⁹ 1720,⁷⁰ 1762,⁷¹ 1766,⁷² 1768,⁷³ and 1769⁷⁴

[T]he Old Bailey sat eight times a year whereas assizes sat twice a year. In the later seventeenth and early eighteenth centuries the Old Bailey, which was the felony trial court for London and the surrounding county of Middlesex, processed between twelve and twenty jury trials per day through a single courtroom.

Id.

⁶⁸ The Old Bailey Session Papers (“OBSP”) are pamphlet accounts of trials that were produced for the general public. LANGBEIN, *supra* note 15, at 182-90. These reports varied in format and detail over time and have many limitations, including that they summarize the trials, reflect only a selection of cases, and focus primarily on the underlying facts, not the legal practices and procedures in place. *See id.*; accord Gallanis, *supra* note 61, at 553-54 (“For the years before 1800, the OBSP are particularly useful In the nineteenth century, however, the OBSP tended increasingly to summarize the testimony presented at trial, rather than reproducing it in a more verbatim fashion.”). Professor Langbein has noted that rape cases often were reported with more detail in the OBSP, perhaps in the publishers’ efforts to cultivate a popular market. LANGBEIN, *supra* note 15, at 198. For a study of rape trials in the Old Bailey from 1730 to 1830, see Simpson, *supra* note 49, at 188.

⁶⁹ *Rex v. Arrowsmith*, OBSP (Dec. 11, 1678), available at http://www.oldbaileyonline.org/html_units/1670s/t16781211e-2.html. The child witnesses in *Arrowsmith* ultimately testified under oath, but the case reflects that the trial judge determined that receiving unsworn testimony was proper. *Id.* Specifically, the defendant was charged with rape of an eight-year-old. The victim and nine-year-old friend were initially heard unsworn. *Id.* The jury expressed concern that they were unsworn since the only other evidence was hearsay. *Id.* The court defended the admission of the unsworn testimony, telling the jury that “in regard to such Offenders never call other to be by while they commit such actions, they could expect no other Testimony from the Party injured, which they had, and with it an eye Witness, both whom they forbore to Swear, because of the tenderness of their Age; but if they insisted upon, they should be Sworn.” *Id.* The court had the children sworn and reexamined them, and the defendant was convicted of rape. *Id.*

⁷⁰ *Rex v. Beesley*, OBSP (Apr. 27, 1720), available at http://www.old-baileyonline.org/html_units/1720s/t17200427-38.html. The defendant was charged with rape of a ten-year-old girl. *Id.* The court asked the child if she understood the oath, and she did not. *Id.* Nevertheless, the court permitted her to testify, and she stated that the defendant had sexually assaulted her on two occasions. *Id.* The court also permitted hearsay evidence of a witness who testified “that the Girl told her the Prisoner had done the Wrong complained of.” *Id.* The defendant was acquitted. *Id.*

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wherein the court permitted child victims of sexual abuse to testify unsworn. In *Rex v. Stringer*, for instance, the defendant was charged with rape of a seven-year-old girl.⁷⁵ “The child was examined, but not upon oath, who said she carried a pot down into the cellar, the prisoner there took her and set her on a box and kissed her, and put his private parts to her’s, but did not put it into her.”⁷⁶ The defendant was acquitted of the capital offense of rape, but re-indicted for the misdemeanor offense of assault with the intent to commit a rape.⁷⁷

⁷¹ *Rex v. Smith*, OBSP (Apr. 21, 1762), available at http://www.old-baileyonline.org/html_units/1760s/t17620421-11.html. The defendant was charged with rape of a five-year-old girl. The “child [was] examined but not sworn” and testified that the defendant “said I must not tell my mamma. He laid me down on my back and hurt my groin, and put his cock to me.” *Id.* The defendant was permitted to cross-examine the child and ultimately was acquitted of rape, but “detained to be tried at Hick’s-hall for an assault with an intent to commit a rape on the child.” *Id.*

⁷² *Rex v. Brophy*, OBSP (Sept. 3, 1766), available at http://www.old-baileyonline.org/html_units/1760s/t17660903-38.html. The defendant was charged with rape of a ten-year-old girl. At trial, a witness testified that, after originally denying anyone had assaulted her, the girl “said it was Ned.” *Id.* A doctor testified that “[s]he said the man had been concerned with her, mentioning the name Brophy; upon which I asked her where; she said in the cellar; she told me the day, but I do not recollect it.” *Id.* The defendant cross-examined the witnesses. The child testified, “not upon oath” about the rape. The defendant was found guilty and sentenced to death. *Id.*

⁷³ *Rex v. Stringer*, OBSP (Apr. 13, 1768), available at http://www.old-baileyonline.org/html_units/1760s/t17680413-47.html. See *infra* text accompanying notes 75-76.

⁷⁴ *Rex v. Gyles*, OBSP (Apr. 5, 1769), available at http://www.old-baileyonline.org/html_units/1760s/t17690405-49.html. The defendant was charged with rape of an eight-year-old girl. “The child was examined but not upon oath; the account she gave was short of proving the fact. Acquitted.” *Id.*

⁷⁵ *Stringer*, OBSP.

⁷⁶ *Id.*

⁷⁷ One review of child rape cases reported in the OBSP found that most of the cases resulted in acquittal. See Simpson, *supra* note 49, at 188 (finding 82 percent acquittal rate in rape cases involving victims under ten years old). One explanation for the low conviction rate may be that conviction required proof of penetration. 1 HALE, *supra* note 53, at 628 (“To make a rape there

On the other hand, several other Old Bailey reports reflect that children often were not permitted to testify unsworn. In many of these trials, the children's accounts were the only evidence, and defendants were acquitted.⁷⁸

must be an actual penetration"). Some of the Old Bailey trials reflect concern over proof of penetration. *See* case cited *infra* note 81. Beyond the evidentiary difficulty of proving penetration, acquittal rates may be explained, in part, on "the sense that juries may have thought the capital sanction too hard" LANGBEIN, *supra* note 15, at 240 n.276. This view is consistent with a practice reflected in some OBSP cases, where the jury acquitted the defendant of rape, but the defendant was detained for another trial for assault with the intent to commit a rape, a non-capital misdemeanor offense. *See* cases cited *supra* and *infra* notes 71, 73, 78 (*Foster*), 82-88, 102. The practice of retrial on misdemeanor charges also suggests that while unsworn testimony of a child or hearsay statements by themselves were not considered sufficient to convict for a capital crime, they might have been considered sufficient for misdemeanor offenses. *See* cases cited *infra* notes 82 (issuing a sentence for the misdemeanor charges), 93 (finding the prisoner guilty of assault).

⁷⁸ *E.g.*, *Rex v. Linsey*, OBSP (Sept. 12, 1750), *available at* http://www.oldbaileyonline.org/html_units/1750s/t17500912-29.html (reporting case involving defendant charged with rape of a seven-year-old; "The child was not capable of being admitted to give its evidence upon oath, and there being no other evidence, the prisoner was acquitted."); *Rex v. White*, OBSP (June 25, 1752), *available at* http://www.oldbaileyonline.org/html_units/1750s/t17520625-30.html (reporting case involving defendant charged with rape of an eleven-year-old; a doctor testified about the presence of a venereal disease, but the "child could not be examined upon oath, not knowing the nature of an oath. The prisoner was acquitted."); *Rex v. Foster*, OBSP (Dec. 12, 1764) *available at* http://www.oldbaileyonline.org/html_units/1760s/t17641212-63.html (reporting case involving defendant charged with rape of a five-year-old; "The Surgeon that had inspected the child did not appear, nor any one else that had inspected her; and the child being too young to be examined, the prisoner was Acquitted. He was detained to be tried for an assault with intent to commit a Rape."); *Rex v. Crother*, OBSP (Sept. 7, 1774), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17740907-63.html (reporting case involving defendant charged with rape of a four-year-old; "The girl being too young to give her testimony upon oath, the prisoner who is but twelve years of age, was Acquitted."); *Rex v. Davies*, OBSP (Sept. 11, 1776), *available at* http://www.oldbaileyonline.org/html_units/1770s/t17760911-71.html (reporting case involving defendant charged with rape of a six-year-old; "There was no evidence to prove the charge but the testimony of the child, who was not of sufficient age to be

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In most of the child rape trials in the Old Bailey Session Papers, however, the court followed the practice, identified by Hale, of allowing hearsay of “incompetent” children to be admitted as evidence. Reports from trials in 1721,⁷⁹ 1724,⁸⁰ 1735,⁸¹ 1750,⁸² 1751,⁸³ 1754,⁸⁴ 1757,⁸⁵ 1765,⁸⁶ 1768,⁸⁷ and

examined under oath. Not guilty.”).

⁷⁹ Rex v. Robbins, OBSP (Jan. 13, 1721), *available at* http://www.old-baileyonline.org/html_units/1720s/t17210113-28.html. The defendant was charged with rape of a seven-year-old girl. The child’s mother testified that the child said, “the Prisoner [had] put his finger into the place where she made Water, and also put the thing with which he made Water, into the Place where she made Water.” *Id.* The jury acquitted the defendant after hearing from several witnesses. *Id.*

⁸⁰ Rex v. Nichols, OBSP (Feb. 26, 1724), *available at* http://www.old-bailey-online.org/html_units/1720s/t17240226-73.html. For a discussion of *Nichols*, see *infra* notes 89-93 and accompanying text.

⁸¹ Rex v. Gray, OBSP (Sept. 11, 1735), *available at* http://www.old-baileyonline.org/html_units/1730s/t17350911-53.html. The defendant was charged with rape of an eight-year-old girl. The child’s mother testified that upon examining the child’s genitals, which showed symptoms of venereal disease, the child “fell on her Knees, and said that one Gray did it.” *Id.* After hearing testimony from doctors concerning the lack of evidence of penetration, the jury acquitted the defendant. *Id.*

⁸² Rex v. Tankling, OBSP (July 11, 1750), *available at* http://www.old-baileyonline.org/html_units/1750s/t17500711-25.html. The defendant was charged with rape of a girl under four years old. A doctor testified that:

I examined the child and the prisoner, they were both foul. The child said, the prisoner hurt her very much with his cock

. . . .

The infant not being capable of giving evidence, the prisoner was acquitted; and by order of the court there was another indictment preferred against him at Hicks’s-hall for an intent to commit rape, and giving the child the foul disease. The prisoner was there cast to be confined in the prison of Newgate [for] three years

Id.

⁸³ Rex v. Larkin, OBSP (July 3, 1751), *available at* http://www.old-baileyonline.org/html_units/1750s/t17510703-21.html. The defendant was charged with rape of a ten-year-old girl. A neighbor testified that the child “said, he was very impudent,” and another woman who lived with the neighbor “went on and confirmed her account.” *Id.* The child “was not admitted to be sworn,” and the defendant acquitted, but indicted for a

1771⁸⁸ reflect that child victims' family members, doctors, neighbors, or others were allowed to testify about what children had told them. In 1724, for instance, the defendant in *Rex v. Nichols*⁸⁹ was on trial for the rape of a five-year-old girl.⁹⁰ The

misdemeanor. *Id.*

⁸⁴ *Rex v. Kirk*, OBSP (May 30, 1754), available at http://www.old-baileyonline.org/html_units/1750s/t17540530-36.html. The defendant was charged with rape of a girl under seven years old. "[T]he child being so young and not knowing the nature of an oath, could not be examined." *Id.* The child's mother, however, testified that "[t]he child told me he used to put his hands up her petticoats," and another woman testified that "[t]he child told me he had done it to her as mentioned by the last evidence." *Id.* The court ultimately concluded that "[t]here being no other evidence against the prisoner than hearsay from the child's mouth it was not judged sufficient; he was therefore acquitted, but detained to be tried on another indictment at Hick's-Hall for an assault with an intent to commit a rape." *Id.*

⁸⁵ *Rex v. Crosby*, OBSP (Dec. 7, 1757), available at http://www.old-baileyonline.org/html_units/1750s/t17571207-14.html. The defendant was charged with rape of a ten-year-old girl. The child's mother testified that the child said, "Mr. Crosby did it, the day his wife went to the hospital, and left me there; he got into bed and call[ed] me to him. I went to him. Then he pulled me to him, and put his c-k in me there, and hurt me sadly." *Id.* The court noted that "the child being but nine years and three quarters old, and not being examined upon oath, he was acquitted; but detained to be tried next session for an assault upon the child with an intent to commit a rape." *Id.*

⁸⁶ *Rex v. Tibbel*, OBSP (Oct. 16, 1765), available at http://www.old-baileyonline.org/html_units/1760s/t17651016-2.html. The defendant was charged with rape of a four-year-old girl. The child's mother testified that "I asked her who had hurt her? She said, Sam had hurt her, that is the prisoner" *Id.* Other witnesses testified that the defendant had confessed to raping the child. The jury acquitted the defendant, but he was detained to be tried for assault with intent to commit a rape. *Id.*

⁸⁷ *Rex v. Allam*, OBSP (Sept. 7, 1768) available at http://www.old-baileyonline.org/html_units/1760s/t17680907-40.html. The defendant was charged with rape of an eight-year-old girl. The child's mother testified that "the child then said, William Allam had had to do with her in the shed two days before" *Id.* The defendant was acquitted, but detained to be tried for assault with intent to commit a rape. *Id.*

⁸⁸ *Rex v. Craige*, OBSP (July 3, 1771), available at http://www.old-baileyonline.org/html_units/1770s/t17710703-33.html. For a discussion of *Craige*, see *infra* notes 94-95 and accompanying text.

⁸⁹ *Rex v. Nichols*, OBSP (Feb. 26, 1724), available at <http://www.old->

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child did not appear, but her mother testified that the child “told her the Prisoner had made her kneel upon his knees had taken up her coats, and had hurt her sadly.”⁹¹ A doctor was permitted to testify “that the child did say it had been done to her by the Prisoner.”⁹² The court reportedly found that “[t]he child being too young to swear to the fact, the jury acquitted him of the rape, but found him guilty of the assault.”⁹³ Nearly fifty years later, in *Rex v. Craige*,⁹⁴ a defendant was on trial for the rape of a girl who was under ten years old. The girl’s neighbor testified, she said “I will tell you who it was if you won’t tell my dada; I said I would not, but would tell her mama. She said it was Mr. Craige.”⁹⁵

Further reflecting the inconsistent application of law during this period, a few Old Bailey reports show that hearsay of child victims was deemed inadmissible. In 1754,⁹⁶ during the trial of the defendant for rape of a nine-year-old girl, the child’s mother started to testify that she tried to get the child to explain what had happened to her, but the court intervened, stating “[y]ou must not tell what the girl said, that is not evidence.”⁹⁷

Beyond these reports of actual trials, the issue concerning allowing unsworn testimony was reflected in the 1770 edition of an influential English justice of the peace manual. This manual cited *Travers* and *Omychund* for the proposition that unsworn testimony of children could not be admitted “as evidence,” but cited Hale in support of allowing unsworn testimony to provide information to the court “where the exigence of the case

baileyonline.org/html_units/1720s/t17240226-73.html.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ OBSP (July 3, 1771), available at http://www.old-baileyonline.org/html_units/1770s/t17710703-33.html.

⁹⁵ *Id.* The defendant ultimately was acquitted of rape but detained for trial for assault with intent to ravish a different child.

⁹⁶ *Rex v. Grimes*, OBSP (May 30, 1754), available at http://www.old-baileyonline.org/html_units/1750s/t17540530-1.html.

⁹⁷ *Id.*

requires it . . . especially in cases of rape, buggery, and such crimes as are practiced upon children.”⁹⁸

⁹⁸ 1 RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 487 (11th ed. 1770). The first edition in 1755 simply cited Hale in support of allowing unsworn testimony:

But if an infant be of age of 14 years, he is as to this purpose, of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear, that he hath a competent discretion, he may be sworn. 2 H.H. 278.

And in many cases an infant of tender years may be examined without oath, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practiced upon children. 2 H.H. 279, 284.

1 RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 190 (1st ed. 1755); cf. 2 HALE, *supra* note 53, at 279 (“But in many cases 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 . . .”). By the eighth edition in 1764, the quote remained the same, but a citation to the *Travers* case, which was first published in 1755, was added. 1 RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 342 (8th ed. 1764) (“especially in cases of rape, buggery, and such crimes as are practiced upon children. 2 H.H. 279, 284. *Str.* 700.”); see also *supra* notes 46-52 and accompanying text (discussing *Travers*).

The 1766 tenth edition was updated to incorporate the *Travers* and *Omychund* decisions. The following shows how the 1766 edition was updated from the prior editions:

But if an infant be of age of 14 years, he is as to this purpose of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear, that he hath a competent discretion, he may be sworn. 2 H.H. 278.

And in many cases an infant of tender years may be examined ~~without oath~~, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practiced upon children. 2 H.H. 279, 284. Str. 700.

But in no case shall an infant be admitted as evidence, without oath. Str. 700 [Travers], Tracy Atk. 29 [Omychund].

The changes reflected in the 1766 tenth edition are not entirely clear given that the deletion of the words “without oath” may suggest that no unsworn testimony could be received. More likely, the 1766 manual is attempting to

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By 1775, the issue was coming to a head. In *King v. Powell*,⁹⁹ the defendant was tried for rape of a six-year-old. Since the child was presumed by law incompetent, “she was admitted to give her evidence against the prisoner without being sworn,”¹⁰⁰ but the defendant was acquitted nonetheless. Judge Gould “mentioned the case to the [Twelve] Judges; and the majority of them were of opinion, that in criminal cases no

reconcile Hale’s views with *Travers* and *Omychund* and drawing a distinction between admitting unsworn testimony as “evidence” rather than as “information” that would be insufficient to secure a conviction.

American justice of the peace manuals were based on Burn’s manual and many were copied verbatim from Burn’s 1770 (or later) editions’ discussion of unsworn testimony. See JOSEPH GREENLEAF, AN ABRIDGMENT OF BURN’S JUSTICE OF THE PEACE AND PARISH OFFICER 124 (Boston 1773); RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 144 (Virginia 1774); JOHN GRIMKE, THE SOUTH CAROLINA JUSTICE OF PEACE 192 (1788); ELIPHALET LADD, BURN’S ABRIDGEMENT OR THE AMERICAN JUSTICE 143 (1792); WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 177-78 (1795). At least a few manuals, however, were copied verbatim from earlier editions and contain a discussion of unsworn testimony identical to the 1755 edition of Burn’s manual quoted above. JAMES PARKER, CONDUCTOR GENERALIS 167 (Woodbridge, N.J. 1764); CONDUCTOR GENERALIS 170 (New York 1788, printed by John Patterson for Robert Hodge); THE CONDUCTOR GENERALIS 140 (New York, 1788, printed by Hugh Gaine). I am indebted to Professor Davies for alerting me to these sources.

⁹⁹ 168 Eng. Rep. 157, 1 Leach 110 (K.B. 1775).

¹⁰⁰ *Id.* at 157, 1 Leach at 110. A reporter’s annotation in *Powell* provides:

- (a) Lord Hale, vol i. page 634 says, That if an infant appear unfit to be sworn, the Court ought to hear her information without oath; but he admits that such evidence is not of itself sufficient testimony to convict, because it was not upon oath. In the argument in *Omychund v. Barker*, Mich Term 1744, it was said by L.C. J. Lee, that it was determined at the Old Bailey, upon mature consideration, that a child cannot be admitted as a witness except upon oath; and L.C.B. Parker likewise said, that it was so ruled at Kingston Assizes before Lord Raymond [*Travers*], where, upon and indictment for a rape, he refused the evidence of a child without oath, 1 Atkins, 21. See also the case of *The King v. Steward*, 1 Strange, 701, and *The King v. Brasier*, *post*, Summer Assize, Reading, 1778.

Id. at 158, 1 Leach at 111.

testimony can be received except upon oath.”¹⁰¹ Thus, by 1775, a split court of the Twelve Judges suggested in essentially dicta (since the defendant in *Powell* was acquitted)¹⁰² that an

¹⁰¹ *Id.* at 158, 1 Leach at 110.

¹⁰² Like *Brasier*, however, the version of *Powell* in the first edition of Leach’s Crown Cases differed from the version in the English Reports. The first version reported that the defendant was convicted. See Davies, *Not the Framers’ Design*, *supra* note 26, at 446 n.238. In 1793, a much more detailed account of defendant Powell’s trial appeared in a reporter that collected reports of trials involving “adultery, incest, imbecility, ravishment.” See 2 CUCKOLD’S CHRONICLE 440-46 (1793). This report indicates that the trial judge in *Powell* recognized a longstanding dispute over whether to allow unsworn testimony, but allowed the child to testify unsworn so that the issue could finally be resolved by the Twelve Judges if the defendant was convicted. The judge reportedly quoted the section of Hale’s treatise advocating the admission of unsworn testimony and noted a conflict with the *Travers* case which had precluded the admission of such testimony. The judge noted, however, that *Travers* was decided before Hale’s treatise was published. *Id.* at 441. The court also reportedly decided not to be bound by *Travers* since he was aware of a dispute among the Twelve Judges concerning the admission of unsworn testimony:

I should have thought myself bound by that case [*Travers*], if I had not known the question much doubted of, and debated among the [Twelve] Judges: some hold it one way, and some another. I do think it is a point that ought to be considered and settled. I am at present inclined to follow the opinion of the King and *Travers*, but am aware that case is not approved by all the Judges; and therefore, in so very important a question of this, I think, in point of prudence, it should be settled; for we have too many instance of offenses of this kind.

Id. at 442. The judge reportedly also addressed Hale’s view about child hearsay:

With regard to admitting the declaration of the child to the mother, Lord Hale speaks of that as a clear and settled thing; for, he says, if you hear the child at second hand, she should be heard also at first hand . . . I am of the present of opinion, not only to hear the evidence of the woman [the child’s mother], but likewise to examine the child without oath: and, if the matter rests upon that, make a case for the opinion of the Judges.

Id. at 442. The judge allowed the child’s mother to testify about what the child had told her and also permitted the six-year-old child to testify unsworn. *Id.* at 442-43, 445. “The Jury, however, brought him in Not

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incompetent child should not be permitted to testify unsworn. Four years later, the Twelve Judges decided *Brasier*.

2. *Brasier Read in Context*

In 1779, the Twelve Judges considered *Brasier*, another case involving a young child who was presumed incompetent under the rule followed in the *Travers* case. Read divorced from the child competency issues of the time, *Brasier* appears to address only two issues. First, the case appears to address the age at which a child may be sworn. The Twelve Judges rejected the rule in *Travers* and held, “there is no precise or fixed rule as to the time within which infants are excluded from giving evidence.”¹⁰³ Second, the *Brasier* case appears to address a hearsay question, where the court held that “no testimony whatever can be legally received except upon oath” and then stated that the trial judge should have excluded the testimony of the mother and lodger.¹⁰⁴

Considered in the context of Sir Matthew Hale’s argument that children should be permitted to testify unsworn, the pre-*Brasier* Blackstone and Buller commentary, the inconsistent treatment of unsworn statements in the Old Bailey trials, and *Powell*’s recognition of division on the issue, *Brasier* also should be interpreted as resolving the prevailing issue about *unsworn* testimony. This is important because it reflects that the statement “no testimony whatever can be legally received except upon oath”—which many have assumed characterized the hearsay as “testimony” and therefore relevant under *Crawford*’s

Guilty. Another indictment was found against him, for violently assaulting and abusing the said Margaret Edson; of which he was found guilty at the next Assizes.” *Id.* at 446. Thus, this more detailed report suggests the later edition of Leach’s containing *Powell* correctly reported that the defendant was acquitted. The earlier report may have improperly suggested a conviction based on the re-indictment and retrial for the misdemeanor offense, a practice not uncommon in sexual abuse cases during the time. *See* discussion *supra* note 77.

¹⁰³ King v. *Brasier*, 168 Eng. Rep. 202, 203, 1 Leach 199, 200 (K.B. 1779).

¹⁰⁴ *Id.* at 202, 1 Leach at 200.

testimonial/nontestimonial dichotomy—was simply referring to the ability of young Mary Harris or any other incompetent child to testify unsworn. The Twelve Judges were stating that no one can give testimony if not sworn, not that the hearsay was “testimony.”

The *Brasier* report itself confirms as much by including in the reporter’s annotations citations to the relevant pages in Hale’s treatise,¹⁰⁵ the *Omychund* case,¹⁰⁶ the *Travers* case,¹⁰⁷ and other sources¹⁰⁸ that addressed whether children could testify

¹⁰⁵ See *supra* notes 53-57 and accompanying text.

¹⁰⁶ See *supra* notes 64-66 and accompanying text.

¹⁰⁷ See *supra* notes 46-52 and accompanying text.

¹⁰⁸ The reporter notes in *Brasier* cite to several sources:

The prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in Dyer’s Reports (Dyer, 303, b, in marg; 1 Hale, 302, 634; 2 Hale, 279; 11 Mod. 228; 1 Atkins, 29; Foster, 70; 2 Hawk. 612; Gilb. L. E. 144); for these notes having been made by Lord Chief-Justice Treby, are considered of great weight and authority; and it was submitted to the Twelve Judges, Whether this evidence was sufficient in point of law?

168 Eng. Rep. at 202, 1 Leach at 200.

The citations to Hale reference the pages involving the age at which a child can be sworn and Hale’s argument that a child should be permitted to testify unsworn. See *supra* notes 53-57 and accompanying text (quoting 1 Hale 634 and 2 Hale 279). The cite to “11 Mod, 228” is *Young v. Slaughterford*, which involved a question concerning the age at which a child could be sworn. The cite to “1 Atkins, 29,” is the *Omychund* case, in which the court addressed Hale’s argument about children being unsworn. See *supra* text accompanying notes 64-66 (discussing *Omychund*). The cite to “Foster, 70” is reference to *The Case of William York*, involving a prosecution of a ten-year-old for the murder of a five-year-old. The relation to *Brasier* is unclear, though perhaps because the boy confessed and declarations containing hearsay of his confessions were admitted, it related to the ability of a court to hear unsworn testimony. Next are references to Hawkins and Gilbert’s treatises, which discuss the age at which a child may be sworn. Finally, the marginal note was based on a note in Dyer’s Report at 303b. That page of Dyer’s I located (likely a different edition) contains no relevant discussion. But the next page contains a reference to a child rape case that “[a] man of sixty years old who had a wife, was arraigned at Newgate . . . for the rape of a girl then of the age of seven years, and no more; and was

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unsworn.

More importantly, it is possible (albeit questionable) that the child in *Brasier* did, in fact, testify unsworn. To be sure, the report of *Brasier* in the English Reports that was discussed by the Supreme Court and litigants in *Davis* states that Mary Harris “was not sworn or produced as a witness on the trial.”¹⁰⁹ In the course of my discussions about *Brasier* with Professor Thomas Davies, however, he identified an earlier report of *Brasier* that appeared in the 1789 first edition of Leach’s Crown Cases. This original report says nothing about the mother and the lodger providing out-of-court statements of Mary Harris, but instead indicates that the child testified unsworn:

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice *Gould*, at the Summer Assizes for York in the year ____, [blank in original] on the trial of an indictment for a rape on the body of an infant under seven years of age. *The information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn.*

The prisoner was convicted; but the judgment was respited, on a doubt, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon *oath*?

The Judges were unanimously of opinion, That no testimony whatever can be legally received except upon oath; and that an infant, though under the age of

found guilty by apparent evidence of divers women and a surgeon, and the girl herself; and hanged by the neck.” 3 Dyer 304a n.51. Since the child was under nine, presumably she was incompetent as a matter of law, but permitted to testify unsworn. In one of the reports concerning *Powell*’s case, which reported that the Twelve Judges were split on whether a child could testify unsworn, the trial judge reportedly noted a case reported at page 304 of Dyer in its analysis of the on-going debate about unsworn testimony of children. See CUCKOLD’S CHRONICLE, *supra* note 102, at 441.

¹⁰⁹ *Brasier*, 168 Eng. Rep. at 202, 1 Leach at 200.

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.¹¹⁰

Upon further research, I located two other Leach's reports of the case from 1792 and 1800, respectively. These versions differed slightly from the 1789 report, but similarly state that Mary Harris testified at trial.¹¹¹

¹¹⁰ *Id.* (emphasis added). There were four editions of Leach's Cases in Crown Law: the first edition (1730-1789), second edition (1730-1791), the third edition (1730-1800), and the fourth edition (1730-1815). 1 MAXWELL & MAXWELL, *supra* note 46, at 303. The English Reports reprinted only the fourth edition of Leach's likely because it was viewed as the most accurate. ROY M. MERSKY AND DONALD J. DUNN, FUNDAMENTALS OF LEGAL RESEARCH 512 (8th ed. 2002) ("English Reports This is a reprint of the nominate reports from 1220 to 1865. When there were competing sets of reports, the editors included only the set they deemed most accurate."); *see also* JOHN WILLIAM WALLACE, THE COMMON LAW REPORTERS 430 (Soule and Bugbee eds. 1882) (describing Leach's: "There are editions in 1789, 1792, 1800, and perhaps other years; the best and most complete is in 2 vols. 8vo, 1815.").

¹¹¹ The following shows how the 1792 report in Leach's was updated from the 1789 report:

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice *Gould*, at the Summer Assizes for York in the year 1778, on the trial of an indictment for a rape on the body of an infant under seven years of age. The information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn.

The prisoner was convicted; but the judgment was respited, on a

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doubt, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon *oath*?

The Judges assembled at Serjeants-Inn Hall 12, April 1779, were unanimously of opinion, 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 to take an oath, their testimony cannot be received. They determined, therefore, that the information of the infant, which had been given in evidence in the present case, ought not to have been received.

King v. Brasier, 1 Leach 182-83 (K.B. rev. ed. 1792). The following shows how the 1800 report was updated from the 1792 report.

This was a case reserved for the opinion of the Twelve Judges, by Mr. Justice Buller Gould, at the Summer Assizes for Reading York in the year 1778, on the trial of an indictment for a rape on the body of an infant under seven years of age.

The ~~information~~ information of the infant was received in evidence against the prisoner; but as she had not attained the years of presumed discretion, and did not appear to possess sufficient understanding to be aware of the dangers of perjury, she was not sworn. [reporter's footnote]

The prisoner was convicted; but the judgment was respited, on a doubt, created by a marginal note to a case in Dyer's Reports; for these notes having been made by Lord Chief Justice Treby, are considered of great weight and authority; and it was submitted to the Twelve Judges, Whether evidence, under any circumstances whatever, could be legally admitted in a criminal prosecution except upon *oath*?

The Judges assembled at Sergeants-Inn Hall 12, April 1779, were unanimously of opinion, 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

In total, there is the original report in the 1789 edition of Leach's,¹¹² slightly different versions in the 1792 and 1800 editions of Leach's,¹¹³ and a fourth version in the 1815 edition of Leach's. This last version from 1815 was reprinted in the English Reports and typically is cited today as the *Brasier* case. Again, these reports reflect material changes over time. In the 1789 and 1792 reports, the child testified unsworn and Leach's made no mention of the mother, lodger, or any hearsay. The 1800 report changed the trial court and judge. More important, while the body of the report remained similar to the prior 1789 and 1792 reports and stated that the child testified unsworn, a footnote was added indicating that additional information about the case was located in manuscript notes.¹¹⁴ "It appears by a

by the Court, to possess a sufficient knowledge of the nature and consequences of an oath [reporter's footnote]: 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. They determined, therefore, that the *information* of the infant, which had been given in evidence in the present case, ought not to have been received.

[first footnote]: It appears by a manuscript note of this case, in the possession of a gentleman at the bar, that the child's evidence was not received at all; but that the mother and another witness gave evidence of what the child had said at the time.

[second footnote]: See White's Case, post.

Brasier, 1 Leach 237 (K.B. rev. ed. 1800).

¹¹² *Brasier*, 1 Leach 346 (K.B. 1789 ed.).

¹¹³ *Brasier*, 1 Leach 182-83 (K.B. rev. ed. 1792); *Brasier*, 1 Leach 237 (K.B. rev. ed. 1800).

¹¹⁴ For a discussion of how manuscript notes kept by lawyers, judges, or others may differ from case reports, see generally James Oldham, *Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for What was Really Said* in LAW REPORTING IN BRITAIN (1995) (noting discrepancies between printed reports and manuscript notes kept by judges, lawyers, and others and analyzing five cases to show how manuscripts can alter the understanding of printed case reports).

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manuscript note of this case, in the possession of a gentleman at the bar, that the child's evidence was not received at all; but that the mother and another witness gave evidence of what the child had said at the time."¹¹⁵ Finally, the 1815 report stated in the body of the report both that Mary Harris did not testify and that hearsay of the mother and lodger was received at trial.

These multiple versions and changes over time are important from an original meaning context because, assuming the Framers even referred to the law of child competency when considering confrontation rights, the only Leach's reports of *Brasier* in print at the framing in 1789 and ratification in 1791 did not mention hearsay. Nor did the Leach's reports in print the year after ratification in 1792.¹¹⁶ Simply put, before, during, and immediately after 1791, the Framers likely would have understood *Brasier* as concerning only child competency and not the admission of out-of-court statements.

What about the hearsay testimony of the mother and the lodger? Again, the reports of the case in Leach's until 1800 made no mention of hearsay. I did locate, however, some post-*Brasier*/pre-ratification English sources that suggest generally, with no mention of the mother and lodger, that *Brasier* involved hearsay. The 1783 English edition Commentaries of William Blackstone (one of the Twelve Judges who considered *Brasier*), for instance, provided: "[I]t is now settled [Brazier's case, before the twelve judges, P. 19 Geo. III] that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath"¹¹⁷ But Blackstone's discussion of *Brasier* does not appear to have been widely considered even in

¹¹⁵ *Brasier*, 1 Leach 237 (K.B. rev. ed. 1800).

¹¹⁶ Some framing-era reports of *Brasier* suggest an understanding that Mary Harris testified, but even some of those reports reflect an inconsistent understanding of the case. An annotation accompanying the *Travers* case, for instance, suggests that Mary Harris was sworn: "*Brazier's case*, where an infant of 5 years old was held a good witness by all the Judges, she appearing to be acquainted with the nature of the obligation of the oath." *Rex v. Travers*, 93 Eng. Rep. 793, 794, 2 Strange 700, 701 (K.B. 1726).

¹¹⁷ See Blackstone, *supra* note 60 (1783 English edition).

England before 1791. For example, Burn's 1785 justice of the peace manual appears to reference *Brasier* (not by name), but made no mention of hearsay.¹¹⁸ Similarly, Barry's English justice of the peace manual from 1790 discusses *Brasier*, indicates that Mary Harris testified at trial unsworn, and does not mention hearsay.¹¹⁹ After 1791, however, the 1793 update of Burn's justice of the peace manual summarizes Blackstone's discussion of *Brasier* and hearsay, but it is questionable whether that or any post-1785 version of Burns would have been available in the states.¹²⁰ Further, a 1793 English treatise also

¹¹⁸ 4 RICHARD BURN, THE JUSTICE OF THE PEACE 69 (15th ed. 1785). Burn's manual notes Hale's argument for allowing unsworn testimony and Hale's rationale that "the law allows what the child told her mother or other relations to be given in evidence . . . and there is much more reason for the court to hear the narration of the child herself, than to receive it second hand from those who swear they heard her say so." *Id.* (citation omitted). The manual discusses Blackstone's view on the age of incompetency (from the edition of Blackstone before *Brasier* was added) and makes what likely is a reference to *Brasier*: "But after all, it is said to have been determined lately by all the judges upon conference, that in no case shall the testimony of an infant be admitted without oath." *Id.* at 71. Later editions replace this reference with a more detailed account of *Brasier*. See discussion *infra* note 120.

¹¹⁹ 3 EDWARD BARRY, THE PRESENT PRACTICE OF A JUSTICE OF THE PEACE 521 (1790). Barry's description appears to be based in part on Richard Burn's 1785 (15th edition) manual, though it adds a more detailed discussion of *Brasier*. See discussion *supra* note 118. I was unable to locate a copy of the 16th edition of Burn's published in 1788, which may include the same text as Barry.

¹²⁰ The 1793 update to Burn's justice of the peace manual, *supra* note 118, deleted the following passage from a prior edition which appeared to reference *Brasier*: "But after all, it is said to have been determined lately by all the judges upon conference, that in no case shall the testimony of an infant be admitted without oath." The 1793 edition replaced this passage with the following, which cited to Blackstone as the source: "Finally, It is now settled by all the twelve judges upon conference, in *Brazier's* case, *E. 19. G. 3*, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath" JOHN BURN, JUSTICE OF THE PEACE (18th ed. 1793) (revised edition of works of Richard Burns, his father).

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discussed *Brasier* but made no mention of hearsay.¹²¹ All of this suggests that *Brasier* was not widely considered as involving hearsay in England before or shortly after 1791.

Even assuming Blackstone's short reference to *Brasier* was a reliable indicator of framing-era understanding in England before ratification, however, it does not show that child hearsay was considered "testimonial." Blackstone merely recognized, without any discussion of the facts in the case, that (1) a child could not testify unsworn; and (2) no hearsay of an unsworn child could be received in evidence. Blackstone did not say hearsay is "testimony." Also, the principal rationale for excluding unsworn testimony, or second-hand accounts of unsworn hearsay, was a concern that an incompetent child may not understand right from wrong.¹²² That says nothing about cross-examination and is more akin to a reliability concern, a consideration the *Crawford* court rejected in confrontation analysis.¹²³

In sum, the law in England before *Brasier* allowed out-of-court statements of children to be admitted into evidence and that law was the predicate for an ongoing debate over child competency issues, including the age at which children should be sworn and whether children should be permitted to testify unsworn. *Brasier* was understood in England as resolving the

¹²¹ A 1793 treatise I located simply reported the 1789 Leach's version of *Brasier* (which makes no mention of the mother and lodger) as addressing the age at which a child could be sworn and prohibition on unsworn testimony. PETER LOVELASS, *THE TRADER'S SAFEGUARD: A FULL, CLEAR, AND FAMILIAR EXPLANATION OF THE LAW* 276 (1793). As for Blackstone, it is questionable whether Blackstone's reference to *Brasier* and hearsay would have influenced the Framers, since most of the editions of Blackstone in the states did not contain it and it is doubtful the other sources discussing Blackstone would have been widely available, or available at all in the states before 1791. See discussion *supra* note 60 (discussing use of Blackstone's Commentaries in the colonies).

¹²² See *Rex v. Travers*, 93 Eng. Rep. 793, 2 Strange 700 (K.B. 1726) ("The reason why the law prohibits the evidence of a child so young is, because the child cannot be presumed to distinguish betwixt right and wrong"); see also *supra* notes 46-52 and accompanying text.

¹²³ See discussion *supra* note 5.

age of capacity and unsworn testimony issue. As for the issue concerning out-of-court statements, there does not appear to be a general understanding in England in 1791 that *Brasier* changed the rule concerning whether hearsay was admissible, in large part because most reports of the case of the time do not even mention hearsay. To the extent the hearsay in *Brasier* was known at the time, moreover, none of the analysis focused on confrontation, hearsay, or cross-examination. Indeed, if the child in *Brasier* did in fact testify unsworn, as the 1789 and 1792 reports in Leach's suggest, there likely would be no confrontation issue at all. When a witness appears, testifies, and the defendant has the opportunity to cross-examine, the only constraint is hearsay principles, not the Confrontation Clause.¹²⁴

D. How Brasier was Understood In the Years After It Was Decided

In *Crawford*, the majority looked not only to the law leading up to ratification to determine the original meaning of the Confrontation Clause, but also “[e]arly state decisions [that] shed light upon the original understanding of the common-law right” as well as nineteenth century treatises.¹²⁵ Conducting a post-ratification analysis of how *Brasier* was understood in England or the states reveals that much depends on which report of the case was being reviewed. Further complicating matters, one of the most often cited reports of *Brasier* was not the 1789, 1792, 1800, or 1815 reports in Leach's or the short reference in Blackstone's Commentaries, but rather, a report of the case that appeared in a popular treatise from 1803.

1. Brasier and Child Competency Issues

Regardless of the report of *Brasier* at issue, both before and

¹²⁴ *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (“[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements”).

¹²⁵ *Id.* at 49.

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after 1791 the case principally was understood in England and the states as resolving child competency issues. Two of the first treatise references to *Brasier* discussed the case in terms of child competency. As noted, in 1783 Blackstone, one of the Twelve Judges who considered *Brasier*, referenced the case as resolving issues concerning the age at which a child could be sworn, rejecting Hale's view that children should be permitted to testify unsworn, and precluding the admission of hearsay of an incompetent child.¹²⁶ Blackstone, however, did not mention the mother or the lodger and did not expressly state whether Mary Harris had been permitted to testify unsworn.¹²⁷ Likewise, Sir Francis Buller's treatise was revised in 1790 to incorporate *Brasier* into its discussion of child competency issues.¹²⁸ Citing the 1789 Leach's report of *Brasier*, Buller describes the case as holding, "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 be received."¹²⁹ This description is notable not only because it makes no mention of the mother or lodger and any hearsay, but also because Buller (according to the 1800 and 1815 reports) was the trial judge in *Brasier* who referred the case to the Twelve Judges (which also included Buller) for review.

Early state cases similarly cited *Brasier* for child competency issues. Courts cited the case to support no presumptive limit on the age at which a child could be sworn,¹³⁰ a result ultimately

¹²⁶ See *supra* note 117 and accompanying text.

¹²⁷ See *supra* note 117 and accompanying text.

¹²⁸ See *supra* note 63 and accompanying text (quoting earlier edition of Buller treatise).

¹²⁹ FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 293 (London, A. Strahan & M. Woodfall Law Printers to the King, corrected 5th ed. 1790).

¹³⁰ *E.g.*, *State v. True Whittier*, 21 Me. 341, 347 (1842) ("It was at one time considered, that an infant, under the age of nine years could not be permitted to testify. *Rex v. Travers*, Stra. 700. And that between the ages of nine and fourteen years it was within the discretion of the Court to admit or not, as it should or should not be satisfied of the infant's understanding and moral sense. It was finally determined in *Brazier's* case, [citing *East's* 1803

followed by the U.S. Supreme Court in 1895 when it adopted *Brasier* and upheld a trial court's decision finding a five-year-old competent to testify in a murder case.¹³¹ Courts also cited *Brasier* as resolving the issue about whether children could testify unsworn, such as in an 1814 Delaware case, which contrasted Hale's view on allowing a child to testify unsworn with *Brasier*.¹³² Similarly, the Alabama Supreme Court in 1841, citing the 1789 Leach's report of *Brasier* noted that, "In Lord Hale's time, it was common to examine children of tender years, without swearing them. This practice was overturned in 1779, in Brazier's case, when the judges were unanimously of the opinion that no testimony whatever, could be legally

report], on consideration between all the judges that a child of any age, capable of distinguishing between good and evil, might be examined under oath." (citations omitted); *Day v. Day*, 56 N.H. 316 (1876) (citing 1800 Leach's report of *Brasier* and East's 1803 report for proposition that children under age nine may be competent to give testimony if they understand the nature of the oath); *McGuff v. State*, 7 So. 35, 37 (Ala. 1889) ("This court has accordingly followed, in substance, the rule laid down in *Brasier's* case, [citing 1815 report and East's 1803 report], where it was held that there was 'no precise or fixed rule as to the time within which infants are excluded from giving evidence'"); *Wheeler v. United States*, 159 U.S. 523 (1895) (citing 1815 Leach's report for its holding that there was no fixed age to give oath and finding no error in court finding five-year-old competent to testify in murder case); *accord* *Piepkke v. Philadelphia*, 89 A. 124, 126 (Pa. 1913) ("The modern law and practice follow *Brasier's* case, 1 Leach's Crown Law, 199 [1815 report], decided more than 100 years ago, where it was distinctly held for the first time, by an undivided court, that, where there is no precise or fixed rule as to the time within which infants are excluded from giving evidence"); *State v. Southmayd*, 158 N.W. 404, 404-05 (S.D. 1916) (quoting *Wheeler's* discussion of *Brasier* and finding no abuse of discretion in allowing six-year-old witness to testify in murder case); *Leahman v. Broughton*, 244 S.W. 403, 404 (Ky. Ct. App. 1922) (citing East's 1803 report of *Brasier* in support of allowing child of any age to be sworn and finding court erred in refusing eight-year-old girl the opportunity to testify).

¹³¹ *Wheeler*, 159 U.S. at 525.

¹³² *State v. Miller*, 1 Del. Cas. 512, 512 (Del. 1814) ("In this case a child about nine years old, who knew not the nature or obligation of an oath, was not admitted to testify. For, 1 Hale P.C. 634 (examined by court without oath); *contra*, *Brazier's Case*, Bull N.P. 293").

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received, except when given on oath.”¹³³

2. *Brasier and Hearsay*

In the hundred years following framing and ratification of the Sixth Amendment, treatises and courts employed various interpretations of *Brasier*'s exclusion of the mother and lodger's hearsay. As noted, there was confusion in the eighteenth century about whether *Brasier* involved hearsay. Leach's 1789 and 1792 reports of *Brasier* made no mention of the out-of-court statements (or the mother and lodger), though Blackstone in 1783 made a general reference to hearsay. By 1800, Leach's report began to mention hearsay (first in a footnote) and Blackstone's report was appearing in other treatises, but the association of *Brasier* and hearsay appears not to have taken hold in England until 1803 when a new report of the case appeared in Edward Hyde East's, *A Treatise of the Pleas of the Crown*.¹³⁴ Citing the manuscript notes of Buller and Gould of the Twelve Judges (and the "amended" 1800 edition of Leach's which contained the footnote mentioning the mother and lodger),

¹³³ *State v. Morea*, 2 Ala. 275 (1841) (citing the 1789 version of *Brasier*). By 1901, however, confrontation rhetoric began finding its way into the oath issues. In *State v. Lugar*, 88 N.W. 333 (Iowa 1901), the defendant was charged with prostitution and a witness who inadvertently was not sworn gave "damaging" testimony against her. The court found that the admission of unsworn testimony was reversible error, citing the 1789 version of *Brasier* as a case reflecting that no unsworn testimony can be admitted. The decision, however, tied the oath issue to confrontation:

The constitution of this state guaranties to every man accused of a crime the right to be confronted with the witnesses against him, and this would be but a barren right, and afford the defendant no protection, if such witness may testify without being sworn, or without any way being subject to the penalties of perjury.

Id. at 334.

¹³⁴ 1 EDWARD HYDE EAST, *PLEAS OF THE CROWN* 443-44 (London 1803). The first American edition was published in 1806. 1 EDWARD HYDE EAST, *PLEAS OF THE CROWN* 443-44 (Philadelphia, P Byren, Law Bookseller 1806). Thanks to Robert Kry for providing me the London edition and for his helpful thoughts on East and other sections of this article.

East set forth another version of *Brasier*, this one adding new details about the trial and review by the Twelve Judges not present in any of the prior reports. Because of its importance, East's discussion is set forth in full:

The last case which has occurred on this doubtful subject is that of William Brazier, who was tried for assaulting Mary Harris, an infant of five years old, with intent to ravish her. The case on the part of the prosecution was proved *by the mother of the child and another woman* who lodged with her, to whom the child immediately on her coming home told all the circumstances of the injury done to her, and described the prisoner, who was a soldier, as the person who had committed it; but she did not know his name.

The next day the prisoner was called from the guard by the serjeant, and shewn to the child, who immediately said that was the man. Two other soldiers had been before shewn to her, of whom she at once denied any knowledge. There was no fact or circumstance to confirm the account given by the girl that the prisoner was the man who committed the offense, except that he lodged where she described. That she had received some hurt was proved by a surgeon as well as by the two women. The child was coming from school when the prisoner attacked her. The school did not break up till four o'clock, and she was at home before five, and had no conversation or communication with the mother before she had told all that had passed. The prisoner was convicted.

But Mr. Justice Buller reserved the above statement of facts for the opinion of the judges, whether this evidence ought to have been received, or was sufficient in point of law to be left to the jury. On the first day of Easter term 1779 the judges met on this subject, when all of them except Gould and Willes, Js. held that this evidence of the information of the child ought not to have been received, as she herself

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was not heard on oath; as to which some, particularly Blackstone, Nares, Eyre and Buller Js. thought that if she appeared on examination to have been capable of distinguishing between good and evil, she might have been sworn. But as to that, others, particularly Gould and Willes Js. held that the presumption of law of want of discretion under the age of seven is conclusive; so as not to admit an infant under that age to be sworn on any examination as to her capacity. And as the information or narration from the child, Gould and Willes Js. held that it being recently after the fact, so that it excluded a possibility of practicing on her, it was a part of the fact or transaction itself, and therefore admissible: and Buller J., held the same, if by law the child could not be examined on oath. But as to what happened the next day, Gould J., thought it not admissible, by reason of the danger of her being influenced in the interval.

But on the 29th [of] April all the judges being assembled, they 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. The prisoner was pardoned.

It 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.¹³⁵

The East treatment of *Brasier*, therefore, departs significantly from the 1789 and 1792 reports in Leach's. It cites the 1800 edition of Leach's, which included a footnote mentioning a "manuscript note" of the case, suggesting that the mother and another witness provided hearsay. (The manuscript

¹³⁵ 1 EAST, *supra* note 134, at 443-44.

might be the notes of Buller and Gould cited by East). East is ambiguous on whether Mary Harris testified unsworn, yet reflects that the Twelve Judges were addressing both the age at which a child could be sworn and Hale's argument that a child could testify unsworn. By italicizing the reference to the mother and the lodger, East may have been attempting to acknowledge that other reports did not mention them, and the emphasis was meant to put the issue to rest. Finally, East's report appears to suggest an exception to barring admission of hearsay statements of unsworn children: evidence that the child had complained shortly after the rape, but not the details of the offense, might be admissible as "confirmatory evidence."¹³⁶

The East report of *Brasier* became one of the most cited accounts of the case and resulted in *Brasier* being interpreted in nineteenth century treatises and cases for various propositions concerning hearsay law. For instance, the 1816 edition of Phillipps's *Law of Evidence* cited East's report of *Brasier* in its discussion of *res gestae*, noting that "on an indictment for rape, what the girl said recently after the fact (so that it excluded a possibility of practicing on her), has been held to be admissible in evidence, as part of the transaction."¹³⁷ Similarly, as various

¹³⁶ *Id.* at 444.

¹³⁷ S.M. PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE 202 (John A. Dunlap ed., New York, Gould, Banks & Gould 1816). The 1838 edition of the treatise cites the East and 1815 reports of *Brasier* in the section concerning the law of competency:

A more reasonable rule has since been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. In Brazier's case, on an indictment for assaulting an infant five years old with the intent to ravish her, all the judges agreed, that children of any age might be examined upon oath, if they were capable of distinguishing between good and evil, and possessed of sufficient knowledge of the nature and consequences of an oath, but that they could not in any case be examined without oath. This is now the established rule, as well in criminal, as in civil cases, and it applies equally to capital offences as to offences of inferior nature.

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state-amici in *Davis* noted,¹³⁸ the 1824 edition of Thomas Starkie's influential treatise, *A Practical Treatise on the Law of Evidence*,¹³⁹ cited *Brasier* for the proposition that, "where an immediate account is given, or complaint made, by an individual, of a personal injury committed against him, the fact of making the complaint immediately, and before it is likely that anything should have been contrived and devised for the private advantage of the party, is admissible in evidence; as upon an indictment for rape" ¹⁴⁰

Cases from the late nineteenth century likewise cited East's report of *Brasier* in terms of *res gestae*. Some courts permitted admission of testimony that the child had reported the offense soon after it occurred, but did not allow hearsay concerning the details of the crime;¹⁴¹ other courts more liberally allowed

EVIDENCE 5 (8th ed., London, Saunders and Benning, Law Booksellers 1838).

¹³⁸ See Brief for the States of Ill. et al., *supra* note 10, at *7-8.

¹³⁹ 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 149 (1st ed. 1824).

¹⁴⁰ *Id.*

¹⁴¹ In *State v. Ivins*, 36 N.J.L. 233 (N.J. 1873), the defendant was tried for attempt to ravish an adult woman and the trial court permitted the admission of hearsay concerning both the fact that the complaint was made immediately after the occurrence and the particulars of the defendant's alleged conduct. The court found that "the rule that in trials for rape, the fact that the woman alleged to have been violated, made complaint soon after the occurrence, is admissible as evidence on the part of the prosecution, is entirely settled, and is very familiar in practice. To this extent, hearsay evidence becomes admissible, and this departure from the ordinary rule seems justifiable on the ground, that in the natural course of things, if a woman has thus been foully wronged, she will almost necessarily disclose the fact." *Id.* The court addressed whether this exception in rape cases should apply in attempts to commit a rape. "There does not appear to be much authority upon the subject, but the little that there is, favors the admissibility of the evidence. *Brazier's Case*, reported in 1 East P.C. 443, tends evidently to this result . . ." *Id.* at 234. The court applied the same rule for rape and attempted rape cases. Notably, with regard to whether hearsay of the victim's details of the offense were admissible, the court held that "[i]t is every day's practice to exclude such narrations in trials for rape." *Id.* at 235. Similarly, in *Hornbeck v. State*, 35 Ohio St. 277 (1879), the defendant was charged with intent to commit a rape and the alleged child victim was found

hearsay concerning the details of the offense.¹⁴²

incompetent to testify. The trial court admitted hearsay evidence concerning what the child had said about the rape and the defendant was convicted. On appeal, the court noted the rule that “where the prosecutrix in a case of this nature has been examined as a witness, the declarations made by her immediately after the offense was committed, may be given in evidence, in the first instance, to corroborate her testimony.” *Id.* at 279. But since the child had not testified, the court had to consider the admission of the hearsay. In so doing, the court noted Lord Hale’s view that children should be allowed to testify unsworn and cited East’s report of *Brasier* as rejecting that rule. *Id.* The court also cited cases holding that “in cases of violence to the person, except when made *in extremis*, the declaration of the injured party are hearsay, and, therefore, inadmissible *to prove the offense*; and the fact that the declarant is incapable of taking an oath, by reason of imbecility, insanity, or infancy, will not justify a departure from the long and firmly-established rule of evidence on the subject.” *Id.* at 280. The conviction was reversed and remanded for a new trial. *Id.* at 281; *see also* *Lyles v. United States*, 20 App. D.C. 559, 563 (D.C. Cir. 1902) (“It seems to be settled that the fact that the prosecuting witness made complaint recently after the commission of the alleged crime is admissible generally, and as evidence in chief.” (citing East’s version of *Brasier*)).

¹⁴² In *Kenney v. State*, 79 S.W. 817 (Tex. Crim. App. 1903), the defendant was charged with the rape of a three-year-old. At trial, the child was deemed incompetent and the child’s mother was permitted to testify that the child told her the defendant had committed the offense. The court found that:

For aught that appears, the assault complained of had just been committed, and the child released by appellant, when she appeared before her mother and made said declarations. So that, so far as the time is concerned, while it was not exactly contemporaneous with the main fact (i.e., the outrage), yet it was so proximate to that event, and at least the first portion of the declaration apparently so spontaneous, as to make it come within the rule of *res gestae*, as laid down by this court.

Id. at 818. The court recognized that by not requiring a contemporaneous declaration it was departing from the common law, but nonetheless found the hearsay statements *res gestae*. The court also addressed the appellant’s argument that, since the child was incapable of giving sworn testimony, hearsay of what an incompetent witness said likewise should not be received. The court held, however, that “wherever the testimony of an infant is a part of the *res gestae*, it is introduceable, notwithstanding the fact that the witness was incompetent to take an oath.” *Id.* The court distinguished common law cases following a different rule on the ground that they did not involve *res*

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Other courts and commentators of the period cited *Brasier* for a more limited proposition. St. George Tucker's 1803 American edition of Blackstone's Commentaries (based on the 1783 English edition) arguably suggested that the case simply meant that if a child lacked the capacity to be sworn, the statements the child told others likewise could not be received.¹⁴³ Phillipps's treatise took a similar view: "When a child from defect of understanding or instruction is unfit to be sworn, it follows as a necessary consequence, that any account, which it may have given to others, of the transaction, ought not to be admitted."¹⁴⁴ There were also cases to the same effect.¹⁴⁵

gestae. It referenced East's version of *Brasier* in support of admitting hearsay of those unsworn as *res gestae*: "it had been considered, allowable on an indictment for an assault on an infant five years old with intent to ravish her, to give evidence of the child having complained of the injury recently thereafter . . ." *Id.* at 819. The conviction was affirmed. A dissenting opinion argued that the majority's decision was not sound and the law was clear that "the statement of an incompetent witness, a child, made immediately after the occurrence [is] inadmissible." *Id.* at 820 (Davidson, P.J., dissenting). The dissent claimed this was the rule at common law, citing East's report of *Brasier* and the *Travers* case. The judge quoted nearly the entire section of East describing *Brasier* and concluded that "at common law [there was] the unqualified rule rejecting this character of testimony." *Id.* at 822.

¹⁴³ See 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 214.

¹⁴⁴ PHILLIPPS, *supra* note 137, at 6 (1838 ed.).

¹⁴⁵ See *Oregon v. Tom, A Chinaman*, 8 Or. 177, 180 (1879) ("The rule that the declarations of one incompetent to testify cannot be admitted in evidence, is now the established doctrine in the States of the Union . . ." (discussing Blackstone's reference to *Brasier*)). In *Weldon v. State*, 32 Ind. 81 (1869), the court held that it was error to admit declarations of an incompetent child to prove charges of assault and battery with intent to commit a rape. The court noted that Hale argued to allow children to testify unsworn and that parents were permitted to testify about the child's account of the rape, but that these ideas had been rejected:

That being the true rule in case of a person immature in intellect, I cannot see why the reason of the rule does not apply with as much force to exclude all evidence of the declarations, assertions, or signs made . . . by a person who is incompetent to be sworn as a witness.

Id. at 83. Notably, *Weldon* quotes another case for the following: "At the

Still, some treatises and cases interpreted *Brasier's* exclusion of hearsay on best evidence/necessity-type grounds. In other words, the mother and lodger's testimony was excluded principally because the court had not first attempted to see whether the secondary evidence was needed when it failed to assess Mary Harris's capacity to take the oath. In 1827, for instance, Jeremy Bentham, citing the 1800 Leach's report of *Brasier*, suggested that the hearsay of the mother and lodger was excluded because the trial judge had not tried to determine whether the child was competent to testify:

[T]wo conditions precedent have been annexed. One is, that the child shall have taken oath; i.e. gone through the same ceremony by which testimonial relation is preceded in other instance. To this operation, had it been performed [in *Brasier*], there could have been no objection.¹⁴⁶

Though much later in time, a court in 1911 interpreted *Brasier* in a similar way:

As far back as *Brazier's Case*, 1 East P.C. 443, it seems to have been virtually allowed that in such cases proof of the complaint and its details might be received, though in that instance it was held improper because the child was not shown incompetent to testify; which in effect was saying . . . that a rule of evidence dictated by necessity becomes inapplicable wherever that necessity does not exist.¹⁴⁷

time of *Brazier's Case*, it seems to have been considered, that, as the child was incompetent to take an oath, what she said was receivable in evidence. *The law was not so well settled then as it is now.*" *Id.* (quoting *Regina v. Guttridges*, 9 C. & P. 471).

¹⁴⁶ 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 149 (1827). Because the treatise relied on the 1800 report of the case, it appears to assume the child in *Brasier* testified. *See id.* ("For, with the approbation of the twelve judges, in the case of an infant of no more than seven years old [citing 1800 report of *Brasier* and another case] (how much under is not said), this evidence was received.").

¹⁴⁷ *Commonwealth v. Zypa*, 3 Berks 350 (Pa. O & T 1911), available at 1911 WL 3681. In *Zypa*, the defendant was charged with raping a seven-

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Finally, some courts interpreted *Brasier* as involving the right to submit hearsay corroborating a witness's testimony. In 1850, the Supreme Court included East's report of *Brasier* in a string cite in support of the proposition that where a witness is impeached with a prior inconsistent statement, evidence that the witness previously gave a consistent statement is inadmissible.¹⁴⁸

year-old girl, the child was deemed incompetent, and the court permitted the girl's mother to recount statements the girl had made about the alleged rape. The court addressed the issue of whether "it was proper to receive and submit to the jury evidence of what the child had said concerning the injury done her as proof of defendant's guilt." *Id.* at *1. The court discussed several relevant legal principles. First, the court noted the rule allowing hearsay testimony of the act that the complaint of the rape was made, but excluding the substance of the details of the offense. *Id.* Second, the court noted the rule that where the witness had testified and the testimony attacked, courts allowed the admission of hearsay to corroborate the testimony. *Id.* at *2-3. Third, the court found that where the witness was unavailable because of lack of competence because of young age, "necessity" might permit such testimony since otherwise perpetrators would benefit simply because of the nature of the crime and age of their victims. *Id.* at *4. The court found that (East's report of) *Brasier* supported admission of such statements, even though the statements there were excluded because the court failed to determine if the child was competent:

As far back as *Brazier's Case*, 1 East P.C. 443, it seems to have been virtually allowed that in such cases proof of the complaint and its details might be received, though in that instance it was held improper because the child was not shown incompetent to testify; which in effect was but saying . . . that a rule of evidence dictated by necessity becomes inapplicable wherever that necessity does not exist.

Id. at 5. Fourth, the court noted cases considering hearsay statements made spontaneously after events might be admitted as *res gestae*. *Id.* at 6. The court ultimately held that hearsay of a rape victim may be received in connection with other evidence that tended to show a rape was committed and that the accused was in a position to commit it. *Id.* at 7. Though finding no error in the admission of the testimony, the court vacated the conviction on the ground that hearsay tending to exculpate the defendant was not admitted and, because it too was *res gestae*, it should have been admitted to give the jury a full picture of the situation. *Id.* at 7-8. Beyond that, other circumstances, including the unpreparedness of the defendant's lawyer and the incompetency of an interpreter warranted a retrial. *Id.*

¹⁴⁸ *Conrad v. Griffey*, 52 U.S. 480, 490-91 (1850) ("But in other places,

This may suggest that the Supreme Court understood that *Brasier* involved the child testifying and the exclusion of the testimony of the mother and lodger was based on the testimony's status as improper prior consistent statements of the child.

Thus, post-ratification interpretation of *Brasier* in England and the states on hearsay is as diverse as it is irrelevant to the understanding of the case in 1791, given that most interpretations of the case were based on East's 1803 modified report or on the altered 1815 Leach's report that appeared more than a decade after ratification of the Confrontation Clause.

II. LESSONS FROM *BRASIER*?

Putting aside my interpretation of *Brasier*, the case serves as an apt case study on the practical issues of a criminal procedure framework that requires overworked prosecutors, defense lawyers, and judges to determine the "Framers' design" to resolve what statements are, and are not, "testimonial" under the Confrontation Clause.

The most striking example of the practical problem with determining authentic original meaning is that all participants in *Davis* failed to note that the reports of *Brasier* in print at ratification,¹⁴⁹ wherein the child reportedly testified, effectively takes the case out of the realm of confrontation analysis. That the entire debate is based on the potentially flawed premise that the child did not appear at trial is telling. It illustrates that research into historic sources is essentially a specialty, foreign to

as in England, such evidence, though at one time considered competent, and especially in criminal cases, is now even there excluded." (citing, among others, *Brazier's Case*, 1 East P.C. 444) (citations omitted)); *see also* *Head v. State*, 44 Miss. 731, 751 (1870) ("For the purpose of discrediting a witness, it is competent to prove that he made discordant statements, at other times and places, but to reestablish creditability, or to support what he has deposed on the trial, it is inadmissible to prove that he has made substantially the same statements, to a third person. Many years ago the British courts received such testimony; afterwards its propriety was doubted, and finally repudiated. The weight of authority and reason is against it." (citing, among other cases, East's version of *Brasier*)).

¹⁴⁹ *See supra* notes 109-13 and accompanying text.

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most in practice, and it counsels against lending too much weight to sources that, in many respects, may have the reliability of a modern day Internet blog.¹⁵⁰ Though legal historians might know to look for earlier editions or manuscripts of reported cases, and may be able to explain how and why changes such as those in *Brasier* occurred over time, criminal lawyers in the trenches—and the judges deciding these issues—cannot reasonably be expected to have the time to find, much less trace the origins of, each and every common law case that seems significant to the confrontation issue before them.

Indeed, many common law sources are not readily accessible. Simply tracking down the multiple reports of *Brasier* and determining which versions were available from 1789 to 1791 required consultation with a legal history scholar and assistance from my law firm's London office library as well as a law school library where I have research privileges.¹⁵¹ It required sources from specialized subscription databases and obtaining materials (unavailable on-line) from the rare book collections of libraries and historical societies.

Brasier also illustrates another practical issue with a rigid originalism-based legal framework: determining the date at which to view the "Framers' understanding." As noted, to make this determination the Supreme Court often looks at 1791, the year that the Bill of Rights was ratified.¹⁵² Others have persuasively argued that "the original meaning has to refer to the public meaning of the text at the time the First Congress approved the language of the amendments—the date the text was *framed*."¹⁵³ Under this approach, September 25, 1789, the date when the text of the Bill of Rights including the Confrontation Clause was approved by the First Congress, becomes the

¹⁵⁰ See Davies, *Not the Framers' Design*, *supra* note 26, at 390 n.96 ("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").

¹⁵¹ See *supra* author's footnote.

¹⁵² See *supra* note 18.

¹⁵³ Davies, *What Did the Framers Know*, *supra* note 26, at 158.

relevant date.¹⁵⁴ After the cutoff date is determined, moreover, there is debate about how long before or after that date treatise and case discussions reliably reflect the Framers' understanding of the law.¹⁵⁵

These timing issues have practical significance, again illustrated by *Brasier*. The first report in *Brasier* that appeared in Leach's Crown Cases became available in London no earlier than May 1789.¹⁵⁶ Accordingly, given the communication difficulties of the era, it is unlikely that the original report of *Brasier* (even if it had been the same as the 1815 report) would have reached the First Congress in Philadelphia before September.¹⁵⁷ Unaware of *Brasier*, the Framers likely would have understood the law as set forth in Sir Matthew Hale's treatise and as restated in English and early American editions of Blackstone's Commentaries that flooded the states and that

¹⁵⁴ See *id.* at 159.

¹⁵⁵ Compare Davies, *What Did the Framers Know*, *supra* note 26, at 179-80 (arguing that state cases decided more than a few decades after the framing are invalid evidence of original meaning) with Kry, *supra* note 26, at 47 (disagreeing with Professor Davies concerning whether post-ratification sources are valid evidence of original meaning). Mr. Kry, for instance, takes issue with Professor Davies's argument that the *Radbourne*, *Woodcock*, and *Dingler* decisions from post-1787 "are not valid evidence of original meaning because the reports would not have been widely available in the United States when the Sixth Amendment was framed." Kry, *supra* note 26, at 522 (citing Davies, *What Did the Framers Know*, *supra* note 26, at 153-62). Kry responds that "[b]ecause colonial lawyers were directly exposed to English practices and ideas, English evidence is relevant whether or not it appeared in a published treatise or case report shipped to the colonies," particularly where a case in question merely embodied preexisting English law. *Id.* ("*Radbourne*, *Woodcock*, and *Dingler* do not purport to *change* Marian committal procedure in any way they simply confirm what that procedure already was"). Davies, in turn, replies that "Hening made no mention in 1794 of *Radbourne* or *Woodcock*, five years after the reports of those cases were initially published in Leach's reports of Old Bailey cases (*Dingler* still had not been published)." Davies, *Revisiting Fictional Originalism*, *supra* note 26, at 620. The timing debates are particularly relevant in *Brasier*, which reflected a change in law. Whether the Framers were aware of the case as opposed to the law reported by Hale and Blackstone is significant.

¹⁵⁶ See *supra* notes 109-12 and accompanying text.

¹⁵⁷ See Davies, *What Did the Framers Know*, *supra* note 26, at 109-12.

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followed Hale's view that "the law allows what the child told her mother, or other relations, to be given in evidence."¹⁵⁸ As the Supreme Court recognized fifty years ago, "two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone . . . exerted considerable influence on the Founders"¹⁵⁹ Indeed, colonial justice of the peace manuals, which "were probably the sources regarding criminal procedure that were most accessible to members of the Framers' generation,"¹⁶⁰ arguably reflected some debate over whether children in sexual abuse cases could testify unsworn, but made no mention of *Brasier* or otherwise questioned Hale's recognition that the law allowed child hearsay in sexual abuse cases.¹⁶¹ On the other hand, there was some reference to *Brasier* and hearsay in later editions of Blackstone,¹⁶² so one cannot foreclose some knowledge of the case in America beyond Leach's reports. But even the post-*Brasier* English sources

¹⁵⁸ See *supra* note 60 and accompanying text. The defendants in *Davis* acknowledged that before *Brasier* courts often admitted hearsay testimony of children in rape cases, but reasonably concluded that *Brasier* changed the rules. See discussion *supra* note 35 and accompanying text. To be sure, there was a notable absence in Old Bailey reports after *Brasier* where hearsay was admitted in rape cases. On the other hand, this may not reflect any change in practice of the time, but rather, how cases were reported. "After about 1790, most reports of such cases in the Old Bailey Proceedings give no details of the offense, and often do not give even the name of the victim. It is likely that many cases after this date represented instances of child molestation." Simpson, *supra* note 49, at 191-92. Further, in the years following *Brasier*, courts bent over backwards to find young children competent to testify, going so far as to defer trials while children deemed incompetent received instruction on the nature and consequences of taking the oath. See *Commonwealth v. Lynes*, 8 N.E. 408 (Mass. 1886). In short, even if *Brasier* did change the rules in England, it is questionable whether that was generally understood in 1791 in England, much less the states.

¹⁵⁹ *Reid v. Covert*, 354 U.S. 1, 26 (1957).

¹⁶⁰ Thomas 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, 280 (2002).

¹⁶¹ See discussion *supra* notes 98, 118-20.

¹⁶² See discussion *supra* notes 117, 120.

before and immediately after ratification were inconsistent on the discussion of *Brasier*, with some citing only to the report of the case where Mary Harris testified and others noting Blackstone's generalized reference to hearsay. Conflicting sources and multiple editions of case reporters and treatises, therefore, require the virtually impossible determination of what sources the Framers would and would not have considered, something particularly difficult where, as with *Brasier*, the case would have reflected a change in the common law concerning out-of-court statements. Simply put, even if *Brasier* did change the rules in England, it is questionable whether that was generally understood in 1791 in England, much less the states.

Finally, the law shortly after ratification, as the Court reviewed in *Crawford*, would bear little on the Framers' understanding. Post-framing law and commentary dealt principally with the 1803 report of *Brasier* in East or the 1815 report reprinted in the English Reports, which injected the case into the law of hearsay.¹⁶³

All of this is not to say that history is irrelevant to an understanding of confrontation or other rights, or to suggest that every historical inquiry will be as complex as *Brasier*.¹⁶⁴ Nor is

¹⁶³ See *supra* Part I.D.2.

¹⁶⁴ That said, a recent dialogue between Professor Davies, who criticized the history relied on by Justice Scalia's majority opinion in *Crawford*, and Robert Kry, Justice Scalia's law clerk during the *Crawford* term, reflects practical complexities similar to those illustrated by *Brasier*. In a recent article, Professor Davies makes a persuasive historical argument that the Supreme Court's history in *Crawford* was inaccurate. Davies, *Not the Framers' Design*, *supra* note 26. Mr. Kry's rebuttal relies on impressive research into framing-era law and practices. Kry, *supra* note 26. Reading both pieces, I imagined how a busy prosecutor or defense lawyer could be expected to properly research similar historic issues, or how a law clerk or judge would get to the bottom of the competing arguments in the pieces (considering caseload demands). Mr. Kry's rebuttal, for instance, included analyses of multiple editions of several cases (several of limited general availability) that changed over time (like *Brasier*). He also scoured the Old Bailey Session Papers, obtained committal depositions from the London Metropolitan Archives, and engaged in an analysis of how Sir Francis Buller (the trial judge in *Brasier*) incorrectly reported certain cases. See Kry, *supra* note 26, at 18-19, 28.

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the fact that a legal framework is difficult to apply necessarily a sound basis to abandon it.

The question remains, however, whether the real-world limitations of requiring proof of “original meaning,” as the exclusive analytical mode will encourage unwarranted assumptions about cases or lead to the creation of shorthand tests based on inauthentic history, such as the recent state high court case that simply presumed that *Brasier* meant that statements to non-law enforcement personnel could be testimonial in nature.¹⁶⁵ Eighteenth century authorities such as *Brasier* change over time, as courts and scholars rely on different versions of the case or misinterpretations of the case found in treatises. Given the nature of the sources, it may be possible for advocates to construct a compelling case of “original meaning” for either side of an issue in cases where the common law is not clear. The framework, therefore, may well lead to the very “unpredictable” and “amorphous” framework¹⁶⁶ *Crawford* sought to replace.

CONCLUSION

There may never be a consensus on what *Brasier* really meant at the time of the framing, which is something originalists can probably live with.¹⁶⁷ A more basic question is whether a legal framework that requires lawyers and judges to essentially become historians could in fact be no better than the “reliability” approach overruled by *Crawford*. To be sure, the reliability framework was far from perfect. Yet, the current rigid history-based doctrine, which requires the time to locate and digest complex, unfamiliar historic materials that are filled with traps for the unwary, appears no better suited to limit short-hand legal tests, selective interpretation by advocates, and results-oriented decision-making. The current framework, moreover, may provide a means to legitimize such practices by shrouding them in “history,” authentic or not.

¹⁶⁵ See *supra* text accompanying note 40.

¹⁶⁶ See *supra* note 5.

¹⁶⁷ See discussion *supra* note 27.