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Mike Madden

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ANCHORING THE LAW IN A BED OF PRINCIPLE: A CRITIQUE OF, AND PROPOSAL TO IMPROVE, CANADIAN AND AMERICAN HEARSAY AND CONFRONTATION LAW

MIKE MADDEN*

Abstract: As recent case law demonstrates, both American Sixth Amendment Confrontation Clause jurisprudence and Canadian common law relating to hearsay evidence are conceptually problematic. The laws are, at times, internally incoherent and are difficult to justify on the basis of legal principles. This Article critiques confrontation and hearsay law in the United States and Canada, respectively, by exposing the lack of principle underlying each body of law. The Article develops a principled basis for evidence law in general, and hearsay and confrontation law in particular, providing a more stable foundation for hearsay and confrontation frameworks. Ultimately, the Article argues that the epistemic, truth-seeking goal of criminal evidence law is best served by the broad admission, rather than exclusion, of all hearsay evidence. Furthermore, while fairness concerns are relevant to some rules of evidence, there are no valid fairness concerns operating in the context of hearsay and confrontation law that should displace the primary principle of facilitating and promoting epistemically accurate fact-finding in criminal trials. Finally, this Article suggests that any dangers associated with the broad admission of hearsay evidence can be mitigated through effective argument by counsel and appropriate cautions to the trier of fact regarding any weaknesses inherent in the evidence.

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* Sessional Instructor, Schulich School of Law, Dalhousie University, Halifax, Canada. Doctor of Laws (JSD) candidate, Schulich School of Law, Dalhousie University. C.D., B.A., Royal Military College of Canada. M.A., Dalhousie University, LL.B., Schulich School of Law, Dalhousie University. I would like to thank Dr. RONALDA MURPHY for her insightful comments and feedback on a draft of this Article. I would also like to thank the Law Foundation of Nova Scotia for its generous award of a Millennium Graduate Fellowship that greatly facilitated the writing of this Article. The opinions and views expressed in this Article are solely those of the author acting in his personal capacity and they are not intended to, and do not necessarily reflect, the views of the Government of Canada, the Canadian Forces, or the Office of the Judge Advocate General.

INTRODUCTION

In many developed legal systems, the right of an accused person to confront witnesses against him in criminal proceedings arises out of either the system's constitutional jurisprudence or explicit texts of rights instruments.¹ The right also exists within various international human rights treaties.² There is, however, no universal acceptance of the *content* of one's right to confront witnesses.³ Accordingly, throughout the world, the rules governing the admissibility of hearsay evidence and the cross-examination of witnesses, the various rights to confront witnesses, and the broader rights of a criminal defendant to test the prosecution's evidence and to benefit from a fair trial have become so conceptually entangled that it is difficult to discern a coherent unifying theory—or a principled basis—underlying the application frameworks for each of these doctrines.⁴ In other words, the laws relating to confrontation rights are an example of what Mirjan Damaška might call “evidence law adrift,”⁵ where the term “adrift” in nautical circles means a vessel that is neither deliberately making way through the water nor at anchor or made fast to the shore.⁶ As the laws of confrontation continue to develop on an arguably *ad hoc* basis, it is apparent that the law is neither at anchor (static), nor making way (progressing in a clearly articulated direction).⁷ The doctrinal confusion surrounding confrontation rights provides the backdrop to this Article and represents the key mischief that this Article endeavors to address.

In Parts I and II of the Article, I analyze the ways in which confrontation rights are described and protected in the United States and Canada in order to ascertain whether these doctrines are internally coherent, and whether they are convincingly justified on the basis of relevant legal principles. As the analysis in these sections will demonstrate, the law of confrontation in both Canada and the United States is problematic for a variety of reasons—in large measure because each body of law

¹ See Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths, and Human Rights*, 2010 CRIM. L. REV. 255, 255.

² See, e.g., International Covenant on Civil and Political Rights art. 14(3)(e), Dec. 19, 1966, 999 U.N.T.S. 171 (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”).

³ Dennis, *supra* note 1, at 256.

⁴ See *id.* at 256–58, 263, 265.

⁵ See generally MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 81 (1998).

⁶ See THE NEW OXFORD AMERICAN DICTIONARY 22 (2001).

⁷ See Dennis, *supra* note 1, at 270.

appears to have developed without faithful adherence to unifying principles. In Part III, I develop a theoretical basis of first principles that can be used to drive the evolution of evidence law, and I will suggest how these principles can be instructive in determining how hearsay evidence should be treated within a criminal trial. My goal in Part III is to propose a theoretically defensible and internally coherent framework for the application of evidence law to the “confrontation” rights of an accused person facing criminal charges in any developed legal system. Ultimately, I conclude that neither American nor Canadian law protects confrontation rights in theoretically defensible and internally coherent ways; thus, careful rethinking of the doctrines applicable to hearsay evidence is required in both jurisdictions in order to render them more principled, more coherent, and therefore more legitimate.

I. CONFRONTATION LAW IN THE UNITED STATES

A. *The Source and Content of the American Right to Confront Witnesses*

In the United States, the right to confront witnesses is enshrined within the Sixth Amendment to the U.S. Constitution, which provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.⁸

This, the Confrontation Clause, is open to a variety of interpretations—a reality candidly acknowledged by Justice Antonin Scalia writing for the majority of the U.S. Supreme Court in *Crawford v. Washington*.⁹ Does it require that the accused be permitted to test all the evidence against him, and that he have a right to cross-examine all those who have made statements against him, or simply that the witnesses who actually testify in a criminal proceeding against the accused must do so in the presence of the accused? Not surprisingly, the Court has attempted to clarify the meaning of the somewhat ambiguous Confrontation Clause.¹⁰

For the purposes of this Article, my intent is not to chronicle the evolution of American confrontation jurisprudence, but rather to focus on the current content of the law. The most recent changes to confron-

⁸ U.S. CONST. amend. VI (emphasis added).

⁹ See 541 U.S. 36, 42–43 (2004).

¹⁰ See, e.g., *id.* at 43, 50–68.

tation law began with the 2004 decision in *Crawford*, wherein the Court dramatically reinterpreted the meaning of the Confrontation Clause and overruled its 1980 decision in *Ohio v. Roberts*.¹¹ The *Roberts* decision held that out-of-court statements could be admissible in spite of the Confrontation Clause so long as they were reliable—that is, as long as they either fell within a “firmly rooted hearsay exception,” or bore “particularized guarantees of trustworthiness.”¹² Since *Crawford* overruled *Roberts*, I will begin by discussing *Crawford*.

Crawford concerned the prosecution of Michael Crawford for assault and attempted murder. Crawford allegedly stabbed the victim, Kenneth Lee, because Lee had attempted to rape Crawford’s wife, Sylvia, on an earlier occasion.¹³ At Crawford’s trial, the prosecution sought, and was permitted, to introduce a taped statement that Sylvia provided to police in the immediate aftermath of the stabbing.¹⁴ The statement tended to show that Crawford did not act in self-defense when stabbing Lee, but Sylvia did not testify at the trial due to state evidence laws regarding “marital privilege,”¹⁵ which barred her testimony in this case.¹⁶ Crawford was convicted, presumably on the basis of Sylvia’s statement to the police (among other evidence), but the decision was ultimately appealed to the Court to determine whether the admission of Sylvia’s taped statement violated the Confrontation Clause.¹⁷

After a lengthy survey of the history and origins of the Confrontation Clause,¹⁸ the majority, in an opinion written by Justice Scalia, made two inferences based on the historical background of the Sixth

¹¹ See *id.* at 60–69; see also *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), *overruled by Crawford*, 541 U.S. at 60–69. In *Roberts*, the Court articulated the “indicia of reliability” test, holding that “[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” 448 U.S. at 66.

¹² *Roberts*, 448 U.S. at 66.

¹³ *Crawford*, 541 U.S. at 38.

¹⁴ *Id.* at 40.

¹⁵ *Id.* Although Justice Scalia used the phrase “marital privilege” in the opinion, the real concern was whether Sylvia was *competent* to testify in the absence of Crawford’s consent, rather than whether any aspect of her evidence was privileged.

¹⁶ See WASH. REV. CODE § 5.60.060(1) (1994) (“A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner.”). In other words, under state evidence law, it falls to the *accused* to determine whether a spouse is competent to testify. See *id.*

¹⁷ See *Crawford*, 541 U.S. at 38–42.

¹⁸ See *id.* at 43–50.

Amendment.¹⁹ First, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”²⁰ This inference led Justice Scalia to conclude that the Sixth Amendment primarily implicated “testimonial hearsay,” and not necessarily statements such as “a casual remark to an acquaintance.”²¹ Second, Justice Scalia inferred that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”²² Justice Scalia rejected the interpretation previously espoused by the Court that evidence might be admissible under the Sixth Amendment if it fell within a “‘firmly rooted hearsay exception’ or [bare] ‘particularized guarantees of trustworthiness.’”²³ On this latter point, Justice Scalia observed that the Framers of the Constitution likely did not mean “to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”²⁴ He further noted that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”²⁵

Although Chief Justice William Rehnquist, in a concurring opinion joined by Justice Sandra Day O’Connor, agreed that Sylvia’s statement should not have been admitted, he strongly disagreed with the majority’s decision to overrule *Roberts*.²⁶ The Chief Justice expressed distaste for the majority’s “arbitrary” distinction between testimonial and non-testimonial hearsay,²⁷ questioned the utility of departing from precedent,²⁸ and referred four times in his brief concurrence to the truth-seeking function of criminal trials,²⁹ all of which the majority’s new doc-

¹⁹ *Id.* at 50. Justice Scalia wrote the majority opinion in *Crawford*, which five other Justices joined. *Id.* at 38. Chief Justice Rehnquist wrote a separate concurring opinion, which Justice O’Connor joined. *Id.* at 69.

²⁰ *Id.* at 50.

²¹ *See id.* at 51, 53.

²² *Id.* at 53–54.

²³ *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 541 U.S. at 66).

²⁴ *Id.* at 61.

²⁵ *Id.* at 62.

²⁶ *See id.* at 75–76 (Rehnquist, C.J., concurring in the judgment).

²⁷ *See id.* at 71 (“[A]ny classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary . . .”).

²⁸ *See id.* at 72 (“I see little value in trading our precedent for an imprecise approximation at this late date.”).

²⁹ *See Crawford*, 541 U.S. at 74, 75, 76 (Rehnquist, C.J., concurring in the judgment). In his concurrence, Chief Justice Rehnquist remarked:

trine would hinder.³⁰ Additionally, Chief Justice Rehnquist presciently suggested that the majority's opinion might be open to criticism for its lack of grounding in precedent and principle:

Stare decisis is not an inexorable command in the area of constitutional law, but by and large, it "is the preferred course because it promotes the evenhanded, predictable, and *consistent development of legal principles*, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."³¹

Ultimately, however, Justice Scalia's new Confrontation Clause doctrine prevailed, thus signaling the end of the reliability-based law for dealing with out-of-court statements articulated in *Roberts*.³²

In *Crawford*, one can see the skeleton of a new framework for applying the Confrontation Clause. The right to confrontation only exists in the context of testimonial statements.³³ Additionally, a testimonial statement may be admissible even where contemporaneous cross-examination is not possible, so long as the declarant is unable to testify at trial, and the defendant has had a previous opportunity to cross-examine the declarant.³⁴ Furthermore, *Crawford* affirms that in the United States, confrontation means only one thing—the opportunity to cross-examine a witness:

To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence

The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." By creating an immutable category of excluded evidence, the Court adds little to a trial's truth-finding function and ignores this longstanding guidance.

Id. at 75 (citations omitted) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

³⁰ *See id.* at 69–76.

³¹ *Id.* at 75 (emphasis added) (citations omitted) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

³² *See id.* at 68–69.

³³ *Id.*

³⁴ *Crawford*, 541 U.S. at 68.

(a point on which there could be little dissent), but about how reliability can best be determined.³⁵

Even after *Crawford*, however, some ambiguity regarding the scope of the Confrontation Clause remained.³⁶ Accordingly, in subsequent decisions, the Court expanded upon the definition of “testimonial” evidence and other relevant confrontation issues.³⁷

In *Davis v. Washington*, the Court considered whether a statement made by a victim of assault to the 911 operator who received the victim’s call was a “testimonial” statement for the purposes of the Confrontation Clause.³⁸ The victim, Michelle McCottry, called 911 after Adrian Davis punched her several times while at her residence to remove his belongings. Police officers arrived on the scene and saw clear signs of recent injuries on McCottry. They took a statement from McCottry, and charges were later filed against Davis.³⁹ McCottry, however, did not testify at Davis’s trial⁴⁰ and, accordingly, the prosecution sought, and was permitted, to introduce the 911 recording in order to prove the link between Davis and the injuries observed on McCottry.⁴¹ The Court decided *Davis* together with *Hammon v. Indiana*,⁴² a similar case with a subtle distinction: In *Hammon*, the police investigators took a statement from the victim of a domestic assault at her house shortly after the incident occurred, and, when the victim did not testify at Hammon’s trial,⁴³ the prosecution sought, and was permitted, to introduce the victim’s statement through the police officer who received the statement.⁴⁴

³⁵ *Id.* at 61.

³⁶ *Id.* at 60–61.

³⁷ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1165 (2011) (victim statements to police officers during an ongoing emergency); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009) (lab test results); *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008) (deceased victims’ prior statements to police officers); *Davis v. Washington*, 547 U.S. 813, 826–34 (2006) (911 calls).

³⁸ See 547 U.S. at 817–18.

³⁹ *Id.*

⁴⁰ *Id.* at 819. The reason why McCottry did not testify is unclear. See *id.* (“McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear.”).

⁴¹ See *id.*

⁴² *Davis*, 542 U.S. 813 (2006). The *Hammon* opinion is included in the *Davis* majority opinion. *Id.* at 819–21.

⁴³ *Id.* at 819–20. As in *Davis*, it is unclear why the victim did not testify. See *id.* (“Amy was subpoenaed, but she did not appear at [Hammon’s] subsequent bench trial.”).

⁴⁴ *Id.* at 820.

The majority opinion in *Davis* and *Hammon*, written by Justice Scalia, distinguished between the two types of statements made to authorities in the following manner:

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.⁴⁵

Whereas the Court in *Davis* held that the victim's statement to a 911 operator was non-testimonial, and therefore not subject to exclusion under the Confrontation Clause, the Court in *Hammon* held that the victim's statement to police investigators was clearly testimonial in nature; therefore, it should have been excluded at Hammon's trial because the accused was not afforded an opportunity to cross-examine the declarant about her statement.⁴⁶

Justice Clarence Thomas dissented in part in *Davis* and *Hammon*. He suggested that the majority's definition of testimonial evidence was overbroad,⁴⁷ and argued that it would "yield[] no predictable results to police officers and prosecutors attempting to comply with the law."⁴⁸ He also noted the difficulty of singling out the function of a police officer at the time a statement is taken:

In many, if not most, cases where police respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.⁴⁹

Justice Thomas concluded that neither the statement to the 911 operator in *Davis*, nor the statement to police in *Hammon*, was sufficiently formalized to be a testimonial statement.⁵⁰ Consequently, Justice Tho-

⁴⁵ *Id.* at 822.

⁴⁶ *Id.* at 834.

⁴⁷ *See id.* at 835 (Thomas, J., concurring in part and dissenting in part).

⁴⁸ *Davis*, 547 U.S. at 838 (Thomas, J., concurring in part and dissenting in part).

⁴⁹ *Id.* at 839.

⁵⁰ *Id.* at 840. Justice Thomas wrote:

mas agreed that the statement in *Davis* should be admitted, but disagreed that the statement in *Hammon* should have been excluded.⁵¹ Although Justice Thomas was alone in his partial dissent, many of his concerns about the distinction between the testimonial or non-testimonial nature of different types of statements received by police re-emerged in *Michigan v. Bryant*, discussed below.⁵²

In the meantime, however, another domestic violence case, *Giles v. California*, further refined American confrontation doctrine.⁵³ Dwayne Giles was charged with murder after fatally shooting his ex-girlfriend Brenda Avie six times. Giles alleged that he fired in self-defense when Avie rushed at him, because he knew that Avie had previously killed a man and claimed that she was jealous and violent.⁵⁴ The prosecution, however, sought, and was permitted, to introduce a statement that Avie made to police three weeks before her death when the police responded to a domestic violence call.⁵⁵ At that time, Avie told police that Giles choked her, punched her in the face, and opened a folding knife in front of her while saying that he would kill her if he found out she was cheating on him.⁵⁶ The jury convicted Giles of first-degree murder,⁵⁷ presumably on the basis of the statement that the deceased victim previously made to police concerning Giles's threats on her life.⁵⁸

In *Giles*, the Court expanded upon its statement in *Crawford* that “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds,”⁵⁹ by deciding whether Giles forfeited his right to confrontation by killing Avie.⁶⁰ A

Neither the 911 call at issue in *Davis* nor the police questioning at issue in *Hammon* is testimonial under the appropriate framework. Neither the call nor the questioning is itself a formalized dialogue. Nor do any circumstances surrounding the taking of the statements render those statements sufficiently formal to resemble the Marian examinations.

Id. Justice Thomas explained the “Marian” examinations, referred to by Justice Scalia in the majority opinion, in more detail; these examinations are essentially ex parte examinations of witnesses in the style of the civil law, authorized by bail and committal statutes passed in England during the reign of Queen Mary. *Id.* at 835.

⁵¹ *Id.* at 842.

⁵² *Id.* at 834; see *infra* text accompanying notes 80–97.

⁵³ See *Giles*, 128 S. Ct. at 2681.

⁵⁴ *Id.*

⁵⁵ *Id.* at 2681–82.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2682.

⁵⁸ See *id.* at 2681–82.

⁵⁹ *Crawford*, 541 U.S. at 62.

⁶⁰ *Giles*, 128 S. Ct. at 2681.

majority of the Court agreed with Justice Scalia that an exception to the Confrontation Clause exists where an accused forfeits his right to confrontation as a result of his own wrongdoing, but that this exception would only apply in cases where it could be shown that the accused *intended* to make the witness unavailable for trial.⁶¹ Thus, the exception would cover obvious witness intimidation and witness tampering situations, but not murder, unless the specific intent of the accused to render the witness unavailable could be proven.⁶² The majority in *Giles* also affirmed that an exception to the Confrontation Clause existed for “dying declarations,”⁶³ but justified its recognition of both the forfeiture and the dying declarations exceptions on the ground that both exceptions clearly existed “at the time of the founding,”⁶⁴ that is, at the time of the adoption of the Sixth Amendment.

The Justices authored five opinions in *Giles*: Chief Justice John Roberts joined in the opinion by Justice Scalia;⁶⁵ Justice Thomas reiterated that non-formalized statements to police are not subject to the Sixth Amendment, but, since the Court was not asked to rule on this question in *Giles*, he agreed with the result;⁶⁶ Justice Samuel Alito concurred in much the same manner as Justice Thomas;⁶⁷ Justice David Souter, joined by Justice Ruth Bader Ginsburg, concurred in the result, but argued that the specific intent aspect of the forfeiture doctrine could be inferred in cases of domestic violence, or “classic” abusive relations where the abuser intends to “isolate the victim from outside help”;⁶⁸ and, Justice Stephen Breyer, joined by Justices John Paul Stevens and Anthony Kennedy, dissented.⁶⁹ The dissenting justices would not read a specific intent requirement into the forfeiture doctrine, preferring instead a lesser requirement of a general intent to do something that would make the witness unavailable.⁷⁰ These justices would therefore have allowed the admission of hearsay statements in *Giles*, because the defendant forfeited his confrontation rights when he killed the victim/witness.⁷¹

⁶¹ *Id.* at 2681, 2693.

⁶² *Id.* at 2684, 2693.

⁶³ *See id.* at 2682–85.

⁶⁴ *See id.* at 2693.

⁶⁵ *Id.* at 2681.

⁶⁶ *Giles*, 128 S. Ct. at 2693–94 (Thomas, J., concurring).

⁶⁷ *Id.* at 2694 (Alito, J., concurring).

⁶⁸ *Id.* at 2694–95 (Souter, J., concurring in part).

⁶⁹ *Id.* at 2695 (Breyer, J., dissenting).

⁷⁰ *See id.* at 2698–99.

⁷¹ *See id.* at 2695.

Ultimately, the admission at trial of Avie's previous statement, without a determination as to whether Giles intended to make Avie unavailable to testify, violated Giles's constitutional right to confront witnesses against him, thus invoking the forfeiture-by-wrongdoing exception to the Confrontation Clause.⁷² The case was "remanded for further proceedings not inconsistent with" the majority opinion.⁷³

American confrontation law continued to evolve as the Court faced a number of cases that required it to clarify and flesh out the *Crawford* doctrine. In *Melendez-Diaz v. Massachusetts*, decided in 2009, a bare majority of the Court—agreeing with an opinion that was again written by Justice Scalia—concluded that certificates of analysis from drug laboratories were "testimonial" evidence for the purpose of the Confrontation Clause because the sole purpose of the certificates under Massachusetts law was to provide evidence of the composition and weight of the drugs.⁷⁴ The majority opinion in this case quickly established that lab certificates were testimonial, and proceeded, for the remainder of the opinion, to explain why "the sky will not fall after today's decision,"⁷⁵ in direct response to arguments by Massachusetts⁷⁶ and the dissenting Justices suggesting that, for efficiency reasons, the nationwide volume of drug trials required the admission of certificates instead of live testimony.⁷⁷ The majority was not persuaded by these arguments, and ultimately ruled that the certificates of analysis should not have been admitted at Melendez-Diaz's trial for drug trafficking.⁷⁸ The matter was

⁷² *Giles*, 128 S. Ct. at 2684 (Scalia, J., majority opinion).

⁷³ *Id.* at 2693.

⁷⁴ *Melendez-Diaz*, 129 S. Ct. at 2531–32.

⁷⁵ *See id.* at 2540. The Court explained:

Perhaps the best indication that the sky will not fall after today's decision is that it has not done so already. Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report. Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that, one way or another, empower a defendant to insist upon the analyst's appearance at trial.

Id. at 2540–41 (citations omitted).

⁷⁶ It seems likely that the United States (as *amicus curiae*, by special leave of the Court, supporting Massachusetts) would echo the arguments raised by Massachusetts at the Court hearing, since the federal Drug Enforcement Agency would surely have been concerned about the impact of the decision in this case on their work.

⁷⁷ *See id.*, 129 S. Ct. at 2540.

⁷⁸ *See id.* at 2540–42.

remanded for further proceedings not inconsistent with the majority's opinion.⁷⁹

Another of the Court's recent significant decisions on confrontation law, *Michigan v. Bryant*, was decided on February 28, 2011.⁸⁰ This case involved the alleged murder of Anthony Covington by Richard Bryant. Police responded to an emergency call indicating that someone had been shot, and found Covington at a gas station with a gunshot wound in his abdomen. Police immediately asked Covington who had shot him, and where the shooting occurred. Covington replied that "Rick" (Bryant) shot him at Bryant's house. Police then proceeded to Bryant's residence and found a gunshot hole through the back door, a bullet on the ground, and blood on the back porch. Covington subsequently died in the hospital.⁸¹ At trial, the police officer who received the statements made by Covington prior to his death testified as to the substance of those statements.⁸² A jury convicted Bryant of second-degree murder.⁸³

The Court was asked to decide whether Covington's statements were properly admitted through the police officer.⁸⁴ A majority opinion, written by Justice Sonia Sotomayor, held that the statements to the police officer were non-testimonial, and were therefore not capable of implicating the Confrontation Clause.⁸⁵ The majority reiterated the distinction between testimonial and non-testimonial evidence as previously drawn in *Davis*,⁸⁶ namely that statements to police in response to an ongoing emergency are non-testimonial, but statements to the police for the purpose of proving past events in contemplation of future criminal proceedings are testimonial.⁸⁷ Furthermore, in delineating the line between an investigation and a response to an ongoing emergency, the majority observed that "[t]he circumstances in which an encounter occurs—e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact,"⁸⁸ and "the duration and scope of an emer-

⁷⁹ *Id.* at 2542.

⁸⁰ 131 S. Ct. at 1143.

⁸¹ *Id.* at 1150.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1152.

⁸⁵ *Id.* at 1166–67.

⁸⁶ See *Bryant*, 131 S. Ct. at 1153–54; *Davis*, 547 U.S. at 822.

⁸⁷ See *Bryant*, 131 S. Ct. at 1153–54.

⁸⁸ *Id.* at 1156.

agency may depend in part on the type of weapon employed.”⁸⁹ Based on these observations, the majority held that the police faced an ongoing emergency when Covington made his statements, because they did not know whether the shooter was still a threat and because the case involved a gun.⁹⁰ As the majority noted, “[i]f an out-of-sight sniper pauses between shots, no one would say that the emergency ceases during the pause.”⁹¹

Interestingly, Justice Scalia wrote a lengthy and scathing dissent in *Bryant*,⁹² highlighting the fact that at least five different police officers interrogated Covington during the “ongoing emergency,” each interrogation occurred at least twenty-five minutes after Covington had been shot, and not one of these officers asked the most logical question in response to a true emergency (“Where is the shooter?”).⁹³ Justice Scalia would have decided this “absurdly easy case”⁹⁴ by characterizing Covington’s statement to the police as testimonial, thereby rendering it inadmissible due to the lack of opportunity for confrontation.⁹⁵ Justice Scalia’s main thematic concern in his dissent was that the Court was creating “a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned,”⁹⁶ and he argued that the Court was attempting “to fit its resurrected interest in reliability into the *Crawford* framework, but the result is incoherent.”⁹⁷

⁸⁹ *Id.* at 1158.

⁹⁰ *Id.* at 1163–64.

⁹¹ *Id.* at 1164.

⁹² *Id.* at 1168 (Scalia, J., dissenting). The opening lines of Justice Scalia’s dissent read as follows:

Today’s tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort.

Bryant, 131 S. Ct. at 1168.

⁹³ *See id.* at 1170–72.

⁹⁴ *Id.* at 1170, 1171 (Scalia, J., dissenting).

⁹⁵ *See id.* at 1171.

⁹⁶ *See id.* at 1174.

⁹⁷ *See id.* at 1175.

In summary, it is clear that, beginning with *Crawford* in 2004, the Court created a categorical exclusionary rule for testimonial evidence when a declarant is unavailable to be contemporaneously cross-examined, and even for testimonial evidence where a prior opportunity for cross-examination existed, unless the declarant was truly unavailable to testify in person at the subsequent trial.⁹⁸ Several cases since 2004, most authored by Justice Scalia, refined this rule by amplifying the distinction between testimonial and non-testimonial evidence and affirming the residual exceptions for dying declarations and forfeiture by wrongdoing.⁹⁹ As *Bryant* indicates, however, the law in this area may continue to evolve, particularly if Justice Scalia's dominant philosophy regarding confrontation jurisprudence loses favor with current members of the Court.¹⁰⁰

B. *Critiquing the Coherence of American Confrontation Doctrine*

The preceding overview of American case law was necessarily detailed due to the rapid recent development of the law. It is also important to note that the above discussion relates only to Sixth Amendment Confrontation Clause jurisprudence, and not to hearsay law more generally. It should be recalled that, in order for a statement to be admissible in a criminal trial, it is not sufficient for the statement to simply conform to the requirements of the Constitution; the statement must also be admissible under normal rules of evidence, including rules pertaining to hearsay statements.¹⁰¹ Thus, the concepts of hearsay and confrontation remain fundamentally associated, even in the post-*Crawford* era.¹⁰² That said, codified rules of evidence in the United States contain numerous exceptions to the general exclusionary rule applicable to hearsay.¹⁰³ Commentators suggest that hearsay rules are mainly *enabling* rules: "Cumulatively, it is said, the exceptions have turned hearsay from a 'rule of exclusion' into a 'rule of admission,' a rule that allows the introduction of 'virtually any hearsay statement that has probative value.'"¹⁰⁴

⁹⁸ See *Crawford*, 541 U.S. 68–69.

⁹⁹ See *Bryant*, 131 S. Ct. at 1165; *Melendez-Diaz*, 129 S. Ct. at 2532; *Giles*, 128 S. Ct. at 2682–83; *Davis*, 547 U.S. at 813, 826–34.

¹⁰⁰ See *Bryant*, 131 S. Ct. at 1164–65; see also *id.* at 1168 (Scalia, J., dissenting).

¹⁰¹ See David A. Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 53.

¹⁰² *Id.* at 54–55.

¹⁰³ *Id.* at 13 ("The Federal Rules of Evidence codify some three dozen exceptions to the prohibition of hearsay.").

¹⁰⁴ *Id.* (footnote omitted).

Thus, with an appreciation for how the Confrontation Clause dominates, but does not fully occupy, the field of law relating to out-of-court statements in the United States, and with a solid understanding of the governing American confrontation doctrine, it is now possible to assess the internal coherence of the law and the attempts at justification.

1. “Confronted with the Witnesses Against Him”: A Textual Critique

From a grammatical and plain language perspective, it is not immediately apparent that the Sixth Amendment guarantees a criminal defendant any cross-examination right under any circumstances.¹⁰⁵ As an illustration of this point, consider the difference between the following two sentences: 1) The accused shall enjoy the right to be confronted with the witnesses against him; and, 2) The accused shall enjoy the right to confront with the witnesses against him. In the first sentence, the action (confrontation) is carried out by the witnesses, and the accused is merely the object of the action—the one who will be confronted. In the second sentence, however, the accused is the subject of the sentence—the one who carries out the confrontation—and the witnesses are merely the object of the sentence upon whom the action is carried out. In the first sentence, the plain language tells us that any confrontation in a trial is actually done by the witnesses, who must come face-to-face with the defendant in order to accuse and bear witness against him.¹⁰⁶ As a corollary to the preceding proposition, the first sentence also suggests that any reciprocal right of the accused to cross-examine the witnesses who confront him at trial cannot be sourced expressly from the text of the first sentence; if such a right exists, then it must be implied from some extra-textual source. In the second sentence, however, it is clear that the accused is granted a right to confront, accuse, and defy the witnesses against him in a trial, where cross-examination of the witnesses would logically be the vehicle through which this confrontation is achieved.

This subtle grammatical distinction can drastically alter the way in which one interprets a right to confrontation. For instance, if we put

¹⁰⁵ See U.S. CONST. amend. VI.

¹⁰⁶ See *id.* The Oxford English Dictionary defines “confront” in the following ways: “esp. To face in hostility or defiance; to present a bold front to, stand against, oppose,” and, “To face as an accuser or as a witness in a trial.” See 3 OXFORD ENGLISH DICTIONARY 719 (2d ed. 1989).

aside the issue of whether “originalism”¹⁰⁷ is a valid and appropriate interpretive technique for expounding a constitution, then the above grammatical analysis—wherein the first sentence mirrors the text of the Confrontation Clause—should cause us to question whether the Framers of the Sixth Amendment intended to grant accused persons a right to cross-examine witnesses, or whether they simply intended to grant accused persons the right to be brought face-to-face with the trial witnesses who would actually confront the accused with their incriminating evidence. It is neither far-fetched nor redundant to suggest that the Framers intended the Confrontation Clause to provide an accused with the more limited right simply to be present at trial; after all, such a right is not provided for explicitly within any other part of the U.S. Constitution.¹⁰⁸ Furthermore, as Justice Scalia noted in *Crawford*, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.”¹⁰⁹ Justice Scalia, however, does not explain in any meaningful detail *why* the Framers intended to prevent ex parte examinations (for instance, to prevent

¹⁰⁷ There is likely no single accepted understanding of what the term originalism means, but the general thrust of the idea in both its older and its more recent variants has been described by Peter J. Smith in *How Different Are Originalism and Non-Originalism?*:

The “old originalism,” which tended to focus on the intent of the Framers and was largely a negative theory developed to criticize the decisions of the Warren and Burger Courts, has been mostly displaced by the “new originalism,” which tends to focus on the objective meaning of the constitutional text and seeks to provide a positive basis for constitutional decisionmaking.

62 HASTINGS L.J. 707, 708 (2011). In other words, originalism is concerned with establishing the original meaning of a constitutional provision so that the meaning can be applied in contemporary cases.

¹⁰⁸ Although the right to be present at one’s trial is constitutionally protected in the United States, this is because the right has been read into the due process clause of the Fifth Amendment to the U.S. Constitution, not because the text of the Constitution explicitly provides for such a right. See *Hopt v. People of the Territory of Utah*, 10 U.S. 574, 579 (1884):

The legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.

Id.

¹⁰⁹ See *Crawford*, 541 U.S. at 50.

unreliable evidence from reaching the trier of fact).¹¹⁰ Instead, it seems to satisfy the *Crawford* majority that the Framers *did* intend to prevent the admission of ex parte examinations, and this fact, alone, drives the majority's reasoning.¹¹¹ If the mischief to be avoided by the Confrontation Clause is ex parte examinations, *simpliciter*, then it would make sense for the Sixth Amendment to guarantee accused persons a right to have witnesses testify in their presence, and nothing more.¹¹² In other words, on the basis of the historical facts accepted by the *Crawford* majority, and particularly on the basis of the text of the Confrontation Clause, it would have been plausible for the majority in that case to find that no right to cross-examine witnesses regarding testimonial or non-testimonial evidence is protected by the Sixth Amendment.¹¹³ Instead, the majority could reasonably have found that the Confrontation Clause only guarantees an accused the right to be present at her trial, face-to-face with the witnesses against her.¹¹⁴

Even if one is not persuaded by this textual critique of American Confrontation Clause jurisprudence, there remains some ambiguity about the definition of the term "witnesses" within the context of the Sixth Amendment.¹¹⁵ As Justice Scalia observed in *Crawford*, "[o]ne could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between."¹¹⁶ In order to resolve this ambiguity, Justice Scalia looked to "the historical background of the Clause to understand its meaning,"¹¹⁷ and concluded, as discussed above, that "witnesses" means anyone who gives "testimonial" evidence, either inside or outside of court.¹¹⁸ If Justice Scalia's originalist approach in this case to expounding the American Constitution is not accepted as a valid inter-

¹¹⁰ *Cf. id.* at 42–50 (discussing historical denunciation of ex parte procedures without specifying why they are unjust).

¹¹¹ *See id.* at 47–49.

¹¹² *See id.* at 42–50.

¹¹³ *Cf. id.*

¹¹⁴ I would like to note that many others have offered textual critiques of various Confrontation Clause doctrines. However, most critiques appear to focus on the meaning of the word "witness," one who gives in-court testimony versus anyone who offers evidence, rather than on the grammatical structure of the Clause and the meaning that can be inferred from this structure. *See, e.g.,* Fred O. Smith, Jr., *Crawford's Aftershock: Aligning the Regulation of Non-Testimonial Hearsay with the History and Purpose of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1508–12 (2008) (challenging use of the Fifth Amendment definition of "testimonial" in the Sixth Amendment context).

¹¹⁵ *See Crawford*, 541 U.S. at 42–43.

¹¹⁶ *Id.* (citations omitted).

¹¹⁷ *See id.* at 43.

¹¹⁸ *See id.* at 51–52.

pretive technique, or if he is incorrect in his assessment of relevant historical realities¹¹⁹—which lead him to suggest that *ex parte* examinations, *simpliciter*, were the primary evil that the Confrontation Clause sought to address)—then one can see how the definition of “witnesses” for the purposes of the Confrontation Clause might mean something altogether different from, but just as legitimate as, that which *Crawford* tells us the term now means.

As the above textual critiques of American confrontation law demonstrate, the text of the Sixth Amendment is capable of supporting a variety of meanings. The Court, in its most recent line of Confrontation Clause cases, derived a meaning for the clause by hypothesizing about the original intent of the Framers. This meaning, when compared with various other textually plausible meanings, is not necessarily the most logical or persuasive meaning for the Clause, since, as I will explain below, it cannot be justified by legal principles.

2. Artificial Distinctions and Exceptions: A Principled Critique

One can easily claim that an originalist approach to constitutional interpretation, and specifically interpretation of the Confrontation Clause, is a principled approach—the relevant principle being that the Framers’ intent at the time of founding should determine the meaning of the clause.¹²⁰ Even if this interpretive methodology reflects a “principled” approach, however, the approach is arguably based on political principles, not legal principles.¹²¹ For instance, if one were to defend

¹¹⁹ See Sklansky, *supra* note 101, at 47 (“The originalist reasoning in *Crawford*, *Davis*, and *Giles* has been challenged on two main grounds. The first is that originalism is a mistaken approach to constitutional interpretation; the second is that the Court is wrong about what kind of evidence was commonly allowed by eighteenth-century common law.”).

¹²⁰ See, e.g., *Crawford* 541 U.S. at 50–56.

¹²¹ Professor Richard Fallon has gone so far as to suggest that political principles and originalist interpretations may be *inextricably* linked. See Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5, 19 (2011). Fallon states:

[E]ven in the Founding generation . . . reasonable people reasonably disagreed in light of their reasonable but divergent political outlooks. It is no small challenge to specify the rules by which to determine what a hypothetical reasonable observer would have concluded with regard to questions that were not clearly foreseen and that understandably provoke, or would historically have provoked, ideologically inflected disagreement. In addressing that challenge, a fully specified originalist theory might actually need to identify the political values or concerns to be attributed to the hypothetical reasonable observers whose views define the original public meaning.

an originalist approach to constitutional interpretation, one would likely argue that it is politically unacceptable for the courts to create new constitutional law in cases where such judicial activism is not necessary and where an existing answer to a legal question can be found by asking what the Framers of the Constitution intended the answer to be.¹²² The role of creating constitutional law, an originalist might say, should be reserved unto the polity as whole, and implemented through the actions of elected officials, not through the judiciary.¹²³ This type of response is concerned more with the political legitimacy of lawmaking than with the soundness of legal decisions, as assessed in reference to legal principles.¹²⁴ In other words, an originalist response to the question, “why does the Confrontation Clause only protect testimonial evidence?” (as demonstrated implicitly in the *Crawford* opinion) could simply be, “because the Framers wanted it that way.”

This answer—while it may or may not be historically accurate—does not allow for meaningful legal debate¹²⁵ through an ongoing process of justification, critique, and counter-justification, as to why the law is the way it is, whether the law does what it is supposed to do, and, if not, whether the law should be fine-tuned. In my view, a more useful answer to the same question (for instance, “because this type of evidence presents the greatest danger of unreliability, and reliable evidence is essential in order for a trial to achieve its truth-seeking purpose”) would refer to legal principles that can be debated in the interest of understanding, applying, and shaping the law. Thus, at the outset, one can critique the current state of American confrontation law—law that was created through originalist interpretation—by arguing that it is not a principled body of law because it does not draw upon *legal* principles as a source of justification for its content.

Even if one accepts, as Richard Fallon suggests, that originalism as a doctrine of constitutional interpretation has “the capacity for princi-

¹²² See Stephanos Bibas, Essay, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 188 (2005). Bibas asserts that originalists believe “the job of judges is archaeology, not architecture: they must discover meaning, not invent it.” *Id.*

¹²³ *Id.* at 186–88.

¹²⁴ *Id.* at 188.

¹²⁵ See, e.g., 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 (2005). Davies claims that “[o]riginal meaning—the public meaning that a constitutional provision carried at the time the provision was framed—is a historical phenomenon. As such, it can be established only by valid historical evidence,” rather than by legal debate. *Id.*

pled application,”¹²⁶ it seems unlikely that such applications can be found in prevailing Confrontation Clause jurisprudence.¹²⁷ As Fallon notes, generally, “more specified originalist theories are likely to be more principled than less specified theories,”¹²⁸ but “many originalists’ working theories—as manifest by the judgments they reach about particular cases and the arguments they adduce to support their judgments—are poorly specified.”¹²⁹ Fallon further suggests that Justice Scalia, the primary author of the recent authoritative string of Confrontation Clause decisions, is particularly notorious for being an unprincipled originalist: “[W]ell-developed literature supports the conclusion that Justices Scalia and Thomas are not consistent in the versions of originalism that they employ—presumably because their theories are not sufficiently specified to constrain them from varying.”¹³⁰

As evidence in support of this observation, Fallon notes that both Justices Scalia and Thomas routinely vote in ways that prioritize the value of precedent, even when these votes “seem impossible to justify by reference to originally understood meanings,”¹³¹ but that on other occasions, the two Justices “have voted to overrule longstanding precedents on the sole ground that they deviate from the original understanding.”¹³² The problematic element of this voting pattern, from Fallon’s perspective and from the perspective of any critic who espouses principled legal decision-making, is that there is no “well-developed, articulated theory of when and why non-originalist precedent should control.”¹³³ In other words, originalist judges like Justice Scalia, who often make decisions on an *ad hoc* basis without reference to underlying legal principles, may be causing law (including evidence law) to continue “adrift” and directionless.¹³⁴

If one values principled judicial decision-making, therefore, it would seem that originalism in general, and Justice Scalia’s variant of originalism in particular, are poor interpretative tools for deciding constitutional cases. With respect to current American Confrontation Clause doctrine, the lack of underlying legal principles—and the prob-

¹²⁶ Fallon, *supra* note 121, at 15.

¹²⁷ See Davies, *supra* note 125, at 192.

¹²⁸ See Fallon, *supra* note 121, at 15.

¹²⁹ *Id.* at 16.

¹³⁰ *Id.* (footnote omitted).

¹³¹ *Id.* at 18.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Cf. Davies, *supra* note 125, at 213–15 (criticizing the tendency of originalists to revise history to fit predetermined outcomes).

lems that this absence creates—manifests itself in a variety of ways. For instance, the Court’s distinction between testimonial and non-testimonial evidence for the purposes of the Confrontation Clause appears arbitrary because there is no logical reason why one type of evidence should garner constitutional protection while the other does not.¹³⁵ If the ultimate goal of the Confrontation Clause is to ensure that evidence is reliable, which it was for many pre-*Crawford* decisions and which even Justice Scalia acknowledged in *Crawford*,¹³⁶ then why should non-testimonial evidence be admitted without “testing in the crucible of cross-examination”¹³⁷ as the Sixth Amendment seemingly requires?

This unprincipled development in the law that follows from *Crawford* will likely reduce many opportunities for cross-examination, and incentivize police forces and lower courts to obtain and characterize statements as non-testimonial.¹³⁸ In fact, one commentator suggests that the testimonial/non-testimonial distinction is already being manipulated to achieve desired results:

These distinctions have been seized on by lower courts, which have read expansively the *Davis* criterion of emergency statements as nontestimonial and have emphasized any conceivable purpose for the interview as noninterrogation to remove hearsay declarations from *Crawford*’s Confrontation strictures. Both the de-constitutionalizing of admissibility standards for nontestimonial hearsay and the expansive definition being applied to that category of out-of-court statements will permit trials to be conducted with significant testimony never subjected to the testing of cross-examination.¹³⁹

Jules Epstein’s comments in the above passage predate *Bryant*, but the phenomenon that he describes is evidently not just occurring in lower courts.¹⁴⁰ Notably, the majority in *Bryant* went to great lengths to characterize the situation that the police officers faced as an “ongoing

¹³⁵ See *Crawford*, 541 U.S. at 61.

¹³⁶ See *id.* (“To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”)

¹³⁷ See *id.*

¹³⁸ See Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk,”* 14 WIDENER L. REV. 427, 441–42 (2009).

¹³⁹ *Id.* (footnotes omitted).

¹⁴⁰ See, e.g., *Bryant*, 131 S. Ct. 1167.

emergency,”¹⁴¹ even though, as Justice Scalia pointed out in his dissent, the statements given to five different police officers were elicited between twenty-five and thirty-five minutes after the victim had been shot, they were made about six blocks away from the scene of the shooting, and none of the officers demonstrated any significant concern for their own safety or the safety of the public.¹⁴² Perhaps some unacknowledged principle motivated the majority to conclude that, notwithstanding the obviously testimonial nature of the victim’s statements in *Bryant* and the absence of any true ongoing emergency, there was nonetheless an important reason why the victim’s statements should be admitted without opportunity for cross-examination.¹⁴³ Unless the principles that underpin these judicial decisions are explicitly acknowledged, however, the courts may appear, as the Supreme Court did in *Bryant*, to manipulate facts and law arbitrarily so as to achieve results that cannot be justified on a principled basis.

Further examples of the unprincipled nature of current American confrontation law are evident in the exceptions to the general exclusion of testimonial evidence for dying declarations and forfeiture by wrongdoing.¹⁴⁴ The Court recognizes these exceptions not because they advance the goal of the Confrontation Clause in any independent way, but because “the Confrontation Clause is ‘most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.’”¹⁴⁵ Can it really be principled to accept these exceptions to the general exclusionary rule simply because they existed when the Sixth Amendment was written, without first inquiring as to whether they support the right that the Confrontation Clause seeks to protect? It seems likely that the principle underlying the exception as it was originally understood may have changed over time; for example, the historic notion that dying declarations are inherently reliable because “no one would wish to meet his Maker with a lie on his lips”¹⁴⁶ may no longer be persuasive in an era when a population is less religious and/or devout than in the past. If it is possible that the rationale underlying an exception at the

¹⁴¹ See *id.*

¹⁴² See *id.* at 1170–72.

¹⁴³ See *id.* at 1168.

¹⁴⁴ See *Giles*, 128 S. Ct. at 2682–83.

¹⁴⁵ *Crawford*, 541 U.S. at 54.

¹⁴⁶ Richard D. Friedman, *The Confrontation Right Across the Systemic Divide*, in *CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOUR OF PROFESSOR MIRJAN DAMAŠKA* 261, 266 n.18 (John Jackson et al. eds., 2008).

time of the founding is no longer applicable due to any one of a number of historical, social, political, or legal facts, then it would seem inherently unprincipled to incorporate such an exception into contemporary law without a proper assessment of the logical validity of the exception.

My point in drawing attention to the above examples, each of which lack an underlying legal principle, is not, at this point, to suggest what principle or principles should animate the development of American Confrontation Clause jurisprudence.¹⁴⁷ Instead, I simply wish to point out the lack of internal coherence within the current doctrine, with its artificial distinctions between various types of testimony, its potential to encourage results-oriented analysis, and its bizarre recognition of exceptions that do not seem to advance the goal of the Sixth Amendment.¹⁴⁸

Where the law developed so clearly from originalist constitutional interpretations, and in the absence of governing legal principles, it becomes almost impossible to engage in reasoned legal debate about the law. We can certainly engage in an extensive historical debate about what the common law of confrontation looked like at the time of the founding, and many commentators have engaged in just such a debate,¹⁴⁹ but within the current American confrontation landscape, we cannot really argue about whether or not the law should be a certain way on the basis of purely legal grounds. This reality should be seen as unfortunate and regrettable in a society that values the communication and free exchange of ideas within the public intellectual marketplace.¹⁵⁰ Accordingly, Part III of this Article proposes a solution to the

¹⁴⁷ Part III of this paper will discuss more fully the types of principles that might prove instructive when considering any type of confrontation law analysis.

¹⁴⁸ See *supra* text accompanying notes 105–146.

¹⁴⁹ See, e.g., Thomas Y. Davies, *Selective Originalism: Sorting Out Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not "at the Time of the Founding,"* 13 LEWIS & CLARK L. REV. 605, 626–27 (2009) (noting, among other things, that only sworn and confronted prior testimony was admissible under the forfeiture doctrine over much of the last 200 years); Tom Harbinson, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians Are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 MERCER L. REV. 569, 572–79 (2007) (identifying contradictory precedent undermining Scalia's justification for the Confrontation Clause); Ellen Liang Yee, *Forfeiture of the Confrontation Right in Giles: Justice Scalia's Faint-Hearted Fidelity to the Common Law*, 100 J. CRIM. L. & CRIMINOLOGY 1495, 1507–12 (2010) (arguing that a clear requirement of specific intent to make a witness unavailable for trial was not a historic requirement of the common law in invoking the forfeiture by wrongdoing exception to the hearsay rule).

¹⁵⁰ See *Red Lion Broad. Co. v. Fed. Comm'n's Comm'n*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in

current problem by suggesting appropriate principles for use in interpreting the Confrontation Clause and similar bodies of law.

II. CONFRONTATION LAW IN CANADA

A comparison between American and Canadian confrontation law may prove useful because both jurisdictions draw their legal origins from the English common law tradition and both are similarly situated globally in terms of democratic and socio-economic development. As I will explain below, however, Canada and the United States protect a criminal defendant's ability to cross-examine witnesses in very different ways.

A. *The Source and Content of the Law in Canada*

1. Sourcing the Right to Cross-Examine Witnesses

The Canadian Charter of Rights and Freedoms (Charter),¹⁵¹ which forms part of the Canadian Constitution, expressly guarantees that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”¹⁵² More specifically, in the context of criminal law, section 11(d) of the Charter provides that “[a]ny person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”¹⁵³ The Canadian Constitution does not explicitly provide an accused with a right to confront witnesses, nor with a right to cross-examine witnesses.¹⁵⁴ The above two Charter sections provide, however, in a circuitous fashion, a quasi-constitutional right to confront and cross-examine witnesses.¹⁵⁵

The text of section 11(d) of the Charter expressly provides an accused with the right to a fair trial.¹⁵⁶ The Supreme Court of Canada (SCC), however, determined that all of the rights listed in sections 8 through 14 of the Charter are simply examples of the principles of

which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”).

¹⁵¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) [*hereinafter* Canadian Charter].

¹⁵² *Id.* § 7.

¹⁵³ *Id.* § 11(d).

¹⁵⁴ *Cf. id.* (omitting mention of confrontation right as an enumerated legal right).

¹⁵⁵ *See infra* text accompanying notes 165–181.

¹⁵⁶ Canadian Charter, *supra* note 151, § 11(d).

fundamental justice that are referred to more generally in section 7: “The sections which follow § 7, like the right to a fair trial enshrined in § 11(d), reflect particular principles of fundamental justice. Thus the discussion of § 7 and § 11(d) is inextricably intertwined.”¹⁵⁷ Elsewhere, the SCC noted that:

[T]he legal rights set out in §§ 8 through 14 of the *Charter* address, among other things, specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, and that these provisions are therefore illustrative of the meaning of the principles of fundamental justice. Similarly, all of the legal rights provisions are to be informed in their interpretation and application by the principles of fundamental justice. In particular, §§ 7 through 14 are informed by the cardinal principles of the presumption of innocence and the right to a fair trial.¹⁵⁸

As these passages demonstrate, a right to a fair trial is a primary right that is protected under both section 7 and section 11(d) of the *Charter*.¹⁵⁹

A closely related right determined by the SCC to exist under section 7 of the *Charter* is the right of an accused person to make a full answer and defense to any charges:

The right to make full answer and defence is protected under s. 7 of the *Charter*. It is one of the principles of fundamental justice The right to make full answer and defence manifests itself in several more specific rights and principles, such as the right to full and timely disclosure . . . as well as various rights of cross-examination, among others. The right is integrally linked to other principles of fundamental justice, such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination.¹⁶⁰

While there is a hint in the above passage that cross-examination is a part of the right to make a full answer and defense—which, in turn, is a principle of fundamental justice—this connection is stated more explic-

¹⁵⁷ *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 603 (citations omitted).

¹⁵⁸ *R. v. Rose*, [1998] 3 S.C.R. 262, para. 95 (citations omitted).

¹⁵⁹ See *Rose*, [1998] S.C.R. para. 95; *Seaboyer*, [1991] 2 S.C.R. at 603.

¹⁶⁰ See *Rose*, [1998] S.C.R. para. 98.

itly in other decisions.¹⁶¹ For instance, in *R. v. Lyttle*,¹⁶² the opening paragraphs of the unanimous SCC decision describe cross-examination in the following manner:

Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be *no other way* to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed. That is why the right of an accused to cross-examine witnesses for the prosecution—without significant and unwarranted constraint—is an essential component of the right to make full answer and defence.¹⁶³

In *Lyttle*, the SCC allowed the accused's appeal and ordered a new trial because, on the facts of the case, the accused was unable to exercise his right to make a full answer and defense when the trial judge unnecessarily curtailed the scope of the defense's cross-examination.¹⁶⁴

R. v. Khelawon provided a further articulation of the relationship between cross-examination and constitutionally protected rights.¹⁶⁵ In that case, the SCC noted the value of cross-examination in highlighting untrustworthiness and inaccuracy within witness testimony, but also observed that:

[T]he constitutional right guaranteed under § 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself. The adversarial trial process, which includes cross-examination, is but the means to achieve the end. Trial fairness, as a principle of fundamental justice, is the end that must be achieved.¹⁶⁶

¹⁶¹ See *R. v. Khelawon*, [2006] 2 S.C.R. 787, para. 48; *R. v. Lyttle*, [2004] 1 S.C.R. 193, paras. 1–2.

¹⁶² [2004] 1 S.C.R. 193. This case involved review of a trial judge's decision to curtail defense counsel's right to cross-examine a Crown witness. The SCC found that the trial judge had placed too high a burden on the defense by requiring it to have "substantive evidence" of a defense theory upon which the Crown witness would be cross-examined. The SCC affirmed that only a "good faith basis" was required for a question put to a witness in cross-examination. See *id.* paras. 68–75.

¹⁶³ *Id.* paras. 1–2.

¹⁶⁴ See *id.* paras. 68–75.

¹⁶⁵ See [2006] 2 S.C.R. 787.

¹⁶⁶ *Id.*

As all of the above cases make clear, under the Canadian Constitution there is no primary right for an accused to confront or cross-examine witnesses, nor is there a clear explanation of the exact connection between cross-examination and the constitutional rights of an accused person.¹⁶⁷ Cross-examination, however, has been held to be a vital part of the accused's right to make a full answer and defense, which, in turn, is a principle of fundamental justice that must be respected under section 7 of the Charter if there is potential for someone to be deprived of life, liberty, or security of the person.¹⁶⁸ Cross-examination is also an important means to ensure that an accused benefits from the ultimate right to a fair trial that is protected by sections 7 and 11(d) of the Charter.¹⁶⁹

These indirect means of protecting a defendant's ability to cross-examine witnesses, in the context of a key hearsay law decision by the SCC, led the court to affirm that "the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension."¹⁷⁰ Notwithstanding this "constitutional dimension" to the very simple rule that presumptively renders hearsay inadmissible,¹⁷¹ there are nonetheless broad exceptions to the hearsay rule that must be discussed in order to understand fully the scope of any right to confront witnesses available to an accused in Canada.

2. The Source and Content of Canadian Hearsay Law

In Canada, the contemporary hearsay exclusionary rule originates from the common law of evidence, rather than from any statute or constitutional provision.¹⁷² In *R. v. Evans*, the SCC defined hearsay as "[a]n out-of-court statement which is admitted for the truth of its contents."¹⁷³ The SCC subsequently refined this definition to explain that "[t]he essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-

¹⁶⁷ See *supra* text accompanying notes 166–176.

¹⁶⁸ See *Lyttle*, [2004] 1 S.C.R. para. 1–2.

¹⁶⁹ See *id.*

¹⁷⁰ See *Khelawon*, [2006] 2 S.C.R. para. 3.

¹⁷¹ See *R. v. Mapara*, [2005] 1 S.C.R. 358, para. 15.

¹⁷² Cf. *R. v. Starr*, [2000] 2 S.C.R. 144, para. 153 ("The law of hearsay in Canada and throughout the common law world has long been governed by a strict exclusionary rule relaxed by a complex array of exceptions.").

¹⁷³ [1993] 3 S.C.R. 653, 661.

examine the declarant.”¹⁷⁴ In other words, under Canadian law, not every out-of-court statement offered to prove the truth of its content is hearsay because the opportunity for the cross-examination of the declarant at the time the statement is made will generally render the out-of-court statement admissible as something other than hearsay.¹⁷⁵ As previously discussed, however, where a statement is caught by the hearsay definition, it is presumptively inadmissible¹⁷⁶: “[A]bsent an exception, hearsay evidence is *not* admissible.”¹⁷⁷

Historically, the common law in Canada recognized exceptions to the hearsay exclusionary rule for prior identifications,¹⁷⁸ prior testimony,¹⁷⁹ admissions by co-conspirators against one another,¹⁸⁰ dying declarations,¹⁸¹ and spontaneous statements,¹⁸² among others. Each exception is qualified, however, and includes one or more preconditions which must be satisfied before the hearsay statement is admissible.¹⁸³

In addition to the historical exceptions to the hearsay exclusionary rule, Canadian common law, in *R. v. Khan*, recognized a residual exception for hearsay statements that were found to be both necessary and reliable.¹⁸⁴ The *Khan* case involved charges filed against a doctor for sexual assault on a three-year-old child.¹⁸⁵ The Crown sought to introduce, through the victim’s mother, statements that the victim made to

¹⁷⁴ *Khelawon*, [2006] 2 S.C.R. para. 35.

¹⁷⁵ *See id.* From the content of the hearsay definition, one might think that out-of-court statements that were made where an opportunity for cross-examination actually existed would be admissible, not as an “exception” to the hearsay rule, but simply as admissible evidence that does not amount to hearsay in the first place. This view, while logical, seems at odds with some SCC case law. *See, e.g.*, *R. v. Hawkins*, [1996] 3 S.C.R. 1043, paras. 47–50. In *Hawkins*, the Crown had sought at trial to introduce previous testimony of a witness, who had been subject to cross-examination, in a subsequent proceeding. *Id.* para. 17. The SCC characterized this evidence in *Hawkins*, and later in *Khelawon*, as hearsay that could only be admitted under an exception to the exclusionary rule. *See Khelawon*, [2006] 2 S.C.R. para. 66; *Hawkins*, [1996] 3 S.C.R. paras. 47–50.

¹⁷⁶ *Khelawon*, [2006] 2 S.C.R. para. 3.

¹⁷⁷ *Id.* para. 34.

¹⁷⁸ *See Starr*, [2000] 2 S.C.R. paras. 220–21; *R. v. Tat*, [1997] 35 O.R.3d 641, 654–64, (Can. Ont. C.A.) (surveying Canadian common law on the prior identification exception to hearsay).

¹⁷⁹ *R. v. Potvin*, [1989] 1 S.C.R. 525, 544.

¹⁸⁰ *R. v. Carter*, [1982] 1 S.C.R. 938, 938.

¹⁸¹ *R. v. Aziga*, [2006] OJ No 4545 (SCJ).

¹⁸² *See* DAVID M. PACIOCCO & LEE STUESSER, *THE LAW OF EVIDENCE* 174–82 (5th ed. 2008) (describing the various ways in which spontaneous utterances may be admissible under Canadian common law).

¹⁸³ *See* sources cited *supra* notes 178–182.

¹⁸⁴ *R. v. Khan*, [1990] 2 S.C.R. 531, 548.

¹⁸⁵ *Id.* at 533–34.

her mother approximately fifteen minutes after the alleged assault occurred, namely that the doctor had put his penis in the child's mouth.¹⁸⁶ The trial judge, however, ruled that the hearsay statements were inadmissible.¹⁸⁷ The SCC held that the trial judge correctly applied the law as it existed at the time, but questioned "the extent to which, if at all, the strictures of the hearsay rule should be relaxed in the case of children's testimony."¹⁸⁸

Ultimately, the SCC remanded the matter for a new trial after unanimously concluding that:

[H]earsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of *necessity and reliability* are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.¹⁸⁹

The SCC elaborated on the concept of *necessity*, noting:

Necessity for these purposes must be interpreted as "reasonably necessary." The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.¹⁹⁰

Furthermore, the SCC suggested that assessments of the *reliability* of the evidence would be extremely contextual:

Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encoun-

¹⁸⁶ *Id.* at 534, 539.

¹⁸⁷ *Id.* at 537. The child victim told her mother that the doctor had asked her if she wanted a candy; she said yes; the doctor told her to open her mouth, and then "put his birdie in [her] mouth, shook it and peed in [her] mouth" *Id.* at 534.

¹⁸⁸ *See id.* at 540.

¹⁸⁹ *Id.* at 548 (emphasis added).

¹⁹⁰ *Khan*, [1990] 2 S.C.R. at 546 (emphasis added).

ters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.¹⁹¹

The SCC subsequently heralded the *Khan* decision “as the triumph of a principled analysis over a set of ossified judicially created categories.”¹⁹² The new principled analysis to hearsay exceptions created in *Khan* was further developed in subsequent cases, including *R. v. Starr*,¹⁹³ *R. v. Mapara*,¹⁹⁴ and *Khelawon*.¹⁹⁵

Starr was the first case following *Khan* wherein the SCC considered how the traditional exceptions to the hearsay exclusionary rule and the new principled approach should operate in tandem.¹⁹⁶ The facts of the case are somewhat complicated, but can be summarized as follows. Robert Starr was acquainted with Bernard Cook and Darlene Weselowski, and was drinking with them on the night they were both shot to death. At some point after Starr left Cook and Weselowski, the two encountered Jodie Giesbrecht, Cook’s girlfriend. Cook told Giesbrecht that he could not stay with her, as he had to perpetrate an “Autopac scam” (an automobile insurance fraud) with Starr later in the night. After leaving Giesbrecht, both Cook and Weselowski were later found dead by the side of a road, each shot in the head.¹⁹⁷ At trial, the Crown successfully introduced, through Giesbrecht, Cook’s statement that he intended to do an “Autopac scam” with Starr later in the night under the rubric of the “present intentions” traditional exception to the hearsay exclusionary rule.¹⁹⁸ A jury convicted Starr of two counts of first degree murder.¹⁹⁹

On appeal to the SCC, where there was some indication that the reliability of Cook’s statement to Giesbrecht was in question,²⁰⁰ the SCC considered whether a traditional hearsay exception, present intentions, could operate to admit evidence even if one of the new principled cri-

¹⁹¹ *Id.* at 547.

¹⁹² *R. v. Smith*, [1992] 2 S.C.R. 915, 930.

¹⁹³ *See* [2000] 2 S.C.R. para. 155.

¹⁹⁴ *See* [2005] 1 S.C.R. paras. 12–16.

¹⁹⁵ *See* [2006] 2 S.C.R. paras. 42–45.

¹⁹⁶ *See Starr*, [2000] 2 S.C.R. paras. 220–21.

¹⁹⁷ *See id.* paras. 108–17.

¹⁹⁸ *Id.* paras. 111, 176.

¹⁹⁹ *Id.* para. 19 (L’Heureux-Dubé, J., dissenting).

²⁰⁰ *Id.* paras. 178–79 (majority opinion).

teria of necessity and reliability was not met.²⁰¹ Prior to *Starr*, the SCC's "application of the principled approach to hearsay admissibility in practice [had] involved only expanding the scope of hearsay admissibility beyond the traditional exceptions."²⁰² The SCC majority in *Starr* agreed that necessity and reliability needed to be the dominant concerns of any court considering the admission of a hearsay statement, since "[i]t would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."²⁰³ The majority, however, also explained that the existing categorical exceptions to the hearsay rule served useful functions by providing participants in the trial process with "certainty, efficiency, and guidance."²⁰⁴ Thus, *Starr* demonstrates the primacy of the principled approach over the categorical exception approach to hearsay law in Canada:

In some rare cases, it may also be possible under the particular circumstances of a case for evidence clearly falling within an otherwise valid exception nonetheless not to meet the principled approach's requirements of necessity and reliability. In such a case, the evidence would have to be excluded. However, I wish to emphasize that these cases will no doubt be unusual, and that the party challenging the admissibility of evidence falling within a traditional exception will bear the burden of showing that the evidence should nevertheless be inadmissible.²⁰⁵

Ultimately, the SCC held that Cook's statement to Giesbrecht was not admissible under either the "present intentions" traditional exception or the principled approach because it was made under circumstances of suspicion, and therefore did not possess threshold reliability.²⁰⁶

The other important holding in *Starr* concerned the inquiry into threshold reliability, which was to be performed by a judge on a *voir dire*, required to determine whether a hearsay statement should be ad-

²⁰¹ On the facts of the *Starr* case, the "necessity" criterion was clearly met, since Cook was dead. Thus, the SCC was really concerned with assessing the status of traditional exceptions in cases where the "reliability" criterion was not satisfied. *See id.* paras. 108–17.

²⁰² *Starr*, [2000] 2 S.C.R. para. 192.

²⁰³ *Id.* para. 200.

²⁰⁴ *Id.* para. 207.

²⁰⁵ *Id.* para. 214.

²⁰⁶ *See id.* paras. 208–09.

missible under the principled approach.²⁰⁷ On this point, the *Starr* majority distinguished between threshold reliability and ultimate reliability: “Threshold reliability is concerned not with whether the statement is true or not; that is a question of ultimate reliability. Instead, it is concerned with whether or not the circumstances surrounding the statement itself provide circumstantial guarantees of trustworthiness.”²⁰⁸ The distinction is significant because the different reliability assessments are performed by different entities—a trial judge determines threshold reliability, and if it exists, then the hearsay statement is “passed on to be considered by the trier of fact.”²⁰⁹ The SCC, however, cautioned that “a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable.”²¹⁰ In *Starr*, the majority also suggested that the trial judge should only look at factors surrounding the circumstances in which the hearsay statement was made when assessing threshold reliability, and not at other evidence, such as “the declarant’s general reputation for truthfulness, nor any prior or subsequent statements, consistent or not.”²¹¹ This restriction on the focus of the reliability inquiry proved to be problematic, and was subsequently overruled in *Khelawon*.²¹²

Mapara adequately summarizes the law relating to hearsay in Canada after *Starr*:

- (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
- (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
- (c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

²⁰⁷ See *id.* para. 214.

²⁰⁸ *Starr*, [2000] 2 S.C.R. para. 215.

²⁰⁹ See *id.* para. 216.

²¹⁰ *Id.* para. 217.

²¹¹ See *id.*

²¹² [2006] 2 S.C.R. para. 4.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.²¹³

In *Mapara*, the SCC applied this framework to the *R. v. Carter*²¹⁴ co-conspirator hearsay exception, and held that the facts of *Mapara* met the traditional exception criteria from *Carter*.²¹⁵ Further, the SCC held that the co-conspirators exception remained valid because the hearsay in question was both necessary and reliable, as required by the principled approach.²¹⁶

Finally, as previously noted, in *Khelawon*, the SCC revisited the question of what evidence should be considered by a trial judge when assessing threshold reliability under the principled approach.²¹⁷ The case involved accusations of assault and abuse filed against Ramnarine Khelawon, the manager of a retirement home, by five its senior residents.²¹⁸ By the time of the trial, however, four of the five complainants were deceased, and the fifth was no longer competent to testify.²¹⁹ Thus, under the principled approach to hearsay, the Crown sought to introduce videotaped statements the complainants had provided to the police because, as the Crown argued, the videos were reliable and necessary.²²⁰ The trial judge admitted all the videos after a voir dire to determine threshold reliability, but ultimately found only two of the videos reliable enough to support a conviction.²²¹ Khelawon was convicted of various charges related to two of the five complainants.²²² A unanimous SCC unequivocally overturned the *Starr* decision, which held that only circumstances surrounding the making of a hearsay statement should be considered when assessing threshold reliability.²²³ Rather, the SCC directed courts to adopt a more “functional approach”²²⁴ that considers all of the relevant evidence, including any corroborating evidence.²²⁵ After considering all of this evidence in *Khelawon*, the SCC

²¹³ *Mapara*, [2005] 1 S.C.R. para. 15.

²¹⁴ [1982] 1 S.C.R. 938.

²¹⁵ See *Mapara*, [2005] 1 S.C.R. para. 31.

²¹⁶ See *id.*

²¹⁷ See [2006] 2 S.C.R. para. 3.

²¹⁸ *Id.* para. 5.

²¹⁹ *Id.*

²²⁰ *Id.* para. 9.

²²¹ *Id.* paras. 27–28.

²²² *Id.* para. 5.

²²³ See *Khelawon*, [2006] 2 S.C.R. paras. 51–54; *Starr*, [2000] 2 S.C.R. para. 215.

²²⁴ *Khelawon*, [2006] 2 S.C.R. para. 93.

²²⁵ *Id.* paras. 94–100.

affirmed that the trial judge erred in admitting the videotaped statements of the complainants because there were significant indicators of their unreliability; for example, among other concerns, the statements were not under oath, one of the declarants was barely comprehensible, and one of the declarants' mental capacity was an issue.²²⁶

The core of Canadian hearsay law has not changed significantly since *Khelawon*, and the *Khan/Starr* framework has been applied in a number of cases. For instance, in *R. v. Couture*, the SCC held that the principled approach to hearsay must be interpreted in a manner that preserves and reinforces the traditional rules of evidence.²²⁷ In that case, the SCC determined that hearsay should have been excluded, even if it was necessary and reliable, in order to preserve the integrity of the rule of spousal incompetence to testify.²²⁸ In *R. v. Devine*, the SCC deemed admissible a videotaped statement by a witness who recanted the statement at trial because the dual criteria of reliability and necessity were satisfied by the circumstances in which the statement was obtained and the witness's recantation, respectively.²²⁹

Lastly, in *R. v. Blackman*, the SCC engaged in a fairly straightforward application of the principled approach to determine that a murder victim's statements to his mother some time before his death should be admissible through the mother where they were necessary and reliable.²³⁰ The SCC further commented on the importance of distinguishing between an absence of evidence of motive to lie and evidence of an absence of motivation to lie; the former should be viewed as a neutral factor, while the latter may signal increased threshold reliability.²³¹ In *Blackman*, the SCC held that circumstantial evidence of an absence of motive to lie supported a ruling in favor of admission under the principled approach.²³² The SCC emphasized, again, that: "The admissibility voir dire must remain focused on the hearsay evidence in question. It is not intended, and cannot be allowed by trial judges, to become a full trial on the merits."²³³

To summarize, Canadian hearsay law occupies a space that is close to constitutional law. Although the rule against hearsay has constitu-

²²⁶ See *id.* paras. 107–109.

²²⁷ [2007] 2 S.C.R. 517, para. 55.

²²⁸ See *id.* para. 63.

²²⁹ See [2008] 2 S.C.R. 283, para. 25.

²³⁰ See *R. v. Blackman*, [2008] 2 S.C.R. 298, paras. 34, 44.

²³¹ See *id.* para. 35.

²³² See *id.* paras. 33–38.

²³³ *Id.* para. 57.

tional dimensions, and cross-examination plays a central role in protecting an accused's rights to a fair trial and to make a full answer and defense, there is no absolute right to cross-examine all witnesses.²³⁴ Hearsay is presumptively inadmissible, but exceptions to this rule exist for traditional categories of evidence and for any other evidence that is both necessary and reliable.²³⁵ The latest development in Canadian hearsay law purports to provide a "principled approach" to the application of hearsay exceptions and is being applied fairly consistently by the courts.²³⁶ Recent cautions by the SCC to trial courts emphasizing that they not usurp a trier of fact's responsibility to determine ultimate reliability, however, signal that the law may be moving toward less rigorous scrutiny of the threshold reliability of hearsay statements, and consequently toward a more relaxed application of the exclusionary rule.

B. *Critiquing the Coherence of Canadian Hearsay Law*

Canadian hearsay law purports to rely upon a "principled approach" to the identification of exceptions to the presumptive exclusionary rule.²³⁷ In many ways, the framework established by the SCC in *Khan* and subsequent decisions is in fact principled. In some essential ways, however, the doctrine is contradictory and unprincipled, which renders it vulnerable to criticism.

The two principles underlying the Canadian approach to hearsay law are necessity and reliability.²³⁸ Necessity explains the need for an exception to the hearsay exclusionary rule because relevant evidence will be unavailable to a court without the exception.²³⁹ Reliability imposes a safeguard upon potential evidence, thereby ensuring, at least in theory, that fact-finders are not led astray by the evidence.²⁴⁰ The hearsay rule and its exceptions are virtually always justified in Canada on epistemic, or truth-maximizing, grounds:

²³⁴ See *Khelawon*, [2006] 2 S.C.R. para. 48.

²³⁵ See *id.* para. 34; *Khan*, [1990] 2 S.C.R. at 548.

²³⁶ See *Khelawon*, [2006] 2 S.C.R. para. 42; *Mapara*, [2005] 1 S.C.R. para 15; *Starr*, [2000] 2 S.C.R. para. 214.

²³⁷ *Khelawon*, [2006] 2 S.C.R. para. 42; *Mapara*, [2005] 1 S.C.R. para 15; *Starr*, [2000] 2 S.C.R. para. 214; see *Khan*, [1990] 2 S.C.R. at 540.

²³⁸ See *Khan*, [1990] 2 S.C.R. at 546.

²³⁹ *Cf. id.* at 542 ("Necessity was present, other evidence of the event . . . being inadmissible.")

²⁴⁰ See *id.* at 547 ("Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability.")

[T]he rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. . . . [However, i]n some circumstances, the evidence presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts.²⁴¹

Thus, one might argue on a broad level that hearsay law in Canada is principled because it seeks to ensure that factually accurate verdicts are produced, or that truth is found within a trial to the greatest extent possible.

Based on these principles of necessity and reliability, and the epistemic goals that they purport to serve, one must ask two important questions: 1) Is cross-examination actually the best way to produce reliable, and therefore more truthful, evidence?; and 2) If so, how can Canadian courts justify both the hearsay rule, which prevents the admission of evidence that cannot be cross-examined, and the numerous exceptions to the hearsay rule, which admit evidence even though it cannot be cross-examined) When Canadian hearsay law is probed in even the most cursory fashion in order to answer these questions, it is evident that the law is littered with incoherence and flawed justifications.

1. Questioning the SCC's Dogmatic Acceptance of the Value of Cross-Examination

To answer the first question, it is instructive to look at explanations that the SCC has provided for why it places such a high value on cross-examination. In *R. v. Osolin*, for example, the SCC held that the importance of cross-examination "cannot be denied," stating that "[i]t is the ultimate means of demonstrating truth and of testing veracity. . . . This is an old and well established principle."²⁴² Similarly, in *Lyttle*, the SCC claimed that, but for cross-examination, there was sometimes "no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed."²⁴³ It is telling, however, that these assertions by the SCC are not supported by empirical evidence, or even rational explanations about why cross-examination has such truth-maximizing tendencies.²⁴⁴ In-

²⁴¹ *Khelawon*, [2006] 2 S.C.R. para. 2.

²⁴² See [1993] 4 S.C.R. 595, 663 (Cory, J., concurring).

²⁴³ See [2004] 1 S.C.R. para. 1.

²⁴⁴ Cf. cases cited *supra* notes 242–243.

stead, the SCC appears willing to simply accept, perhaps as common sense or as a form of “wisdom of the ages,” that cross-examination actually serves to elicit truth from, and expose the untruth of, witnesses.

As any epistemologist, or even an ordinary skeptic, will note, this substantiation of the value of cross-examination is extremely flimsy. It may be that the SCC is correct in its assumptions about cross-examination—but this would be an epistemic coincidence rather than the result of any careful consideration of the evidence in support of, or in contrast to, the theory that cross-examination produces truth, because no such evidence appears to ever have been canvassed by the SCC, or by courts in Canada more generally. My point at this stage is not to argue that the SCC is wrong about the value of cross-examination, but simply that the SCC’s theory about the value of cross-examination was not derived in an epistemologically, or logically, valid manner. The theory was assumed true, and has been accepted as such ever since the initial assumption was made.

Thus, if one begins to question whether cross-examination is actually the best tool, or even a useful tool, for eliciting truthful evidence, yet one clings to the idea that evidence law should incorporate principles that maximize a court’s ability to determine truth, then the coherence of Canadian hearsay law is seriously undermined. To begin with, the very definition of hearsay would likely need to change because it presumes a certain evidentiary weakness in out-of-court statements where there is no opportunity for contemporaneous cross-examination.²⁴⁵ Furthermore, there may not be a need for a strong exclusionary rule at all if such a rule only serves to protect opportunities for cross-examination, and cross-examination cannot convincingly be said to assist in producing truth. Basically, if it can be demonstrated that cross-examination does not assist in generating the truth at trial, the very idea of hearsay can largely be eliminated from Canadian law—which is why it is fascinating that the SCC never attempted to demonstrate exactly how and why cross-examination produces greater probabilities of arriving at the truth.

2. A Legal Paradox: Cross-Examination as Both Dispensable and Indispensable?

Even if one accepts that cross-examination tends to assist in eliciting the truth from witnesses, there is still an unavoidable flaw in the reasoning of the SCC that allows courts in Canada to admit or exclude

²⁴⁵ See *supra* text accompanying notes 172–191 (discussing the development of the relationship of hearsay and cross-examination in Canadian jurisprudence).

hearsay evidence depending on threshold reliability. Recall that, under the principled approach to identifying exceptions to the hearsay exclusionary rule in *Khan*, evidence can be admitted if it is necessary and reliable.²⁴⁶ Thus, a trial judge is forced to rule on the threshold reliability of a statement before it can be passed to a trier of fact, whether judge or jury, to assess ultimate reliability.²⁴⁷ Recall also that the trial judge is denied the benefit of the “ultimate means” of testing the reliability of the evidence—the tool of cross-examination that can often be the only way to properly probe the reliability of the evidence—in making her assessment of threshold reliability.²⁴⁸

The trial judge is therefore forced to assume, without being able to test, that evidence is reliable in certain circumstances.²⁴⁹ Thus, for instance, the SCC concluded in *Khan* that the child victim’s hearsay statements to her mother were reliable because:

The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence.²⁵⁰

This reasoning by the SCC leads to obvious questions. How does one know that the child had no motive to lie if the child cannot be questioned (perhaps the child was angry with the doctor for having administered a painful needle)? Would it not be preferable, from an epistemic perspective, to ascertain through cross-examination the child’s actual knowledge of sexual acts before accepting her statement, rather than inferring a lack of knowledge, and using that inference to suggest that the child’s statement was reliable? As these questions suggest, the SCC’s reasoning in *Khan* is problematic because it assumed a statement to be reliable so that it could dispense with the need to actually establish the reliability of a statement through cross-examination while at the same time noting that cross-examination is sometimes, by the SCC’s own admission, the only way to uncover the truth of a matter.²⁵¹ It is a perfect example of the reasoning flaw acknowledged by Justice Scalia in *Crawford v. Washington* when he observed that “[d]ispensing with con-

²⁴⁶ See *Khan*, [1990] 2 S.C.R. 546–47.

²⁴⁷ See *id.* at 547.

²⁴⁸ See *Osolin*, [1993] 4 S.C.R. at 663.

²⁴⁹ See *Khan*, [1990] 2 S.C.R. at 547.

²⁵⁰ *Id.* at 548.

²⁵¹ See *Khan*, [1990] 2 S.C.R. at 548; see also *Lyttle*, [2004] 1 S.C.R. para. 1.

frontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”²⁵² In both *Khan* and Justice Scalia’s example, the reasoning is tantamount to cheating the system by circumventing a process that is believed to produce the most truthful results in criminal trials.

Perhaps the only way to understand why the SCC accepts this faulty reasoning is to appreciate that the SCC may actually hold dissonant beliefs about cross-examination. As the principled approach suggests by its very design, cross-examination is not, in fact, the best way to test the veracity of a statement, because it is almost unthinkable that courts would allow accused persons to be convicted on the basis of statements exposed to anything less than the most rigorous scrutiny.²⁵³ Instead, perhaps the SCC believes, at least implicitly, that there are other equally effective ways to test the reliability of evidence, and that evidence should be admissible when it has been exposed to these equally effective substitutes for cross-examination. If this hypothesis is true, then it further demonstrates the internal incoherence in current Canadian hearsay doctrine, because cross-examination cannot logically and simultaneously be both “the best” and “not the best” means for testing evidence.

As the above critique of Canadian hearsay law makes apparent, the law is incoherent not because it lacks guiding principles, but because its content cannot be justified in terms of the principles of necessity and reliability that it purports to respect.²⁵⁴ If hearsay law were truly about the admission of only necessary and reliable evidence, then it would be hard to criticize the law as being unprincipled. In reality, however, there is no clear indication that the doctrine developed by the SCC in *Khan*, *Starr*, and *Khelawon* actually encourages the admission of such evidence. The basic belief in the tendency of cross-examination to produce truthful testimony is both unproven and uncritically accepted by the SCC, but it remains a foundational tenet of current hearsay law. Furthermore, the supposedly principled approach to exceptions to the exclusionary rule is itself unprincipled as a result of the flaws in reasoning that are incorporated into the threshold reliability assessment mandated by the approach. For these reasons, Canadian hearsay law, like American confrontation law, lacks principle.

²⁵² See 541 U.S. 36, 62 (2004).

²⁵³ See *Khan*, [1990] 2 S.C.R. at 546–47.

²⁵⁴ See *supra* text accompanying notes 237–251.

III. CONSIDERING CONFRONTATION LAW FROM FIRST PRINCIPLES

Instead of considering confrontation and hearsay law from the perspective of one who is indoctrinated or locked into the Anglo-American legal tradition, it is useful to consider this body of law afresh and to ponder its model content in a way that can be justified through reference to acceptable legal principles.

A. *Identifying Relevant Principles: A First Step*

It is generally accepted that one objective of the rules of evidence applicable at criminal trials, and perhaps the most important objective, is the promotion of the ability of fact-finders to arrive at accurate, or truthful, conclusions and verdicts.²⁵⁵ I will refer to this as the “epistemic” objective of evidence law. That criminal evidence law should further this epistemic objective is not a new proposition: Over sixty years ago, Edmund Morgan noted that a trial must, among other things, lead to “as close an approximation of the truth as is possible in the circumstances in which the court has to function.”²⁵⁶ Of course, as any amateur epistemologist²⁵⁷ would likely point out, even if an objective “Truth” exists, it is unlikely that a fallible human trier of fact will be capable of realizing this “Truth.”²⁵⁸ Consequently, a realistic body of evidence law will not strive to produce objective “Truth,” because this is probably unattainable, but should nonetheless consist of rules that tend to assist triers of fact in finding something that approaches, as closely as humanly possible, this objective “Truth.”

There can be little argument that promotion of a fact-finder’s ability to determine truth is a valid and important principle of criminal

²⁵⁵ See, e.g., LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* 2 (2006) (“[W]hatever else it is, a criminal trial is first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.”); see also PACIOCCO & STEUSSER, *supra* note 182, at 2 (“As a matter of principle, the rules of evidence should accommodate the presentation and consideration of any information that could help the trier of fact to come to an accurate factual determination.”); Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 L. & PHIL. 321, 321 (2005) (“The trial is fundamentally an epistemological event. We want jurors and judges to know.”).

²⁵⁶ Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 184–85 (1948).

²⁵⁷ I include myself in this category.

²⁵⁸ See ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 2 (2005) (“Because absolute certainties are presently unavailable—a proposition that both experience and philosophy of induction confirm—adjudicative fact-finding, as, indeed, any fact-finding, is bound to be conducted in conditions of uncertainty.”).

evidence law: after all, a basic purpose of criminal law itself is to deter, punish, and rehabilitate those who commit crimes,²⁵⁹ and it would be nonsensical for such a system to operate arbitrarily against those who did not “truly” commit crimes. As the preceding statement implies, however, truth is important not only for the criminal law to convict and punish those guilty of crimes, but is equally important, if not more so, in order to ensure that the materially²⁶⁰ innocent are not convicted of crimes.²⁶¹ Philosophers and theorists generally agree that it is preferable for several guilty persons to escape justice than for one innocent person to be punished by the criminal law.²⁶² Although there is no consensus on the ratio of false acquittals to false convictions that would be acceptable in a liberal and democratic society,²⁶³ it is obvious that a truth-seeking trial is an essential means to ensure that the number of false convictions within a criminal justice system does not exceed morally and socially allowable limits.²⁶⁴

If we accept that a criminal trial is largely about determining the truth of a matter, then how should evidence law function in order to assist this larger goal? The simple answer is that evidence law should ensure that all relevant evidence is admitted for consideration by the trier of fact:

One of the important and legitimate gate-keeping functions of a judge is to see to it that the jury hears all and only relevant evidence. If American judges stuck resolutely to this principle, they could not be faulted on epistemic grounds since virtually all forms of sophisticated hypothesis evaluation (in science, medicine, and technology, for instance) work with this same notion of relevance.

²⁵⁹ See Criminal Code, R.S.C. 1985, c. C-46, § 718 (Can.) (articulating these purposes and objectives in the context of criminal sentencing law).

²⁶⁰ See LAUDAN, *supra* note 255, at 12. I use the word “materially” here, and throughout this Article, as Laudan uses it in his book—namely to distinguish between a factual result of a trial (guilty or not guilty), and the objectively true state of affairs that a trial seeks to ascertain. *Id.* In other words, one can be “factually” guilty of a crime in any case where a court makes a finding of guilt, but this does not necessarily mean that the offender is “materially” guilty, since the relevant fact-finder could have been wrong: the offender may not have truly committed the crime. *Id.*

²⁶¹ See *id.* at 1–2.

²⁶² See, e.g., *id.* at 1, 63.

²⁶³ See *id.* at 63–64 (sampling the various ratios of false acquittals to false convictions, ranging from 2:1 to 1000:1, that various thinkers have proffered as acceptable over the ages).

²⁶⁴ *Id.*

.....

It is universally agreed, outside the law courts, that decision makers can make the best and most informed decisions only if they are made aware of as much relevant evidence as possible. Excluding relevant but non-redundant evidence, for whatever reasons, decreases the likelihood that rational decision makers will reach a correct conclusion.²⁶⁵

In other words, a principled body of evidence law concerned only with determining the truth of a matter would have but a single rule: All relevant, non-redundant evidence is admissible.²⁶⁶ No evidence would be excluded on any other grounds.

It is probably not enough, however, for evidence law simply to maximize a fact-finder's ability to arrive at truth in her conclusions, since there are, and should be, non-epistemic policy considerations that inform the law of evidence.²⁶⁷ In my view, the main non-epistemic value that should govern evidence law is fairness. For instance, even if we assumed that truthful and accurate confessions could be obtained through torture, it seems clear that a rule of evidence should nonetheless prevent a fact-finder from relying on such confessions because in liberal democratic societies (and most civilized societies of any kind), we abhor the very idea of torture.²⁶⁸ It would simply be unfair for the State to use a confession extracted through torture when society has unequivocally asserted that it does not condone torture. As this example demonstrates, the measures that can legitimately be authorized to further the search for truth within a trial are not unlimited.

The notion that laws of criminal evidence must be fair, and, in addition to assisting a court to arrive at a factually correct verdict, must also permit deliberation that shows appropriate "respect and concern

²⁶⁵ *Id.* at 18–19.

²⁶⁶ See LAUDAN, *supra* note 253, at 18–19. This claim is not universally accepted. For instance, Stein argues that the "ostensibly appealing proposition" that more information yields better adjudicative accuracy is wrong, because "[t]here is no *quantitative* parallel between complete and incomplete information." STEIN, *supra* note 258, at 122. While I note Stein's criticism, I maintain that, other things being equal, more information is better than less information when finding facts. See LAUDAN, *supra* note 255, at 18–19.

²⁶⁷ STEIN, *supra* note 258, at 12 ("Generally, when the epistemological reasons for fact-finding no longer apply, adjudicators allocate the risk of error by applying the rules and the principles from the moral domain of evidence law. *Morality picks up what the epistemology leaves off.*").

²⁶⁸ See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (aspiring to prevent torture around the world).

for the person whose case is being judged,” is a central theme of Hock Lai Ho’s treatise on the philosophy of evidence law:

A party has not merely a right that the substantive law be correctly applied to objectively true findings of fact, and a right to procedure that is rationally structured to determine the truth; she has, more broadly, a right to a just verdict, where justice must be understood to impose ethical demands on the manner in which the court conducts the trial, and importantly, on how it deliberates on the verdict. Findings of fact must be reached by a form of inquiry and process of reasoning that are not only epistemically sound but also morally defensible.²⁶⁹

Thus, at least according to Ho, rules of evidence should encourage the conduct of both morally fair and epistemically effective trials.²⁷⁰

Other commentators make similar arguments using slight variances in terminology. For instance, Toni Massaro suggests that where a rule of evidence “jars some persons’ sense of fairness,” the rule should be reinterpreted in a manner that “corresponds with common notions of fairness to the accused.” Specifically in a way that “rests on principles of human dignity.”²⁷¹ Seizing on this concept of dignity, Ian Dennis recognizes that, in order to respect “the defendant’s dignity and autonomy,” a rule of evidence should “symbolically place[the accused] on a footing of equality with the witness.”²⁷² This, according to Dennis, “emphasises his entitlement to play a full role in the adjudicative process rather than being dealt with as an object for the application of the criminal law.”²⁷³ Finally, Eileen Scallen argues that a rule of evidence should have, in addition to an evidentiary and a procedural dimension, a “societal” dimension that “embodies communal values,” which would presumably include a value of fairness.²⁷⁴

Regardless of whether one labels an underlying objective of evidence law as the promotion of dignity, communal values, equality, or appropriate respect and concern for the accused, I argue that, on a

²⁶⁹ HOCK LAI HO, *A PHILOSOPHY OF EVIDENCE LAW: JUSTICE IN THE SEARCH FOR TRUTH* 79 (2008).

²⁷⁰ *See id.*

²⁷¹ *See* Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 866 (1988).

²⁷² *See* Dennis, *supra* note 1, at 263–64.

²⁷³ *See id.* at 264.

²⁷⁴ *See* Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 626–27, 641–43 (1992).

broad level, the discussion centers upon a single concept of fairness. In each of the above passages, commentators express a desire to see rules of evidence shaped in a way that accords with common understandings of fairness.

While it is true that the ideals of truth and fairness inform the law of evidence, these two ideals should not necessarily have equal impact upon the law, especially if there is tension between them. In most cases, no such tension will exist because an epistemically sound trial will also be a fair trial; that is to say, an accused who is materially innocent has a particularly high interest in a factually correct verdict because it would be unfair to convict him for a crime that he did not commit,²⁷⁵ while a materially guilty accused may not have a particularly strong interest in seeing the truth emerge at his trial, but he certainly could not complain, under most circumstances, that a factually correct verdict is unfair.²⁷⁶

In this sense, truth and fairness overlap substantially. I appreciate that there is potential for conflict between these ideals—such as a reliable torture confession, if such a confession even existed—but the magnitude of this potential for conflict depends on how broadly one construes the concept of fairness in the context of a criminal trial. If one views fairness as being a value that applies only to an accused, then there may be sizable scope for tension between truth and fairness; however, if one understands fairness as being applicable to an accused (who should be treated with appropriate respect and concern), to witnesses (who should also be treated with appropriate respect and concern), and to society as a whole (since the greater community's claim to fairness might demand that effective measures be taken by the State to prevent and punish crimes),²⁷⁷ then one can see how epistemic and fairness concerns will tend to converge in almost all cases.

²⁷⁵ See LAUDAN, *supra* note 255, at 144 (“[I]t cannot be hostile to the innocent defendant to propose that the rules governing a trial should be those most likely to lead to a true verdict. Above all else, the innocent defendant seeks a true verdict.”).

²⁷⁶ *Cf. id.* at 145 (stating that evidentiary practice generally tends to, if anything, over-acquit guilty defendants).

²⁷⁷ See, e.g., *R. v. Harrer*, [1995] 3 S.C.R. 562, 587 (Can.) (McLachlin, J., concurring). This broader conception of fairness is a reasonable one, I think, and has been espoused by the SCC on several occasions. For example, the Court has stated:

At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view. Nor must it be conflated with the perfect trial; in the real world, perfec-

Thus, since the value of truth in shaping rules of evidence almost always subsumes, rather than overrides, the value of fairness, it stands to reason that evidence law should be driven, first and foremost, by epistemic concerns. To be sure, the value of truth will, in certain cases, need to be sacrificed in order to advance some non-epistemic, fairness-related goals; however, this “dominant value” substitution should occur only in the exceptional cases where truth and fairness ideals diverge, and lawmakers, whether judicial or legislative, should be clear about the deliberate purpose and effect of any evidence rule that subordinates epistemic concerns to fairness concerns in these rare cases.

Notwithstanding the above analysis, some Anglo-American legal commentators suggest that many rules of evidence, and most exclusionary rules of evidence, are actually not epistemically sound, and that the law of evidence is disproportionately influenced by misplaced fairness concerns.²⁷⁸ Perhaps this emphasis on fairness at the expense of truth flows from an overly restrictive understanding on the part of lawmakers that trial fairness is a concept that only pertains to an accused. In any event, as I will explain below, Canadian hearsay rules and American confrontation law might look remarkably different if they were focused exclusively on generating epistemically accurate results, with only limited exceptions to account for independent trial fairness concerns.

B. Applying the Ideals of Truth and Fairness to Hearsay and Confrontation Law

For the sake of argument, let us accept that criminal evidence law is primarily concerned with facilitating epistemically correct conclusions within trials, and that the law leaves some room, under exceptional circumstances, for the displacement of truth as an ultimate goal in favor of another fairness-related goal. This proposition would certainly allow for the development of principled rules of evidence, and particularly, of a

tion is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.

Id. (citation omitted).

²⁷⁸ See, e.g., LAUDAN, *supra* note 255, at 10. Laudan states:

Because current American jurisprudence tends to the view that rights almost invariably trump questions of finding out the truth (when those two concerns are in conflict), there has been far less discussion than is healthy about whether certain common legal practices—whether mandated by common law traditions or by the U.S. Constitution or devised as court-designed remedies for police abuses—are intrinsically truth thwarting.

Id. at 6.

principled body of hearsay and confrontation law. Under this proposition, there is room to argue about whether the underlying principle is good or bad for the law, but no one can say that the law is unprincipled if it were justified by reference to predominantly epistemic concerns.

1. Justifying Admission of Hearsay on Epistemic Grounds

Would relevant, non-redundant hearsay be presumptively excluded under such a principled form of evidence law? In order to answer this question, one must first know whether there is a valid epistemic reason for excluding such evidence. Historically, hearsay was considered a danger because it was presented to juries without an opportunity for the trier of fact to see a party testing the declarant's perception, memory, sincerity, and communication skills under cross-examination, which, in turn, might cause the trier of fact to place undue weight on the hearsay evidence.²⁷⁹ The historically accepted dangers of hearsay, however, and the actual dangers of hearsay, if any, are not necessarily identical.²⁸⁰ In other words, if the exclusionary rule is to be justified on epistemic grounds, there needs to be some indication, preferably empirical, that admitting hearsay evidence leads triers of fact away from, rather than closer to, the truth—even though courts claim that rules of evidence such as the hearsay exclusionary rule “reflect considerable wisdom and judicial experience.”²⁸¹

Although it is beyond the scope of this Article to canvass the full spectrum of studies examining the effect of the hearsay exclusionary rule on jurors,²⁸² there is certainly a wealth of data and opinion tending to suggest that hearsay evidence is not likely to have an adverse impact on a fact-finder's ability to reach accurate conclusions.²⁸³ Mock

²⁷⁹ See Morgan, *supra* note 256, at 179–88.

²⁸⁰ See LAUDAN, *supra* note 255, at 10.

²⁸¹ *Khelawon*, [2006] 2 S.C.R. para. 59; see LAUDAN, *supra* note 255, at 10.

²⁸² See ANDREW L.T. CHOO, HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS 33–37 (1996); see also Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 973 (2006) (noting that between 1991 and 2006 some twenty-seven primary and secondary empirical studies have been undertaken to study juror use of hearsay).

²⁸³ See, e.g., CHOO, *supra* note 282, at 42–43 (“We have seen that the extent to which observation of demeanour and cross-examination can actually expose unreliability is, at best, uncertain, and it is also questionable whether the oath discourages untruthfulness to the extent to which it has been traditionally assumed to do.”); Park & Saks, *supra* note 282, at 975 (“The circumstances of some studies revealed jurors to be quite capable of heavily discounting hearsay testimony as compared to firsthand witness testimony.”). Also, Friedman maintains:

jurors have rated the usefulness of a hearsay witness's testimony as being less than that of an eyewitness,²⁸⁴ which tends to demonstrate that jurors are cognizant of the inherent weaknesses of hearsay evidence and that they will not put undue weight on such testimony. In fact, as one study found, jurors tend to assess the potential weaknesses of hearsay evidence more carefully than they assess eyewitness testimony:

[I]t is conceivable that jurors scrutinize hearsay testimony more rigorously than eyewitness testimony because they distrust hearsay testimony inherently. The findings that jurors are insensitive to the quality of eyewitness testimony, yet are sensitive to the relative accuracy of hearsay evidence, challenge the legal assumption that jurors can accurately judge the validity of eyewitness testimony but are incapable of judging the reliability of hearsay testimony.²⁸⁵

If these studies are to be believed, it is clear that the hearsay exclusionary rule operates at cross-purposes with the general epistemic goal of criminal evidence law, because the rule requires relevant evidence to be excluded even though the perceived dangers of the testimony are fully understood and accounted for by the triers of fact.²⁸⁶

Even if the above studies, and other similar studies, do not provide conclusive proof that hearsay evidence is either a) helpful or b) not harmful to a jury, there is still no valid epistemic reason for excluding the evidence until we can say with an acceptable degree of certainty that hearsay evidence is harmful to a jury, or that it will tend to hinder a fact-finder in his efforts to arrive at the truth.²⁸⁷ If relevant hearsay evidence is helpful, or not harmful, then it should be admissible based on

[T]here is no good basis for believing that as a presumptive matter the introduction of hearsay evidence relevant to a material proposition will lead a jury away from rather than closer to the truth; on the contrary, it appears that the exclusionary rule, shutting the eyes and ears of the trier of fact to evidence that is often highly probative, impairs, slows, and adds unnecessary expense to the truth-determining process.

Friedman, *supra* note 146, at 264.

²⁸⁴ Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 718 (1992).

²⁸⁵ *Id.* at 720.

²⁸⁶ *Compare, supra* notes 311–313 and accompanying text (summarizing studies that suggest jurors are generally skeptical of hearsay testimony), with LAUDAN, *supra* note 275, at 2 (“[W]hatever else it is, a criminal trial is first and foremost an epistemic engine, a tool for ferreting out the truth from what will often initially be a confusing array of clues and indicators.”).

²⁸⁷ *Cf. supra* text accompanying notes 282–286.

the presumption that all relevant evidence should be admissible on epistemic grounds. If it is not clear whether hearsay evidence is helpful or harmful, then it should still be admissible on epistemic grounds based on the same presumption. If, and only if, we can be satisfied that hearsay evidence is harmful, however, it should be excluded on epistemic grounds because it will hamper the truth-seeking task of the trier of fact.²⁸⁸

Surveying the data regarding the usefulness of hearsay evidence, rather than the judicial rhetoric and dogma, it becomes clear that there is no empirical body of knowledge suggesting with acceptable certainty that hearsay evidence is harmful to a trier of fact.²⁸⁹ On the basis of empirical observations, hearsay evidence might be helpful, neutral, or harmful to fact-finders. In light of this current state of knowledge, or lack of knowledge, about the true value of hearsay evidence, one cannot convincingly argue that hearsay evidence should be excluded from criminal trials on epistemic grounds. Relevant, non-redundant hearsay evidence should always be admitted if truth is the ultimate and only goal of a trial.

2. Justifying Admission of Hearsay on Fairness Grounds

If hearsay and confrontation law is to be principled, and if there is no valid epistemic basis for excluding hearsay, there must be some other non-epistemic, fairness-type reason for excluding such evidence. Recall that I previously accepted the possibility that truth sometimes must be sacrificed in a rule of evidence in order to advance another fairness objective, but that this should occur only in exceptional cases.²⁹⁰ I suggested that such a reprioritization of evidentiary principles can occur in the case of reliable confessions that are extracted through torture. Since fairness would demand that these be excluded.²⁹¹ As I will explain, however, I cannot conceive of any fairness concern that would require the exclusion of relevant, non-redundant hearsay evidence.

²⁸⁸ See LAUDAN, *supra* note 255, at 215. Laudan makes a similar point regarding the American exclusionary rule for retracted confessions:

It would be premature to suggest that we have any robust evidence from well-designed studies that would either corroborate or undermine the hypotheses that drive these evidentiary exclusions. Until such studies are available, our default assumption should be that relevant evidence is admissible.

Id.

²⁸⁹ See *supra* text accompanying notes 282–286.

²⁹⁰ See *supra* text accompanying notes 268–274.

²⁹¹ See *supra* text accompanying notes 268.

Some commentators suggest that an accused must have a right to a face-to-face confrontation with witnesses in order for the accused's dignity to be respected.²⁹² This type of theory generally argues that participation—active participation—by a defendant in her trial is an essential element of a system that respects the dignity of the defendant.²⁹³ The main flaw with this theory, however, is that it asserts a proposition that cannot be proven: How can we authoritatively say that procedure *X* is more respectful of a defendant's dignity than procedure *Y*? Dignity is such an abstract concept that it is difficult to employ it effectively to argue for a concrete formulation of a rule of evidence.²⁹⁴ In the absence of any obvious indignity to an accused that would accompany the admission of a hearsay statement without opportunity for contemporaneous confrontation or cross-examination, I find the suggestion that dignity demands the exclusion of such evidence to be utterly unpersuasive.

A similar criticism can be leveled against each of the aforementioned non-epistemic justifications for an exclusionary rule of evidence.²⁹⁵ An accused is shown a full measure of respect and concern at his trial regardless of whether hearsay evidence is admitted, as long as the trier of fact does not callously overlook the inherent weaknesses of the evidence. This requirement of careful deliberation on the part of the fact-finder, however, applies with respect to every piece of evidence that comes before her, not just with respect of hearsay evidence. In other words, the requirement for a trier of fact to deliberate conscientiously out of fairness to the accused is a requirement that demands that jurors be instructed about potential frailties in the evidence, but it is not a requirement that should lead to the exclusion of relevant, non-

²⁹² See Massaro, *supra* note 271, at 917.

²⁹³ *Id.* at 902 (“[T]he procedure should allow those affected to participate meaningfully, personally, and on equal footing with their adversary.”). Stein also noted the importance of participations:

Arguably, a criminal defendant's right to cross-examine prosecution witnesses and the consequent exclusion of hearsay statements should also be perceived as belonging to the family of participation rights that are valuable per se. . . . The issue is whether the community in which criminal trials are conducted without full participation of the accused is attractive in moral and political terms.

STEIN, *supra* note 258, at 31.

²⁹⁴ See *The Simpsons: A Milhouse Divided* (FOX television broadcast Dec. 1, 1996) (presenting, from the fourth to the sixth minutes, an excellent and humorous animated representation of the difficulty one has when thinking about or attempting to draw dignity).

²⁹⁵ See *supra* text accompanying notes 291–301.

redundant evidence.²⁹⁶ It simply strains logic to suggest that hearsay evidence must be excluded out of abstract notions of “respect and concern” for the accused.

Similarly, the admission of hearsay evidence does not transform an accused from the subject of a criminal trial into a detached object of the proceeding; the fact remains that the accused participates in the trial by his very presence, his arguments through counsel, and, where applicable, his confrontation of witnesses through counsel.²⁹⁷ There are differing degrees of participation involved in each of these forms, for each accused, and each counsel. That a reduced form of participation exists for some period of time with respect to some evidence does not, in and of itself, render the trial less fair or demean the accused.

As the above discussion indicates, it is difficult to see how the admission of hearsay evidence, which is justifiable on epistemic grounds, is somehow not justifiable on fairness grounds. Although in exceptional cases some rules of evidence are likely to lead to conflicts between the values of truth and fairness, the hearsay rule is not within this category of evidentiary rules. Hearsay should be admissible because it tends to allow the fact-finder to arrive at the truth (which is, in itself, a fair outcome for either the materially guilty or the materially innocent defendant), and there are no other compelling fairness-related reasons for excluding hearsay evidence.

3. Giving Principled Content to Hearsay and Confrontation Law

Let us now put everything together in order to determine how constitutional and evidence law should treat hearsay statements on a principled basis. Relevant, non-redundant evidence will often come in the form of hearsay.²⁹⁸ This type of evidence carries certain inherent weaknesses, namely the inability of the trier of fact to discern, through cross-examination, any problems with the perception, memory, sincerity, or communication ability of the declarant.²⁹⁹ If rules of evidence

²⁹⁶ Cf. sources cited *supra* notes 310, 312 (discussing scientific studies that concluded that juries are inherently skeptical of hearsay evidence).

²⁹⁷ Cf. Massaro, *supra* note 271, at 910 (discussing the importance of the defendant’s participation in the trial when hearsay is admitted). *But see* CHOO, *supra* note 282, at 40–41 (noting that hearsay rules ensure the parties participation in the proceeding); STEIN, *supra* note 258, at 31 (stating that the issue with hearsay evidence is a concern for the full participation of the accused).

²⁹⁸ See LAUDAN, *supra* note 255, at 137 (“Many of these evidentiary practices hinder the ability of the jury to come to a correct verdict because they block the jury’s access to relevant, often powerfully relevant, evidence.”).

²⁹⁹ See CHOO, *supra* note 282, at 17.

law are understood as reinforcing both epistemic and fairness principles, however, there is no reason why hearsay should be excluded because there is no empirically valid reason for us to believe that its admission would lead fact-finders away from the truth.³⁰⁰ Further, the admission of such evidence would not be an affront to the obligations of fairness, dignity, and respect that are owed by society to an accused.³⁰¹ Every form of evidence comes with its own unique set of weaknesses, but according to epistemic and fairness principles, this is not a sufficient reason for the evidence to be excluded from a trial.

Hearsay evidence should be admissible, but this is not to say that hearsay is free from any weaknesses, or that hearsay evidence should be afforded the same weight in every case as other forms of evidence. No evidence is perfect. Just as with other forms of evidence, however, certain precautions can be imposed so as to draw the fact-finder's attention to the weaknesses of the evidence. In Canada, for instance, the testimony of unreliable or unsavory witnesses is not excluded from a criminal trial; rather, in accordance with direction from the SCC in *R. v. Vetrovec*, the testimony is admissible, but the trial judge must caution the jury (with a *Vetrovec* warning) of the risks inherent in such testimony.³⁰² Similarly, American scholars and judges have long recognized the weaknesses inherent in eyewitness testimony, but instead of excluding eyewitness evidence altogether, which would be absurd, "[m]ost courts now allow some form of cautionary jury instructions on eyewitness evidence, the majority of which are modeled after the instruction set forth by the U.S. Court of Appeals for the District of Columbia Circuit."³⁰³ In both of these examples, a principled basis for the rule of evidence developed: Admit the relevant evidence because it will tend to assist the fact-finder in arriving at the truth and because there is nothing unfair in admitting it, but caution the fact-finder about the weaknesses of the evidence because this will also tend to yield more accurate factual findings.³⁰⁴ The same principle should be applied in the context of hearsay, and any form of evidence with known weaknesses.

³⁰⁰ See *id.* at 42–43 (stating that it is not guaranteed that admissible forms of evidence are any more reliable than evidence excluded under hearsay rules).

³⁰¹ But see *id.* at 41–42 (arguing that the rules prohibiting the admission of hearsay provide the accused with the opportunity to confront and cross-examine witnesses and thus ensure respect for individual dignity).

³⁰² See [1982] 1 S.C.R. 811, 817–18.

³⁰³ Christian Sheehan, Note, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 654 (2011).

³⁰⁴ See *Vetrovec*, [1982] 1 S.C.R. at 817–18; Sheehan, *supra* note 303, at 654.

The broad admission of hearsay statements cannot be opposed on dignity or participation grounds because the admission of hearsay precludes cross-examination of the declarant but it does not preclude cross-examination of the witness who provides the hearsay evidence at trial, nor does it preclude counsel for the accused from making arguments about the weight that should attach to such testimony (where there is uncertainty about the declarant's perception, memory, sincerity, or communication skill). In other words, even though a lack of opportunity for cross-examination might prevent an accused from conclusively and positively exposing contradictions or falsehoods in the testimony of a witness—something that seems to happen much more often on television than in reality—it still permits the accused to raise reasonable doubt about his guilt by demonstrating the weaknesses inherent in hearsay evidence.

In short, truth and fairness demand that hearsay evidence be admitted, rather than excluded. The fallacy of doing anything else with hearsay evidence is plainly apparent:

To exclude evidence on the ground alone that the fact-finder cannot evaluate it as well as she could evidence that has been exposed to cross-examination makes little sense—almost as little sense as a hungry person refusing food for the reason that it is not as nutritious as it could be.³⁰⁵

CONCLUSION

American confrontation law lacks principle because it arbitrarily distinguishes between testimonial and non-testimonial evidence and because it is a slave to history, rather than to legal principles. Canadian hearsay law purports to respect principles of reliability and necessity, but often fails to do so by admitting evidence untested by the accepted means of assessing reliability. Neither jurisdiction's law respects the truth-seeking function of a criminal trial, nor adequately balances epistemic considerations with fairness concerns, in large part because both Canadian and American courts tend to overestimate, or unquestioningly accept, the value of cross-examination in producing truthful, accurate verdicts. I have described here how the principles of truth and fairness can ground a coherent body of evidence law, and can animate the content of hearsay and confrontation law in Canada and the United States, respectively. The truth-seeking function of criminal trials within each

³⁰⁵ Ho, *supra* note 269, at 237.

country may be better respected by simply admitting hearsay evidence accompanied by appropriate arguments by counsel regarding the weight that such evidence should be afforded, and with cautions to the trier of fact about weaknesses inherent in such testimony.

The law that I am proposing might, at first glance, seem to encompass a radical idea. It should be recalled, however, that hearsay evidence has never been categorically excluded from criminal trials in civil law jurisdictions;³⁰⁶ rather, in those places where “free proof”³⁰⁷ is the governing doctrine of evidence, hearsay statements can simply form part of the entire evidentiary dossier upon which a court relies when rendering a decision. Furthermore, recently, rules excluding hearsay evidence are generally on the decline, even throughout the common law world.³⁰⁸ In 2003, England created an extremely broad exception to the hearsay exclusionary rule for first-hand hearsay of witnesses who are unavailable to testify at trial due to death or intimidation, among other reasons.³⁰⁹ Since the 1990s, similar sweeping changes to hearsay law occurred in Scotland, New Zealand, and Australia, all by statute, and all toward greater admissibility of hearsay evidence.³¹⁰ Finally, in Canada, in a case in which the right of a witness to wear her religious veil clashed with the right of an accused to cross-examine a key witness, the Ontario Court of Appeal noted that “appropriate jury instructions may go some considerable way to mitigate any unfairness that may flow from an evidentiary or procedural rule that has limited the scope of cross-examination.”³¹¹ Perhaps the idea of admitting all relevant, non-redundant hearsay, with appropriate cautions, is not such a large departure from the common law of evidence after all.

What is more, there already seems to be a trend developing in both Canada and the United States toward increased admission of evidence that has not been cross-examined. In Canada, this trend can be

³⁰⁶ See Sklansky, *supra* note 111, at 36 (“The bottom line is that the hearsay rule . . . remains alien to civil-law legal systems.”).

³⁰⁷ See STEIN, *supra* note 274, at 117 (“For fact-finders, free evaluation of evidence entails freedom from legal constraints in inferring facts from evidence. This fundamental freedom is surrounded, but not interfered with, by legal rules that constitute the law of evidence.”).

³⁰⁸ See generally Marian K. Brown, Reform and Proposed Reform of Hearsay Law in Australia, New Zealand, Hong Kong, and Canada, with Special Regard to Prior Inconsistent Statements, Paper Presented at the 2007 Annual Conference of the International Society for the Reform of Criminal Law (2007), available at <http://www.isrcl.org/Papers/2007/Brown.pdf> (noting widespread reform of hearsay rules in common law jurisdictions).

³⁰⁹ See Criminal Justice Act, 2003, c. 44, § 116 (Eng.).

³¹⁰ Sklansky, *supra* note 111, at 28–30.

³¹¹ *R. v. S. (N.)* (2010), 102 O.R. 3d 161, para. 51 (Can. Ont. C.A.).

seen in the continued emphasis by the SCC that a trial judge should only consider threshold reliability when deciding whether to admit hearsay because the trier of fact should be the one who determines ultimate reliability. This movement by the SCC will likely have the effect of rendering more and more hearsay evidence admissible at the initial stage of the inquiry, while leaving it to the jury (with appropriate arguments by counsel and limiting instructions from the judge) to decide what weight the evidence should receive. In the United States, the trend apparently began in lower courts, and continued to the Supreme Court in *Bryant*. Courts are struggling to characterize out-of-court statements as “non-testimonial,” perhaps in order to avoid the blanket exclusionary rule now in force under the Sixth Amendment.

One cannot help but wonder whether Canadian and American courts already recognize that it is difficult to justify the exclusion of hearsay evidence on principled grounds, and whether these courts are now trying to avoid unprincipled outcomes by subversively admitting evidence on unacknowledged grounds. It would be problematic for courts to admit evidence when their common law or constitutional law doctrines tell them to exclude it—not because the results of their evidentiary rulings would be unjustifiable on principled grounds, but because the decisions would be unjustified by reference to espoused principles. It would be far better for the sake of transparency, coherence, and principle, if courts were to “admit”³¹² the problem that they are having with the exclusion of hearsay evidence, “confront”³¹³ it head-on, and recreate their respective laws in a manner that eliminates the problem: namely, by allowing the admission of all hearsay evidence, encouraging counsel to provide argument about the quality of such evidence, and cautioning fact-finders about the dangers of such evidence. To return to our original nautical metaphor, as good sailors always do when telling stories, I suggest that it is time for courts to halt the “drifting” tendencies of their hearsay and confrontation doctrines by more honestly and effectively “anchoring” these bodies of law in epistemic principle.

³¹² The double entendre here is intentional.

³¹³ Here as well.