

3-1-2008

# Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require that Roberts Had to Die

Robert P. Mosteller  
*Duke University Law School*

Follow this and additional works at: [http://lsr.nellco.org/duke\\_fs](http://lsr.nellco.org/duke_fs)

---

## Recommended Citation

Mosteller, Robert P., "Confrontation as Constitutional Criminal Procedure: Crawford's Birth Did Not Require that Roberts Had to Die" (2008). *Duke Law School Faculty Scholarship Series*. Paper 125.  
[http://lsr.nellco.org/duke\\_fs/125](http://lsr.nellco.org/duke_fs/125)

This Article is brought to you for free and open access by the Duke Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Duke Law School Faculty Scholarship Series by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact [tracy.thompson@nellco.org](mailto:tracy.thompson@nellco.org).

**CONFRONTATION AS CONSTITUTIONAL  
CRIMINAL PROCEDURE:  
CRAWFORD'S BIRTH DID NOT REQUIRE  
THAT ROBERTS HAD TO DIE**

*Robert P. Mosteller\**

INTRODUCTION

This essay has changed in basic nature between when it was first presented at this symposium. It was initially about the conflict between the Confrontation Clause in *Ohio v. Roberts*,<sup>1</sup> which provided the basis for Confrontation Clause analysis for over two decades, and the Clause as seen in the 2004 decision, *Crawford v. Washington*.<sup>2</sup> I had no doubt that *Crawford* was dominant, and virtually no question that Justice Scalia intended to vanquish *Roberts* completely.

The issue was whether, as a matter of constitutional criminal procedure, *Roberts* “had to die.” My conclusion was that *Roberts* was in very good company when one looks at the general range of modern constitutional criminal procedure doctrines derived from the Fourth, Fifth, and Sixth Amendments. In particular, I believed that *Idaho v. Wright*,<sup>3</sup>

---

\* Chadwick Professor of Law, Duke Law School. I wish to thank Craig Bradley, Erwin Chemerinsky, Randy Jonakait, Rick Lempert, Roger Kirst, Jeff Powell, and Andy Taslitz for their helpful comments on an earlier draft of this essay. I also wish to thank the participants in the Brooklyn Law School Symposium for lively debate and helpful insight, and my research assistant Allison Hester-Haddad.

<sup>1</sup> 448 U.S. 56 (1980).

<sup>2</sup> 541 U.S. 36 (2004).

<sup>3</sup> 497 U.S. 805 (1990).

which rested on *Roberts*, contains an important concept worthy of continued life—unreliable and accusatory hearsay should be required to pass at least a minimal screening process under the Confrontation Clause of the Sixth Amendment before it could be used against a criminal defendant without confrontation. I hoped that *Roberts* would be allowed to continue to provide supplementary protection for nontestimonial hearsay that was facially problematic and that this essay might in some small way provide support for *Roberts*' continued life within the federal Confrontation Clause. The preceding paragraph is written largely in the past tense. This is because as I was completing the editing of this essay, the Supreme Court decided *Whorton v. Bockting*,<sup>4</sup> which states in unmistakable terms that *Roberts* is dead and that the Confrontation Clause of the Sixth Amendment has no role in excluding unreliable hearsay that is nontestimonial.<sup>5</sup>

When I read the *Bockting* opinion, it brought to mind a story from my first year at Yale Law School. A friend there, let me call him Dave, had many interests outside of legal studies. As we approached our first semester exams, some classmates worried that Dave had not spent the necessary hours studying. He entered one particularly difficult exam, and to everyone's amazement, he almost immediately began writing on the very lengthy and difficult single question that comprised the exam. He later told us he began writing quickly in order to avoid panic. Unfortunately for Dave, deep into the exam, he learned of the death of the party around whom he had structured his exam answer. Judging correctly that it was too late to start over, Dave tore a page from his bluebook, wrote on it "had X not died," placed that piece of paper in the front of his bluebook, and kept writing. There was nothing else that could be done. Fortunately, Yale's first semester exams are pass/fail, and Dave passed. He has gone on to be a very successful attorney. I now figuratively insert that bluebook page, and suggest that readers examine this essay as they would "had *Roberts* not died."

---

<sup>4</sup> 127 S. Ct. 1173 (2007).

<sup>5</sup> See *infra* notes 51-53 and accompanying text.

*CONFRONTATION AS CRIMINAL PROCEDURE* 687

After the strong suggestion in *Davis* of *Roberts*' demise, I did not entirely understand the apparent happiness of liberal leaning academics. I believe *Roberts*' death should be mourned rather than celebrated. The end of such supplemental protection under the federal Constitution is unfortunate, and it makes this essay in many ways an "academic" exercise, which it presumably will be during my lifetime with regard to the federal Constitution. I nevertheless recommend this essay and what is now a thought experiment to readers as part of *Roberts*' decent burial. Moreover, the arguments presented here are not irrelevant. State supreme courts have the power to preserve *Roberts*-type protection under their states' confrontation clauses, which need not move in lockstep with the United States Supreme Court, particularly when that Court goes beyond the clarity of historical sources and ignores important values. Additionally, now that the Supreme Court has stated that unreliability is not a direct concern of the Sixth Amendment's Confrontation Clause, as matters of policy, the legislatures can and should structure statutory protections to guard against unreliable nontestimonial hearsay.

The basic *Crawford* approach, whether or not precisely correct in formulation,<sup>6</sup> remedies an inadequacy in constitutional protection of the core confrontation right. Accordingly, I do not disagree with the proposition that *Crawford* is roughly "right." However, I do not accept that *Roberts* was all wrong in providing lesser supplementary protection outside the core concerns embodied in the testimonial concept. Given the obvious and widely recognized inadequacy of *Roberts*' protection for the confrontation right, one might wonder why—or whether—the decision would have been worth preserving.<sup>7</sup> I was in fact most

---

<sup>6</sup> See generally Robert P. Mosteller, *Softening of the Formality and Formalism of the "Testimonial" Statement Concept*, 19 REGENT U. L. REV. 429 (2007) (discussing some of the advances of *Davis* against the possibility of an extremely formal and formalistic definition but also noting some of the remaining problems with even a "softened" definition anchored in formality).

<sup>7</sup> I am not alone in finding value in its residual protections. See Laird C. Kirkpatrick, *Nontestimonial Hearsay After Crawford, Davis, and Bockting*, 19 REGENT U. L. REV. 367 (2007) (arguing the multiple ways that *Roberts*

concerned with preserving *Wright*, which has not been officially interred, but likely has no future under *Crawford*.<sup>8</sup>

In *Wright*, the court excluded highly problematic statements by a child that were accusatory and secured by leading questions asked by a pediatrician, rather than a police officer, as violating the Confrontation Clause under *Roberts*. Situations analogous to that in *Wright*, whether or not declared to involve testimonial statements, should but are not likely to be scrutinized under the Confrontation Clause.<sup>9</sup> Hopefully, such scrutiny (or some

---

has constrained receipt of problematic hearsay and the unfortunate consequences of its total demise).

<sup>8</sup> Of course, it is not possible to know if *Wright* will be preserved by the Supreme Court, but its future is realistically bleak. Its focus is the unreliability of the out-of-court statement, which *Boecking* excludes from Confrontation Clause scrutiny. 127 S. Ct. at 1183. Ominously, Scalia had not cited *Wright* at all in either *Crawford* or *Davis*, although he cited many other recent cases which he endorses in result if not in approach. *Crawford*, 541 U.S. at 58-60. Moreover, the case does not exhibit the types of features that clearly brings it within the testimonial concept (questioning by a police officer), and the private status of the doctor who received the statement and the arguable primary purpose of his questioning of the child—to conduct a medical examination—would support treating it as nontestimonial. See generally Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them,"* 82 IND. L.J. 919 (2007) (examining the developing consensus among the lower courts to include some statements by children, such as those to police officers, within the testimonial concept and to exclude others, such as those to doctors, and the potential decisive impact of *Davis*' focus on the questioner's "primary purpose" in resolving the treatment of children's statements).

<sup>9</sup> If one had the power to move the Supreme Court toward revision of *Roberts* as a true supplemental protection outside the core defined by testimonial statements, rather than its preservation to offer protection against highly problematic accusatory hearsay, I might try to reformulate *Roberts*' dimensions to redefine its relationship to hearsay exceptions, for example, and give review under it somewhat more rigor. My sense, however, is that mere preservation without reform will be difficult enough, if not impossible. I choose here take on one largely hopeless task at a time. Perhaps the testimonial statement concept will be developed in future cases to be broad enough that many of my concerns about problematic, typically highly accusatory hearsay, will be met directly because these problematic statements will be defined as testimonial. Despite the largely positive direction of *Davis* in softening the testimonial statement concept in terms of its formality and

*CONFRONTATION AS CRIMINAL PROCEDURE* 689

scrutiny) will continue in some courts and through other legal mechanisms.

Part I and Part II of this essay compare the approaches set forth in *Crawford* and *Roberts*. I accept that *Crawford*'s core concept may be anchored firmly in constitutional history,<sup>10</sup> but that did not necessarily render *Roberts* wrongheaded or an unfit constitutional outlier. Of course, originalism dictates that *Roberts* (and likely *Wright*) must die, but that is equally true of much of the rest of modern constitutional criminal procedure based on the Bill of Rights. In Part III, I examine the story of Sir Walter Raleigh, certain aspects of which the Court relied upon in *Crawford* to establish the new Confrontation Clause jurisprudence. However, the Court in that case conveniently omitted other problematic hearsay introduced against Raleigh history, which lends support to a somewhat broader confrontation right.<sup>11</sup> Part IV describes the difficulties

---

formalism, which unfortunately may be almost inherent in a definition built around the testimonial concept, I fear a confrontation jurisprudence that covers exclusively testimonial statements will be inadequate. *See generally* Mosteller, *supra* note 6 (noting the positive movement of *Davis* but the uncertainty of the future course of the definition given the continued commitment to formality as a necessary element and the difficulty of providing appropriately broad coverage of problematic accusatory hearsay while remaining at all true to the word "testimonial").

<sup>10</sup> Although the detail of the Framers' primary concern is at best difficult to pin down and more likely impossible to determine, I believe that at a somewhat broader level it is clear that the Confrontation Clause was written as part of the effort to reject the inquisitorial model of trial and accordingly that it firmly rejected *ex parte* examinations that were part of the civil-law mode of criminal procedure. *See Crawford*, 541 U.S. at 50. That leads to exclusion of "testimonial statements" in their narrow definition, but would also extend to other areas, such as accusatorial statements that might provide a more useful shorthand. *See* Robert P. Mosteller, "Testimonial" and the Formalistic Definition—the Case for an "Accusatorial" Fix, 20 CRIM. JUST. 14 (Summer 2005). *See generally infra* note 94.

<sup>11</sup> In *Davis v. Washington*, 126 S. Ct. 2266 (2006), Justice Scalia focused on one isolated part of the Raleigh story as proof by itself of the Framers' intent:

The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed

confronted in the process of translation that is inherent in the originalist approach, and proposes ways of negotiating this process.

#### I. THE FUNDAMENTAL DIFFERENCE BETWEEN THE *CRAWFORD* AND *ROBERTS* APPROACHES

*Crawford's* transformation of confrontation analysis from a broad but weak reliability based system to a regime that offers far more powerful protection for the narrow class of testimonial statements was a stunning development. I begin by describing the new system and then set out and critique the old methodology.

##### A. *The Crawford Approach*

In *Crawford*, the Supreme Court created a new paradigm for Confrontation Clause analysis with regard to the admission of out-of-court statements. In an opinion authored by Justice Scalia, the Court applied the Clause with real rigor to a subset of such out-of-court statements, which it termed "testimonial" statements. Relying on history, dictionary definitions, and his own brand of originalism, Scalia found support for a focus on such statements in the use of the word "witnesses" in the text of the Sixth Amendment, which guarantees the accused in a criminal case the right "to be confronted with the witnesses

---

interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. *Raleigh's Case*, 2 How St. Tr. 1, 27 (1603)).

*Id.* at 2274 n.1. Surely the Cobham letter is part of the Raleigh story, but we have no indication that the Framers thought it particularly significant and certainly no indication that the words of the Constitution are designed to cover volunteered statements because of the injustice of receiving such evidence. Scalia has no more evidence that the Cobham letter should define the right than admission of the hearsay accusation from the Portugese gentleman, *see infra* Part IV, which is nontestimonial under his terminology and which he conveniently completely ignores.

*CONFRONTATION AS CRIMINAL PROCEDURE* 691

against him.”<sup>12</sup>

Justice Scalia observed that history reflected a special concern by the Framers for the use of statements that were of a “testimonial” character: “[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>13</sup> He cited two specific examples: first, the use of statements taken from accusers by the examining magistrates under the Marian Statutes in the sixteenth century,<sup>14</sup> and second, the accusations of Lord Cobham against Sir Walter Raleigh in his treason trial, who had implicated him in both an examination before the Privy Council and in a letter to it.<sup>15</sup>

With respect to the dictionary and its insight into the meaning of the constitutional language, Justice Scalia wrote:

The text of the Confrontation Clause reflects this focus. It applies to “witnesses” against the accused—in other words, those who “bear testimony.” “Testimony,” in turn, is typically “[a] solemn declaration or affirmation made for the purpose of

---

<sup>12</sup> U.S. CONST. amend. VI.

<sup>13</sup> *Crawford*, 541 U.S. at 50.

<sup>14</sup> *Id.* at 44, 50.

<sup>15</sup> Justice Scalia states that Cobham “had implicated [Raleigh] in an examination before the Privy Council and in a letter.” *Crawford*, 541 U.S. at 44. Cobham’s accusation was obtained through interrogations in the Privy Council on three different occasions. 1 DAVID JARDINE, *CRIMINAL TRIALS* 410 n.† (1832) (indicating interrogations on July 16, 19, and 20, 1603). Cobham wrote two letters to the Council, which were read at Raleigh’s trial. One letter was dated July 29, 1603, which was written after his examination on July 20, and was used to “fortify the Lord Cobham’s accusation against” Raleigh. *Id.* at 422-23. The second, a much more damning letter that implicated Raleigh directly, was written in November during the trial. *Id.* at 444-46. See Robert P. Mosteller, *Crawford v. Washington, Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L. Rev. 511, 545 (2005). Again in *Davis*, Scalia refers to only one letter, stating “[p]art of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly not the result of sustained questioning.” *Davis*, 126 S. Ct. at 2274 (citing Raleigh’s Case, 2 How. St. Tr. 1, 27 (1603)). The letter described in his cited source is the latter of the two, which directly accuses Raleigh.

establishing or proving some fact.” An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.<sup>16</sup>

From these sources and his originalist perspective, Scalia adopted the testimonial statement approach. He left for another day a comprehensive definition of such statements, stating that “it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>17</sup>

The Court slightly amplified the coverage of testimonial statements in *Davis v. Washington*.<sup>18</sup> The Court stated that:

Statements are not testimonial 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 is to establish or prove past events potentially relevant to later criminal prosecution.<sup>19</sup>

---

<sup>16</sup> *Crawford*, 541 U.S. at 51 (quoting 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

<sup>17</sup> *Id.* at 68.

<sup>18</sup> 126 S. Ct. 2266 (2006).

<sup>19</sup> *Id.* at 2273-74. In the formulation of the test in *Davis*, Scalia appears to perform several subtle alterations in his test from the text of Webster’s dictionary on which he bases the test. First, he shifts from an apparent focus on the intent of the speaker (“made for the purpose of establishing or proving”) to that of the police who solicited the statement (“primary purpose of the interrogation”), and he de-emphasized the importance of the formality of the statement (“a solemn declaration or affirmation”) by applying it to an oral statement made in the field to a police officer that Justice Thomas, in dissent, believed deviated from the historical examples exemplified by the formality of proceedings before the examining magistrates under the Marian Statutes. *Id.* at 2280-82 (Thomas, J., dissenting). See Mosteller, *supra* note 6, at 447-49; Robert P. Mosteller, *Davis v. Washington and Hammon v. Indiana: Beating Expectations*, 105 MICH. L. REV. FIRST IMPRESSIONS 6, 7-9 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/mosteller>.

*CONFRONTATION AS CRIMINAL PROCEDURE* 693

*Crawford* set out strict standards for dealing with testimonial statements and stated that in order to admit such statements without confrontation, “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”<sup>20</sup> While the goal of the Confrontation Clause is to ensure reliability, it protects as “a procedural rather than a substantive guarantee. It commands, not that evidence is reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>21</sup> Thus, unless a testimonial statement fits into one of a limited number of exceptions,<sup>22</sup> it must be excluded unless the declarant is unavailable and the statement was subjected to earlier confrontation, or the declarant is brought into the courtroom and is subject to cross-examination.

*B. The Roberts Approach*

*Roberts* also begins with the words of the Sixth Amendment, but reflects a facially far broader notion of the phrase “witnesses against him” than Scalia’s interpretation of the phrase in *Crawford*. Justice Blackmun’s opinion for the Court stated: “If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not at trial.”<sup>23</sup> He concluded that, although the Clause “was

---

pdf.

<sup>20</sup> *Crawford*, 541 U.S. at 68.

<sup>21</sup> *Id.* at 61.

<sup>22</sup> Among these limited exceptions are that the statement is not used for its truth, *Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)), and that the defendant forfeited his right to confrontation by wrongdoing, *id.* at 62 (citing *Reynolds v. United States*, 98 U.S. 145, 158-59 (1979)), the latter of which the Court seemed in *Davis* to encourage domestic abuse prosecutors to use. *Davis*, 126 S. Ct. at 2280. For the other exceptions, see 2 MCCORMICK, EVIDENCE § 252, at 163-64 (6th ed. 2006).

<sup>23</sup> *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). I do not consider in my treatment of the issue the excellent research and arguments by Professor Randy Jonakait that Scalia’s use of the definition offered by Webster for the word testimonial is selective and that an equally reasonable definition would have covered all hearsay statements as *Roberts* did. See Randolph N.

intended to exclude some hearsay,” an approach that excluded virtually every hearsay statement was inconsistent with historical practice and had been rejected “as unintended and too extreme.”<sup>24</sup> Instead, *Roberts* recognized that the case law had established a set of principles that reflected a compromise between competing interests: on the one hand, a preference for face-to-face confrontation, the right to cross-examination, and a concern for accuracy and integrity in the fact-finding process, and on the other, concerns of public policy and necessity reflected by the need for effective law enforcement and the clear formulation of evidentiary rules and procedures.<sup>25</sup>

*Roberts* found that the Confrontation Clause imposes two types of requirements.<sup>26</sup> First, the Framers’ preference for face-to-face accusation translated into a requirement that the prosecution either produce the declarant or demonstrate his or her unavailability.<sup>27</sup> Later cases concluded that this was not in fact a general requirement, but applied only to a limited class of hearsay statements and most clearly only to prior testimony.<sup>28</sup> The second requirement, trustworthiness, proved the more lasting and fundamental element of the system. Where

---

Jonakait, “*Witnesses*” in the *Confrontation Clause*: Crawford v. Washington, Noah Webster, and Compulsory Process, 79 TEMP. L. REV. 155, 198 (2006). Although quite plausible in my judgment, Professor Jonakait’s message is a bit more sweeping than my effort simply to say *Roberts* is within the fold of many contemporary criminal procedure protections and should not be rejected because of its failure to meet Scalia’s exacting, and I believe, contestable standards.

<sup>24</sup> *Roberts*, 448 U.S. at 63.

<sup>25</sup> *Id.* at 63-64.

<sup>26</sup> See generally 2 MCCORMICK, *supra* note 22, § 252, at 159.

<sup>27</sup> *Roberts*, 448 U.S. at 65.

<sup>28</sup> In *United States v. Inadi*, 475 U.S. 387, 394 (1986), the Court held that unavailability need not be shown for coconspirator statements because they have “independent evidentiary significance” that made them superior to what could be obtained if the declarant testified at trial. In *White v. Illinois*, 502 U.S. 346, 355-56 (1992), the Court applied that rationale to statements admitted under the excited utterance and “medical examination” exception, and effectively generalized the elimination of the unavailability requirement to a large group of hearsay exceptions, including all those in Rule 803 of the Federal Rules of Evidence. See 2 MCCORMICK, *supra* note 22, § 252, at 160.

*CONFRONTATION AS CRIMINAL PROCEDURE* 695

unavailability is shown and no confrontation is provided, *Roberts* looked to the underlying purpose of the Clause “to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence.”<sup>29</sup> The statement could be introduced if the hearsay was “marked with such trustworthiness that ‘there is no material departure from the reason of the general rule.’”<sup>30</sup> Justice Blackmun’s opinion argued that “certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the ‘substance of the constitutional protection.’”<sup>31</sup> Hearsay could be introduced without confrontation if judged to be trustworthy because that judgment was seen as making cross-examination unnecessary.

The opinion’s reliability test was formulated as follows: “Reliability 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.”<sup>32</sup>

*C. Critique of Roberts*

Leaving aside for a moment *Crawford*’s scorn for *Roberts*,<sup>33</sup> the *Roberts* system of confrontation analysis is rather easily criticized on a number of levels. In terms of its effectiveness as protection for defendants either to enforce a guarantee of confrontation, which I suggest should be the primary goal of the Clause,<sup>34</sup> or to exclude unreliable hearsay in the absence of confrontation, which is a necessary remedy for violation and an inducement to providing confrontation, it was largely a failure. While in theory the confrontation right under *Roberts* provided broad coverage, it often resulted in scant protection as a

---

<sup>29</sup> 448 U.S. at 65.

<sup>30</sup> *Id.* at 65 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

<sup>31</sup> *Id.* at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

<sup>32</sup> *Id.* at 66.

<sup>33</sup> See *infra*, notes 39-41 and accompanying text.

<sup>34</sup> See generally Mosteller, *supra* note 6.

practical matter.<sup>35</sup>

For hearsay other than prior testimony, the rights of face-to-face confrontation and cross-examination were easily ignored when faced with hearsay other than prior testimony. *Roberts* and its progeny allowed the prosecution to admit most hearsay that fell within established hearsay exceptions without any effort to produce even readily available declarants.<sup>36</sup> It required absolutely no showing of trustworthiness for statements admitted under the long list of established hearsay exceptions that *Roberts* itself colorfully lampooned as “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists,”<sup>37</sup> and allowed ad hoc balancing for the scrutinized statements that fell within non-traditional exceptions or problematic expansions of traditional exceptions.

Only occasionally did *Roberts* provide protection even against facially problematic hearsay. The Supreme Court excluded hearsay in several cases involving accusatory statements by co-defendants under police interrogation admitted as statements against interest,<sup>38</sup> and in *Wright*,<sup>39</sup> the Court excluded highly accusatory statements secured by leading questions from a child witness/victim, which in the lower courts had been admitted under Idaho’s catch-all exception.

*Crawford* described *Roberts*’ departure from historical principles as twofold. First, *Roberts* was too broad in that it applied to hearsay that was not *ex parte* testimony and thus was “far removed from the core concern of the clause;” it was also

---

<sup>35</sup> See Mosteller, *supra* note 6, at 6 (describing briefly the weaknesses of *Roberts* and comparing it to the more vigorous protections provided by *Crawford* for an important group of problematic hearsay statements, but considering *Roberts* “better than nothing” and occasionally offering protection from problematic hearsay).

<sup>36</sup> 2 MCCORMICK, *supra* note 22, § 252, at 159-60.

<sup>37</sup> *Roberts*, 448 U.S. at 62 (quoting Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)).

<sup>38</sup> See *Lilly v. Virginia*, 527 U.S. 116 (1999); *Lee v. Illinois*, 476 U.S. 530 (1986).

<sup>39</sup> *Idaho v. Wright*, 497 U.S. 805 (1990).

*CONFRONTATION AS CRIMINAL PROCEDURE* 697

too narrow in that it often admitted *ex parte* testimony under a malleable reliability standard, which “often fail[ed] to protect against paradigmatic confrontation violations.”<sup>40</sup> *Crawford* repeatedly criticized *Roberts* as effectively standardless, stating accurately, for example, that “[r]eliability is an amorphous, if not entirely subjective, concept.”<sup>41</sup> Second, and more damning, was *Roberts*’ admission of “core testimonial statements that the Confrontation Clause plainly meant to exclude,” referring here to accusatory statements made by a co-defendant under police interrogation, which the Court in *Lilly v. Virginia*<sup>42</sup> had earlier indicated was highly problematic.<sup>43</sup> This failure is truly damning for *Roberts* as a primary test for guaranteeing confrontation.

Later in the term, in *United States v. Gonzalez-Lopez*,<sup>44</sup> Scalia returned to a criticism of *Roberts*’ “functional” approach in a case concerning another aspect of the Sixth Amendment—whether denial of a defendant’s right to appointed counsel of his choice was subject to harmless error analysis if it did not undermine the fairness of the trial. He stated:

What the Government urges upon us here is what was urged upon us (successfully, at one time . . .) with regard to the Sixth Amendment’s right of confrontation—a line of reasoning that “abstracts from the right to its purposes, and then eliminates the right.”<sup>45</sup>

---

<sup>40</sup> *Crawford*, 541 U.S. at 60.

<sup>41</sup> *Id.* at 63.

<sup>42</sup> 527 U.S. 116 (1999) (ruling that admission of non-testifying accomplice’s confession violated confrontation right under *Roberts*).

<sup>43</sup> *Crawford*, 541 U.S. at 63 (observing that despite the *Lilly* plurality’s suggestion that accomplice confessions could not survive under *Roberts* analysis, *Lilly*, 527 U.S. at 137, courts continued to routinely admit such statements). The Court cited a study by Roger Kirst that accomplice statements were admitted more than one-third of the time in the seventy-five cases he examined. Roger W. Kirst, *Appellate Court Answers to the Confrontation Question in Lilly v. Virginia*, 53 *Syracuse L. Rev.* 87, 104-05 (2003).

<sup>44</sup> 126 S. Ct. 2557 (2006).

<sup>45</sup> *Id.* at 2562 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980); *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)).

As noted above, Scalia's opinion in *Crawford* indicated clear displeasure with *Roberts*, and he raised the issue of its survival by first observing that the analysis in *Crawford* had cast doubt on the decision in *White v. Illinois*,<sup>46</sup> *inter alia*, not to limit the Confrontation Clause to testimonial statements. However, he avoided resolution of the issue because the Court was not required to decide its survival as to nontestimonial statements in order to rule that a new system applied to testimonial statements such as those in *Crawford*.<sup>47</sup> Near the end of his opinion in *Crawford*, Scalia allowed that as to nontestimonial hearsay, "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*."<sup>48</sup> But again he raised the specter of total obliteration, noting that "an approach that exempted such statements from Confrontation Clause scrutiny altogether would also provide such flexibility."<sup>49</sup>

The continued viability of *Roberts* was not directly at issue in the consolidated cases of *Davis* and *Hammon*, the Supreme Court's second decision under its new paradigm, because admission of the statements in *Davis* and *Hammon* did not turn on *Roberts*' application. The statements in *Hammon* were excluded because they were found to be testimonial, despite *Roberts*' acceptance of those statements.

The situation in *Hammon* was precisely the same as in *Crawford*, where the Court effectively overruled *Roberts* as to statements in the core area of confrontation concern, but left it unaffected outside that core.<sup>50</sup> In *Davis*, other statements were ruled admissible under the Confrontation Clause because they were considered nontestimonial. *Roberts* would likewise have admitted those statements because they fit within a firmly rooted hearsay rule—excited utterances.<sup>51</sup> Thus, under both *Crawford*

---

<sup>46</sup> 502 U.S. 346, 352-53 (1992).

<sup>47</sup> 541 U.S. at 61.

<sup>48</sup> *Id.* at 68.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 61, 68.

<sup>51</sup> In its opinion in *State v. Davis*, 111 P.3d 844 (Wash. 2005), the Supreme Court of Washington noted that "[r]elying on *Ohio v. Roberts* . . . ,

*CONFRONTATION AS CRIMINAL PROCEDURE* 699

and *Roberts* the results would have been identical to that in *Davis*, and no occasion would arise to rule on the continued validity of *Roberts*.

Nevertheless, again in an opinion by Scalia, the *Davis* Court signaled its displeasure with *Roberts* and announced its demise, albeit somewhat obscurely. The opinion stated: “It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.”<sup>52</sup> Also, referring to its focus on testimonial hearsay in *Crawford*, it stated: “A limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its ‘core,’ but its perimeter.”<sup>53</sup> Thus, in dicta, *Davis* laid *Roberts* to rest and declared the Confrontation Clause inapplicable to hearsay that is not testimonial. Although I recognized that even dicta can sound the death knell of a previous holding, I hoped it was more than an “academic” exercise to argue for its survival.<sup>54</sup>

---

the Court of Appeals held that the trial court properly classified the 911 call as an excited utterance, which is a firmly rooted exception to the hearsay rule and thus satisfies the requirements of reliability.” *Id.* at 847. *Davis* did not challenge the correctness of the determination that the Confrontation Clause had not been violated in *Roberts*. See Brief for the Petitioner, *Davis v. Washington*, 126 S. Ct. 2266 (2006) (No. 05-5224) (citing *Roberts* at three points but not relying on it in any fashion to support reversal of the conviction).

<sup>52</sup> *Davis*, 126 S. Ct. at 2273.

<sup>53</sup> *Id.* at 2274.

<sup>54</sup> Although Scalia’s statements about *Roberts*’ demise were arguably clear, the early decisions by lower courts were not uniform after *Davis* and prior to *Bockting*. *United States v. Thomas*, 453 F.3d 838, 844 (7th Cir. 2006), *State v. Davis*, 148 P.3d 510, 515-16 (Kan. 2006), and *State v. Blue*, 717 N.W.2d 558, 565 (N.D. 2006), state that *Roberts* continues to apply to nontestimonial statements. However, *United States v. Tolliver*, 454 F.3d 660, 665 n.2 (7th Cir. 2006), which was decided by the same circuit as *Thomas* shortly after it, noted that *Davis* “appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause” but found it unnecessary to address the issue because there was no dispute that if the statements were nontestimonial the Clause was not violated, and *United States v. Felix*, 467 F.3d 227, 231 (2d Cir. 2006), ruled that *Davis* made it

*Whorton v. Bockting*<sup>55</sup> unmistakably buries *Roberts* and makes its destruction and the elimination of any supplemental protection to nontestimonial hearsay part of the reasoning of the case, which cannot be characterized as dicta. *Bockting* repeatedly states, without limitation, that *Crawford* overruled *Roberts*.<sup>56</sup> However, the most telling and significant portion of the opinion explains why *Crawford* does not implicate the fundamental fairness and accuracy of the trial and therefore should not be considered a “watershed rule” that would make it retroactive.

The Court stated:

With respect to *testimonial* out-of-court statements, *Crawford* is more restrictive than was *Roberts*, and this may improve the accuracy of fact-finding in some criminal cases. Specifically, under *Roberts*, there may have been cases in which courts erroneously determined that testimonial statements were reliable. . . . *But whatever improvement in reliability Crawford produced in this respect must be considered together with Crawford’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the*

---

clear that confrontation only applied to testimonial statements. *See generally* James J. Duane, *The Cryptographic Coroner’s Report on Ohio v. Roberts*, 21 CRIM. JUST. 37 (Fall 2006) (describing correctly the demise of *Roberts* albeit by cryptic statements in *Davis*). Whether the justices who joined Scalia’s opinion recognized fully the import of his language, and more importantly, whether they appreciated the implications of that statement for a case like *Wright* is a matter of some uncertainty. I recognize these are thin reeds on which to depend, but they provide some possibilities for the future.

<sup>55</sup> 127 S. Ct. 1173 (2007).

<sup>56</sup> *Id.* at 1179, 1182-83. These statements seem plainly inaccurate as to nontestimonial statements. In *Crawford*, the Court stated on that issue that “we need not definitively resolve whether it survives our decision today.” 541 U.S. at 61.

*CONFRONTATION AS CRIMINAL PROCEDURE* 701

*Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.*<sup>57</sup>

Thus, *Bockting* frees nontestimonial hearsay from scrutiny under the federal Confrontation Clause and lays *Roberts* to rest. Now, I turn to either what might have been “had *Roberts* not died” and to an examination of what state supreme courts and legislatures should consider in examining the constitutional and statutory protects against unreliable hearsay.

II. TWO-PART CONSTITUTIONAL PROTECTION—GREATER PROTECTION FOR THE CORE RIGHT AND LESSER PROTECTION FOR A FUNCTIONALLY RELATED PROBLEM

Constitutional criminal procedure recognizes doctrines under the Fourth, Fifth, and Sixth Amendments that principally protect individual from violations by the government of core constitutional rights.<sup>58</sup> Although inconsistent with strictly originalist interpretations and hardly elegant, the Court in the second half of the twentieth century, particularly during the Warren Court era, expanded these doctrines to protect additional areas outside of but related to the core concern.<sup>59</sup> In these latter

---

<sup>57</sup> *Whorton*, 127 S. Ct. at 1183 (emphasis added).

<sup>58</sup> These core rights include the protection of the home against searches in the absence of probable cause and a warrant under the Fourth Amendment, protection of a suspect against being forced under penalty of contempt to testify in court against herself under the Fifth Amendment, and the holding of secret trials under the Sixth Amendment. U.S. CONST. amend IV, V & VI.

<sup>59</sup> As I have read e-mails from my colleagues in evidence scholarship, I have been struck by how many of them with liberal political and doctrinal leanings seem to embrace with some enthusiasm Justice Scalia’s originalism as exhibited in *Crawford* and *Davis*. My reaction is different, which I attribute to the fact that I am also anchored in criminal procedure, and see the potentially quite negative impact of this mode of reasoning on the broad set of criminal procedure rights that were created during the Warren Court revolution and are largely treated as part of accepted law today.

I attribute at least part of this difference between my reaction and what I perceive as that of a larger number who appear to welcome *Roberts*’ demise to the fact that within constitutional criminal procedure and even within the

situations, something of a functional approach was often used in fashioning the dimensions of the expanded modern right,<sup>60</sup> sometimes resulting in a somewhat lower degree of protection outside the core right.<sup>61</sup>

A strong *Crawford*-based analysis protecting the core and a weaker *Roberts*-based analysis protecting a broader area would

---

Sixth Amendment, the Confrontation Clause is studied most carefully by evidence scholars rather than criminal procedure scholars. This anomaly has been attributed to Dean Henry Wigmore's impact on the Confrontation Clause and his capture of that area of constitutional law by evidence scholars. See Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332-43 (1981). As many scholars have noted, this is but one of the consequences of Wigmore's influence in this area, which equated the Confrontation Clause and hearsay doctrine and was effectively adopted in *Roberts*. See, e.g., Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. Ill. L. Rev. 691, 713 (1993). Professor Randy Jonakait has made arguments that flow from at least a related intuition. He has linked the Confrontation Clause within the Sixth Amendment to other criminal procedure rights both as a matter of history and of construction. See Jonakait, *supra* note 23; Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988).

The effort to fit Confrontation Clause jurisprudence into a larger pattern of constitutional criminal procedure clearly has its difficulties and much complicates the story. My contention here is somewhat narrower, however. I believe as evidence scholars, we operate at some peril if we embrace originalism in the area of confrontation without recognizing its broader implications and potential impact on other constitutional rights or if we examine the Confrontation Clause totally in isolation from larger theories of constitutional law and constitutional criminal procedure.

<sup>60</sup> See *Katz v. United States*, 389 U.S. 347 (1967) (abandoning the trespass and property law basis of the Fourth Amendment previously employed and protecting conversation in telephone booth, the Court recognized the importance of the public telephone in private communication).

<sup>61</sup> Compare *New Jersey v. Portash*, 450 U.S. 385 (1978) (ruling that as to statements obtained in a pure violation of the Fifth Amendment through formal compulsion, impeachment was not permitted) with *Harris v. New York*, 401 U.S. 222 (1971) (permitting impeachment with statements obtained in violation of the expanded right under *Miranda v. Arizona*, 384 U.S. 436 (1966)).

*CONFRONTATION AS CRIMINAL PROCEDURE* 703

differ principally from the development of other criminal procedure doctrines in the chronological order of when the core and the secondary rights were recognized. The normal pattern is for the core right to be recognized relatively early and to enjoy continued protection into the modern era. Additional rights are extrapolated from the core right at a later time, and often justified as an application of the original intention to the changed circumstances of modern life.<sup>62</sup> Confrontation Clause protection, by contrast, has involved a reversal of the temporal development of the otherwise familiar two-part pattern, and perhaps it is this distinction that gives *Crawford* its special attraction for some who see it as the only appropriate protection.

Before 2004, there was a good argument to be made that the Confrontation Clause under *Roberts* provided less protection to the areas with which the Framers were particularly concerned. While the protection was broader than the Framers had envisioned, that was not remarkable in the context of other modern rights. More unusual was that the strong protection the Framers intended to provide to areas of core concern was not effectively guaranteed by the Warren Court or under the *Roberts* decision, and it was not until very recently in *Crawford* that the Court first provided such strong protection. Such a failure of core protection is atypical, and in its attractive affirmative holding *Crawford* accomplished the restoration of a constitutional commitment to guarantee confrontation. Thus, *Crawford* is “right” to that extent. Its suggested destruction of *Roberts*, however, was of a different character. An originalist perspective would call for such a destruction, but no more so than for most other expansions of rights in modern criminal procedure, such as *Miranda*,<sup>63</sup> which have not been obliterated.

---

<sup>62</sup> See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

<sup>63</sup> 384 U.S. 436 (1966). See *infra* note 64 and accompanying text, see also *infra* notes 66-95 and accompanying text.

A. *The Primacy of Constitutional Commitments to Prohibit Conduct in Original Intent*

In his book on the structure of constitutional law, Professor Jed Rubenfeld<sup>64</sup> provides a way to visualize this dichotomy between that which is clearly on solid constitutional grounds and that which is ahistoric but hardly uncommon or unjustifiable as a matter of constitutional interpretation, suggesting an “impossibly simple distinction:”

Specific understandings about a constitutional right can take two different forms: There can be specific laws or practices that the right is understood to *prohibit*; and there can be specific laws or practices that the right is understood *not* to prohibit. Virtually all the important historical understandings of the former kind—specific understandings of what a right prohibited—are alive and well throughout constitutional law, playing a foundational role in the doctrine. By contrast, where constitutional doctrine has departed from important historical understandings, it has virtually always departed from understandings of the latter kind—concerning what a right did not prohibit.<sup>65</sup>

Professor Rubenfeld labels constitutional understandings about what constitutional rights are understood to prohibit as “Application Understandings,” and he labels the historical understanding of what the rights did not prohibit as “No-Application Understandings.”<sup>66</sup> He sees originalism as treating all understandings as equally binding, but flawed for that very reason.<sup>67</sup> Application Understandings are foundational or core

---

<sup>64</sup> JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005). In his review of this book, my colleague Jeff Powell finds Rubenfeld’s bold claims about his new method of constitutional interpretation quite successful. H. Jefferson Powell, *Grand Visions in an Age of Conflict*, 115 *YALE L.J.* 2067, 2085-92 (2006).

<sup>65</sup> See RUBENFELD, *supra* note 64, at 13.

<sup>66</sup> *Id.* at 14.

<sup>67</sup> *Id.* at 15.

*CONFRONTATION AS CRIMINAL PROCEDURE*      705

understandings.<sup>68</sup> They are fundamental commitments that are not to be disregarded, and Rubinfeld believes the pattern of cases show they indeed have rarely been disregarded.<sup>69</sup> No-Application Understandings are not “commitments” but are rather “intentions,” which can and have been disregarded.<sup>70</sup> Rubinfeld sees judges building frameworks around the paradigmatic Applications Understanding, and in that process occasionally breaking free from No-Application Understandings.<sup>71</sup>

*B. Examples of the Dichotomy in Faithfulness to Historical Practices in Constitutional Criminal Procedure*

Rubinfeld looks briefly at contemporary constitutional criminal procedures, which he characterizes correctly as “notoriously untethered to original understandings or practices.”<sup>72</sup> In this field, the Supreme Court dramatically expanded constitutional guarantees governing police procedure regarding searches, arrests, and questioning far beyond the original understanding, while leaving foundational applications intact to play a central role in development of the doctrine.<sup>73</sup>

As to the Fourth Amendment, the clearest historical view is that the amendment was intended to prohibit “general warrants,” which is an Application Understanding. That Understanding remains a basis for invalidating insufficiently particularized

---

<sup>68</sup> *Id.* at 14. The discussion in the text concerns provisions that prohibit, which is the nature of most of the Bill of Rights provisions. As to constitutional provisions that grant power, Application Understandings are the inverse—they are understandings of what that provision authorized. No-Application Understandings in this context are understandings of what the constitutional provision did not authorize. *Id.*

<sup>69</sup> He recognizes only two areas of possible counterexamples, both having to do with “powers” rather than rights. One involves the contracts clause and the other the declaration-of-war clause. *Id.* at 67-68.

<sup>70</sup> RUBENFELD, *supra* note 66, at 14-15.

<sup>71</sup> *Id.* at 16.

<sup>72</sup> *Id.* at 32.

<sup>73</sup> *Id.*

warrants.<sup>74</sup> According to Rubinfeld, it also provided the general source for expansion into areas not covered at the time of the framing through a general principle derived from it: “that the Fourth Amendment stands against unconstrained police discretion and unjustified intrusions into personal privacy.”<sup>75</sup> He continues:

By contrast, the Fourth Amendment’s No-Application Understandings have been systematically forgotten. For example, as Akhil Amar has emphasized, one of the most important original understandings of the Fourth Amendment was that it did not generally prohibit warrantless searches or seizures. The Amendment was intended to limit the issuance of warrants, which were viewed with suspicion because they immunized searches and seizures from subsequent attack in court. . . . Today, [this] No-Application Understanding has been jettisoned. Modern Fourth Amendment doctrine holds that warrantless searches are presumptively unconstitutional . . . .<sup>76</sup>

Case law on self-incrimination under the Fifth Amendment has followed a similar pattern. The detail of the original understanding is obscure and unknown, and “*all* we know with certainty about the historical meaning of the privilege is its foundational paradigm case: the practice of interrogating an accused under oath while threatening harsh sanctions against him for refusal to answer.”<sup>77</sup>

There are problems, however, in applying the abhorrence of

---

<sup>74</sup> *Id.*

<sup>75</sup> RUBENFELD, *supra* note 64, at 33.

<sup>76</sup> *Id.* at 33. Professor Donald Dripps provides a telling critique, not of Amar’s central conclusion regarding the importance of the general warrant, but of the complexity of how to interpret that history in the light of changed circumstance of the Fourteenth Amendment that applied the right to the states, and the failure of tort remedies in this new environment. See Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again,”* 74 N.C. L. REV. 1559 (1996).

<sup>77</sup> RUBENFELD, *supra* note 64, at 33.

*CONFRONTATION AS CRIMINAL PROCEDURE* 707

the core concern represented by the historical practice of “subjecting those charged with crime to the cruel trilemma of self-accusation, perjury or contempt’ that defined the operation of the Star Chamber.”<sup>78</sup> To control custodial police interrogation, modern self-incrimination doctrine must leap over some substantial historical barriers. The suspect arrested and interrogated by the police would not have been viewed as “remotely comparable to the Star Chamber scenario” where the oath was considered critical because he faced eternal damnation if he perjured himself.<sup>79</sup> Indeed, the historical evidence indicates that questioning not done under oath was not prohibited by the privilege against self-incrimination.<sup>80</sup> Professor Yale Kamisar notes a further problem. The arrested and interrogated suspect is not under compulsion in a form historically recognized, which was understood to be *legal* compulsion, since “he was threatened neither with perjury for testifying falsely nor contempt for refusing to testify at all.”<sup>81</sup> Thus, the interrogation situation is a No-Application Understanding, but *Miranda*<sup>82</sup> nonetheless rests on the Fifth Amendment.<sup>83</sup>

Another example of the expansion of rights in modern constitutional criminal procedure contrary to historical understandings in the Sixth Amendment itself is the right to counsel discussed in *Johnson v. Zerbst*<sup>84</sup> and *Gideon v. Wainwright*.<sup>85</sup> To modern lawyers, the pattern of the right to counsel in England prior to the middle of the nineteenth century, from which the United States departed, is positively bizarre.

---

<sup>78</sup> *Id.* at 34 (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990)).

<sup>79</sup> *Id.* at 34-35.

<sup>80</sup> See John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1079-80 n.142 (1994).

<sup>81</sup> YALE KAMISAR, *POLICE INTERROGATION AND CONFESSION* 37 (1980).

<sup>82</sup> 384 U.S. 436 (1966).

<sup>83</sup> *Id.* at 458 (claiming an “intimate connection between the [Fifth Amendment’s] privilege against compulsory and police custodial questing,” upon which the *Miranda* remedy rests).

<sup>84</sup> 304 U.S. 458 (1938).

<sup>85</sup> 372 U.S. 335 (1963).

In ordinary criminal cases, the right to counsel was restricted to the right of an individual, not to be appointed counsel, but to be represented by retained counsel of his choice.<sup>86</sup> However, even that limited right was seemingly turned on its head as compared to our conception, which grants counsel in serious cases rather than minor cases. In contrast, English practice only clearly allowed a defendant to be represented by retained counsel in misdemeanor cases, while in felony cases, most of which were at least nominally capital cases, the defendant was prohibited from retaining counsel.<sup>87</sup> The difficulty of defending this position, which was based on the theory that the court was a neutral in criminal trials where charges were generally brought by private individuals, led to judicial exceptions such as the right of counsel to argue legal points and frequently to take other actions as well.<sup>88</sup>

The specific history of the right to counsel in the framing process is extremely limited and not terribly helpful. What does seem clear is that the constitutional provision was intended to give defendants the right to bring their retained counsel into court to represent them in all federal criminal cases.<sup>89</sup> In *United States v. Gonzalez-Lopez*,<sup>90</sup> Justice Scalia stated that the “right to select counsel of one’s choice . . . has been regarded as the root meaning of the constitutional guarantee.”<sup>91</sup> He contrasts this

---

<sup>86</sup> See generally WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-9 (1955). The exception was the right to two appointed counsel in cases of treason, which was granted through legislation in 1695. *Id.* at 9.

<sup>87</sup> *Id.* at 8-9.

<sup>88</sup> *Id.* at 9-11 (noting that, although practices differed between individual cases, defense counsel was permitted to perform an increasing number of functions during the eighteenth century, which sometimes included direct and cross-examination, but was consistently barred from addressing the jury at the conclusion of the evidence).

<sup>89</sup> *Id.* at 32 (stating that “[t]he constitutional provision meant, at a minimum, that defendants in federal courts had the right to retain their own counsel”).

<sup>90</sup> 126 S. Ct. 2557 (2006).

<sup>91</sup> *Id.* at 2563. In support of this proposition, which seems clearly correct, he cites *Wheat v. United States*, 486 U.S. 153, 159 (1988); *Andersen*

*CONFRONTATION AS CRIMINAL PROCEDURE* 709

core meaning from other aspects of the right that are “derived from the Sixth Amendment’s purpose of ensuring a fair trial.”<sup>92</sup>

Earlier in that opinion, Scalia first articulated and then rejected the distinction between the core right and the right based on fairness of the trial in a way that reflects his view of the Confrontation Clause. He acknowledged the government’s point that the rights within the Sixth Amendment have the purpose of ensuring a fair trial, but rejected any implication that specific guarantees could be disregarded if the trial was fair on the whole. He stated his point as follows:

What the Government urges upon us here is what was urged upon us (successfully, at one time . . .) with regard to the Sixth Amendment’s right of confrontation—a line of reasoning that “abstracts from the right to its purposes, and then eliminates the right.” Since, it was argued, the purpose of the Confrontation Clause was to ensure reliability of evidence, so long as the testimony hearsay bore “indicia of reliability,” the Confrontation Clause was not violated.<sup>93</sup>

Something on the order of the confrontation right as recognized in *Crawford* as part of the core meaning of the Confrontation Clause, and in Professor Rubinfeld’s terminology, it is an Application Understanding entitled to recognition as a paradigm case. In contrast to Rubinfeld’s observation that with rare exceptions Supreme Court decisions have honored Application Understandings, the Court initially got this one wrong. While I am not yet convinced that either the paradigm case is accurately covered as a testimonial statement,<sup>94</sup> or that if

---

*v. Treat*, 172 U.S. 24 (1898), makes a general reference to BEANEY, *supra* note, at 18-24, 27-33, and a “cf” citation to *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

<sup>92</sup> *United States v. Gonzalez-Lopez*, 126 S. Ct. at 2563.

<sup>93</sup> *Id.* at 2562 (quoting *Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting)).

<sup>94</sup> I have argued elsewhere that the concept of “accusatory” statements has some historical basis and either as a supplement or an alternative would be useful in defining statements within the core area of concern of the

covered the nomenclature of “testimonial” is accurately descriptive,<sup>95</sup> *Crawford* makes an important correction in giving vigor to the confrontation right as a procedural right when core values are concerned. Scalia’s point quoted above is thus largely accurate and quite telling. The core procedural right was abstracted to a principle of fairness—here reliability—and in that amorphous form, it was ineffective in providing protection even to core cases.

Having corrected the paradigm case does not at all mean, however, that abstracting the right as part of an extension to

---

Confrontation Clause. See Mosteller, *supra* note 6, at 16-17, 747-49. However, if the *Davis* opinion is a guide, the Court seems uninterested in using such terminology to describe the invigorated core of confrontation despite being given substantial opportunity to do so. The brief for Petitioner Hammon contained some version of “accuse” or “accusation” over one hundred times; the brief for Petitioner Davis presented this terminology over seventy times. Brief for Petitioner in *Davis v. Washington*, No. 05-5224; Brief for Petitioner in *Hammon v. Indiana*, No. 055705. And the concept I have advocated regarding accusatory statements to police officers was specifically presented by Professor Friedman in oral argument as Hammon’s counsel. Transcript of Oral Argument in *Hammon v. Indiana*, No. 05-5705, at 27 (March 20, 2006). However, Justice Scalia did not embrace either the limited version regarding police officers or more generally ascribe utility to accusatory statements in describing or defining the scope of the Confrontation Clause. His opinion in *Davis* did not use the terms “accusatorial,” “accusatory,” or “accusation” a single time, *Davis*, 126 S. Ct. at 2270-81, and Justice Thomas uses “accusers” only to describe the historical practices under the Marian Statutes, where that category of individuals had special place. *Id.* at 2281, 2282 (Thomas, J., dissenting).

<sup>95</sup> As the definition of “testimonial” statements was further developed in *Davis* it appears to me more sensible, but less “testimonial.” Scalia moves the focus of whose perspective matters from that of the speaker to that of the questioner, and he diminishes the importance of the formality of the statement. See Mosteller, *supra* note 6, at 7-9. It appears sufficient that the statement be secured in a non-emergency situation by a known investigative officer for the purpose of establishing a past fact. *Davis*, 126 S. Ct. at 2278, n.5. That is quite far from what “testimonial” would appear to convey and, as Justice Thomas noted in his dissent, not what was indicated by the initial statement of the concept in *White v. Illinois*. *Davis*, 126 S. Ct. at 2282-83 (Thomas, J., dissenting) (citing his definition of “testimonial” in *White*, 502 U.S. at 365 (Thomas, J., concurring). The current form is, I believe, superior, but it would likely be better described by other terminology.

*CONFRONTATION AS CRIMINAL PROCEDURE* 711

cover No-Application Understandings is wrong. That is in essence what the Court did in *Johnson v. Zerbst* and *Gideon v. Wainwright* under the Sixth Amendment's right to counsel.

First, in *Johnson*, the court interpreted the Sixth Amendment, not historically, but as a guarantee of fairness.<sup>96</sup> Then, in *Gideon*, through the language of fundamental rights essential to a fair trial, the Court declared that the Sixth and Fourteenth Amendments guaranteed the right to appointment of counsel in the states as to all felonies because such a right was essential to a fair trial.<sup>97</sup>

---

<sup>96</sup> The Court in declaring the defendant to have been denied his Sixth Amendment right when not offered appointed counsel stated:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to ". . . the humane policy of the modern criminal law . . ." which now provides that a defendant ". . . if he be poor, . . . may have counsel furnished him by the state, . . . not infrequently . . . more able than the attorney for the state."

304 U.S. at 462-63. The language is of fairness in a modern age.

<sup>97</sup> Justice Black stated:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the

It is hardly irrational to derive from the Confrontation Clause's procedural guarantee that defendants may test witness' testimony, whose purpose is to ensure fairness and reliability, the principle that the confrontation right is concerned with ensuring reliability or trustworthiness in evidence. Outside the core area of protection, a guarantee that helps force confrontation or excludes particularly problematic hearsay statements from a person whom the defendant cannot confront is well in line with the additional types of protections guaranteed in other areas of constitutional criminal procedure. It cannot be said that such a right is historically grounded, but as noted above, such extrapolation from the historical core is in good company. Moreover, such protection does not threaten in any fashion the core procedural right *Crawford* guarantees.

### III. AMBIGUITY IN THE MAJOR HISTORICAL ANTECEDENT TO THE CONFRONTATION RIGHT

The treason trial of Sir Walter Raleigh is cited by Justice Scalia as one of the major historical events that was known to the Framers and that influenced their fashioning of the Confrontation Clause.<sup>98</sup> In telling of this event, Scalia emphasizes the admission of certain hearsay that fits his

---

right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

372 U.S. at 344-45 (citing 287 U.S. 45, 68-69 (1932)). Again, this is language of fairness.

<sup>98</sup> *Crawford*, 541 U.S. at 44, 50.

*CONFRONTATION AS CRIMINAL PROCEDURE* 713

testimonial model. However, other hearsay was also admitted against Raleigh, which is almost certainly nontestimonial. That latter hearsay, which could suggest a broader confrontation right, is omitted. Scalia's very narrow, clear, and definitive account of the story amounts to a selective recitation that arguably produces an erroneously narrow confrontation doctrine.

In the Raleigh story, there are "testimonial statements," as Scalia characterizes them, that might well have concerned the Framers. Scalia cites the use of a letter by Lord Cobham as proof not only of the Framers' concern, but also of the specific construction that should be given to the Confrontation Clause. On the question of whether interrogation is required, he states in *Davis* with apparent total confidence based on the use of this letter that the "Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."<sup>99</sup> This assertion reflects remarkable certainty and selectivity.

On the other hand, Raleigh protested the admission of other hearsay, which appears almost certainly not to be testimonial under Scalia's construction of the term, but it is unnoticed and unmentioned in the historical accounts in both *Crawford* and *Davis*. It is difficult to understand the origin of this certainty that the Framers were not concerned about that other, arguably even more outrageous, hearsay. The omitted part of the Raleigh story challenges the clarity of Scalia's version of history and his confident assertions that the Framers had only a core constitutional concern with regard to testimonial statements.<sup>100</sup>

The other hearsay also illustrates a further ambiguity, which is the subject of the next section. It involves the "translation" of history into its contemporary constitutional meaning and the

---

<sup>99</sup> 126 S. Ct. 2274 at n.1.

<sup>100</sup> If the core constitutional concern were not only with the narrow class of testimonial statements necessarily defined by *Crawford* (i.e., "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations," *Crawford*, 541 U.S. at 68), but defined the core to include "accusatory" statements as well, both types of complaints in the Raleigh story would fit.

interaction between the development and understanding of hearsay law at the time of the framing of the Bill of Rights as compared to its definition and admissibility today. It also explores how those differences would have impacted the Framers' intentions for the Clause and how the earlier different treatment of hearsay should affect our interpretation of the role of historical meaning as applied to an altered, modern setting.

Scalia concentrates on Lord Cobham, who gave several statements to members of the Privy Council and who wrote two incriminating letters to the Council regarding the case. Raleigh insisted on, but was denied, the right to confront Cobham. Scalia focuses exclusively on this aspect of the story.

There was a witness produced against Raleigh, one Dyer, who did not provide his own firsthand accusations against Raleigh but rather recounted the accusations of another person, who was not identified by name and did not testify. Dyer, a ship pilot who had been in Lisbon, Portugal during the time of the alleged conspiracy to topple the king, testified:

Being at Lisbon, there came to me a Portugal gentlemen who asked me how the King of England did, and whether he was crowned? I answered him that I hoped our noble King was well and crowned by this, but the time was not come when I came from the coast for Spain. "Nay," said he, "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned."

*Sir W. Raleigh:* This is the saying of some wild Jesuit or beggarly Priest; but what proof is it against me?

*Attorney General [Sir Edward Coke]:* It must per force arise out of some preceding intelligence, and shows that your treason had wings.

*Sir W. Raleigh:* If Cobham did practise with Aremberg, how could it but be known in Spain? Why did they name the Duke of Buckingham in Jack Straw's Rebellion, and the Duke of York in Jack

*CONFRONTATION AS CRIMINAL PROCEDURE* 715

Cade's, but to give countenance to the treasons?<sup>101</sup>

Professor Myrna Raeder has noted the significance of this statement. She argues that, in terms of the historical record, both Cobham's hearsay and that of the Portuguese gentlemen were received in Raleigh's trial, and asks why we should not be then concerned with both.<sup>102</sup> She assumes, correctly in my judgment, that the second type of hearsay might not be covered by the testimonial concept since it was "made to a private individual, but was clearly accusatory, either from the perspective of the declarant or a reasonable observer."<sup>103</sup> Writing long before *Crawford* was decided, Professor Roger Park noted that, even if the Raleigh trial had a major impact on the Framers, it is ambiguous in providing guidance on the scope of the Confrontation Clause. If intended to prohibit the conduct in Raleigh's trial, the accusations of Cobham should not be admitted. Professor Park suggests "that anonymous rumors from

---

<sup>101</sup> JARDINE, *supra* note 15, at 436. The testimony is recited with slight differences in Howell's State Trials. The exchange is given as follows:

*Dyer*: I came to a merchant's house in Lisbon, to see a boy that I had there; there came a gentleman into the house, and enquiring what countryman I was, I said, an Englishman. Whereupon he asked me, if the king was crowned? And I answered, No, but that I hoped he should be so shortly. Nay, saith he, he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come.

*Raleigh*: What infer you upon this?

*Att*: That your treason had wings.

*Raleigh*: If Cobham did practise with Aremberg, how could it not but be known in Spain? Why did they name the duke of Buckingham with Jack Straw's Treason, and the duke of York with Jack Cade, but that it was to countenance his Treason? Consider, you Gentlemen of the Jury, there is no cause so doubtful which the king's counsel cannot make good against the law. Consider my disability, and their ability: they prove nothing against me, only they bring the Accusation of my Lord Cobham, which he has lamented . . . .

2 STATE TRIALS 25 (T.B. Howell ed., T.C. Hansard 1816).

<sup>102</sup> Myrna Raeder, *Remember the Ladies and the Children Too*, 71 BROOK. L. REV. 311, 318 (2005).

<sup>103</sup> *Id.* at 319.

declarants without personal knowledge should be excluded as well.”<sup>104</sup>

Raleigh was not a lawyer and was not permitted to have an attorney in his treason trial. Thus, it is unfair to hold him to the legal knowledge of the time, particularly in responding immediately to the accusation from Dyer, which he likely did not know would be produced. However, several scholars have interpreted Raleigh’s response as an objection not to the lack of confrontation but rather, at least initially, to the insignificance of the statement. Professor Kenneth Graham sees Raleigh’s response as going to “weight rather than admissibility,”<sup>105</sup> and Professor Robert Pitler notes the lack of complaint about confrontation, which he suggests alternatively might have been due to the fact that Raleigh was arguing instead the absence of probative value, or because he may have sensed the testimonial statement distinction—a difference between a private person’s statement and “government secured, *ex-parte* examined statements.”<sup>106</sup>

One may reasonably argue that Dyer’s hearsay has limited importance because the evidence is weak. Indeed, in Raleigh’s initial summation to the jury, he stated that “[f]or all that is said to the contrary, you see my only accuser is the Lord Cobham . . . .”<sup>107</sup> However, Professor Graham notes that

---

<sup>104</sup> Roger Park, *A Subject Matter Approach to Hearsay*, 86 MICH. L. REV. 51, 90 (1987).

<sup>105</sup> Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 101 (1972).

<sup>106</sup> Robert M. Pitler, *Introduction*, 71 BROOK L. REV. 1, 8n.28 (2005). I take modest issues with one of Professor Pitler’s suggestions, or at least do so from the perspective of those who are firmly convinced Scalia is recounting a view of the Clause clearly known to the Framers and their progenitors. Professor Pitler suggests that noting this distinction between testimonial and nontestimonial statements would have been “prescient.” Those who claim the distinction to be the clear interpretation of what I believe is a murky historical record would say, I believe, that Raleigh was merely observing that distinction, which was obvious to those in Raleigh’s time and as to the Framers, and to us now after *Crawford*.

<sup>107</sup> JARDINE, *supra* note 15, at 441.

*CONFRONTATION AS CRIMINAL PROCEDURE* 717

despite the fact that his contemporaries thought none of the evidence proved Raleigh's guilt, he was still convicted.<sup>108</sup> The fact that he was convicted on what is argued to be inadequate evidence does not inspire confidence that this hearsay was in fact insignificant evidence. Some commentators have observed that this was the corroborating evidence that the prosecutor, Sir Edward Coke, offered in response to Raleigh's protestations that if Lord Cobham were produced there would be no need for corroboration.<sup>109</sup>

Given the concentration of attention on the accusation of Lord Cobham both by Raleigh and by those who have commented on the case, I accept that Cobham's statements were likely the central concern of those troubled by the lack of confrontation in Raleigh's case. Dyer's recitation of the accusations of the Portugese gentleman was, however, also there as part of the historical record, and no commentator has demonstrated that it was not also of concern to the Framers.

As Raleigh's biographer observed, the introduction of Dyer's hearsay was "the crowning absurdity" of the trial.<sup>110</sup> Justice Scalia's omission of it from the historical account is surely a selective analysis of that history, which carries with it obvious dangers of misunderstanding of and lack of appreciation for the

---

<sup>108</sup> Graham, *supra* note 105, at 101.

<sup>109</sup> Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundation Testing and Corroboration under the Confrontation Clause*, 81 VA. L. REV. 149, 149 (1995). See also Stephan Landsman, *Who Needs Evidence Rules, Anyway?*, 25 LOY. L.A. L. REV. 635, 646 (1992).

<sup>110</sup> WILLARD M. WALLACE, *SIR WALTER RALEIGH* 210 (1959). See also 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE—HEARSAY AND CONFRONTATION* § 6342, at 268 n.610 (1997) (noting both the weakness of the evidence as hearsay evidence in the form of an opinion from a person who could not have had personal knowledge, but also recognizing that it was cited as absurd in Raleigh's biography). Wallace stated further: "The case against Raleigh was falling of its own flimsiness when the prosecution attached significance to such evidence." WALLACE, *supra* note 110, at 210. But again there is discord between the position that the case was falling apart and the fact that Raleigh was convicted, and the real possibility that evidence mattered to the conviction.

full range of the Framers' concerns.

#### IV. APPLICATION OF ORIGINALISM IN A CHANGED WORLD: THE PROBLEM OF KNOWING AND TRANSLATING

In his concurrence and dissent in *Crawford*, Chief Justice Rehnquist cited an aspect of an article that I had written in support of his argument that it is difficult to apply the historical understanding regarding confrontation from a world with a very different treatment of hearsay to the modern day.<sup>111</sup> Rehnquist was arguing that unsworn statements made to police officers, such as those offered in *Crawford*, would not have been admitted in evidence at the time of the framing because they were not made under oath, a safeguard the absence of which bars admission of the hearsay as well as the additional consideration of it under the right of confrontation.<sup>112</sup>

Rehnquist argued that any classification of particularly suspect statements beyond that of sworn affidavits and depositions, such as Scalia makes, is somewhat arbitrary since unsworn statements were treated no differently than nontestimonial statements, and there was no special concern with a broad category of testimonial but unsworn statements.<sup>113</sup> He objected to this “mere proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.”<sup>114</sup> Scalia responded:

Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption (here, allegedly, admissible unsworn testimony) involves some degree of estimation—what the Chief Justice calls use of a “proxy,” . . . but that is hardly a reason not to make

---

<sup>111</sup> *Crawford*, 541 U.S. at 69, n.1 (Rehnquist, C.J., concurring in judgment and dissenting from analysis). The article is *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, *supra* note 43, at 738-46.

<sup>112</sup> *Id.* at 70-71.

<sup>113</sup> *Id.* at 71.

<sup>114</sup> *Id.*

*CONFRONTATION AS CRIMINAL PROCEDURE* 719

the estimation as accurate as possible. Even if, as The Chief Justice mistakenly asserts, there was no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.<sup>115</sup>

Later in *Davis*, Scalia made a similar point in rejecting Justice Thomas' argument that the statement to a police officer in the field was not sufficiently formal, unlike the depositions taken by Marian magistrates, which were characterized by a high degree of formality. Scalia stated, "restricting the Confrontation Clause to the precise forms against which it was originally directed is a recipe for its extinction."<sup>116</sup>

Rehnquist uses the term "proxy." Scalia speaks of "estimation." Still others term this process "translation."<sup>117</sup> Regardless of the label, this is the process by which the original purpose is effectuated in a changed and changing world.<sup>118</sup> As Scalia's use of it indicates, it is a tool that at least modestly flexible originalists can use.<sup>119</sup>

This process, which I will call translation, is obviously necessary unless the Constitution is to become irrelevant to modern life. It is, nonetheless, fraught with great difficulty and uncertainty unless one has the ability to "channel" the Framers.<sup>120</sup> With respect to confrontation, one must first

---

<sup>115</sup> *Id.* at 52 n.3.

<sup>116</sup> *Davis*, 126 S. Ct. at 2278 n.5.

<sup>117</sup> See Lessig, *supra* note 62.

<sup>118</sup> RUBENFELD, *supra* note 64, at 9.

<sup>119</sup> See also Lessig, *supra* note 62, at 1167-68 (discussing "translation" as a tool of originalist interpretation).

<sup>120</sup> Although such translation is, I believe, almost always difficult, it is particularly difficult in some situations where the world is so different that it is virtually impossible to imagine what the Framers would have thought of the new environment. The Fourth Amendment appears to be one of those almost impossible situations, although creative authors can and do draw interesting insights that they present with an enormous number of caveats. See, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005).

determine what the law of confrontation was at the time of the framing, which can be complicated by its interaction with hearsay restrictions. Then, one must determine what the Framers knew about the law,<sup>121</sup> and ascertain how the provision adopted was designed to remedy whatever problem was perceived. Finally, moving to the process of translation, one needs to determine how best to effectuate the Framers' intentions in a changed context.

I contend that the difficulty of knowing for certain how this translation should operate is another reason why *Roberts* should have been permitted to operate outside the core area of concern. The Court may well have picked a slightly inaccurate tool—the testimonial statement concept—to effectuate the intent of the Framers, running the risk that in the process of giving a detailed definition to the term it may make mistakes of translation.

The Court has twice refused to give a comprehensive definition of testimonial statements. If history and translation offered a clear definition, surely the Court would have set out that rule. But obviously an enormous number of legitimate questions are not answered and if honestly treated cannot be definitively decided.

For example, we do not yet know if the government must have a role in creating the statement, and if it does, whether the speaker must know he or she is talking to a government agent. We do not yet know whether the intention involved must be

---

<sup>121</sup> Professor Davies argues, (1) that much of what Justice Scalia says about the law at the time the Confrontation Clause was proposed and adopted is in error, and (2) that particularly as to what the English law that Scalia cites was at the critical time, the Framers would have had great difficulty knowing it. See generally Thomas Y. Davies, *What Did the Framers Know, and When Did they Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005). See also generally Thomas Y. Davies, *Not "The Framers' Design:" How the Framing Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & POL'Y 349 (2007). Whether one accepts each of the points that Davies makes or not, the accumulation of evidence that he provides for inaccuracy in understanding the law from a different era and the difficulty of attributing questionable knowledge to the Framers is to my examination extremely persuasive.

*CONFRONTATION AS CRIMINAL PROCEDURE* 721

viewed from the perspective of the speaker or of the government agent. We do not yet know what type of formality is required. The list of unknowns is not unlimited, but it is lengthy and includes many questions of substantial importance. While history gives us clues as to these answers, it yields very few certainties.

Moreover, even as to statements that are not testimonial, it is unclear how the Framers would have reacted to a modern world where, as Rehnquist noted, hearsay is much more admissible and ordinarily given weight that likely would have appeared foreign to the Framers.<sup>122</sup> For example, in *Crawford*, Scalia states that the spontaneous declaration exception was much narrower at the time of the framing than it is today.<sup>123</sup>

The Framers therefore could not have contemplated whether the Confrontation Clause should apply to the vast range of excited utterances that are today introduced with great frequency and with apparently persuasive impact because most of those statements would have been inadmissible in the Framers' world on hearsay grounds. The Court suggested that the spontaneous declaration made to a police officer in *White v. Illinois*<sup>124</sup> might be excluded as a testimonial statement,<sup>125</sup> but would the Framers have excluded such statements made to family members as well? We cannot know because it is unclear that the law permitted admission of either at the time of the framing.

Therefore, we may only make a realistic and appropriately modest claim about our ability to know what information was available to the Framers, their understanding of it, and their intentions, and then attempt to translate and properly apply such

---

<sup>122</sup> Rehnquist contended that, although courts were inconsistent, "out-of-court statements made by someone other than the accused and not taken under oath, unlike *ex parte* depositions or affidavits, were generally not considered substantive evidence upon which a conviction could be based." *Crawford*, 541 U.S. at 69 (Rehnquist, C.J., concurring in the judgment and dissenting from the analysis).

<sup>123</sup> *Crawford*, 541 U.S. at 58 n.8 (stating that to be admissible the statement needed to be "immediat[ely] upon the hurt received," (quoting *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693))).

<sup>124</sup> 502 U.S. at 349-51.

<sup>125</sup> *Crawford*, 541 U.S. at 58 n.8.

understandings to modern practices. These limitations call for a weaker additional system, such as that set forth in *Roberts*, to screen problematic hearsay. The statement may be regarded as suspect either because it is facially unreliable or because it is only barely outside the definition of testimonial statements, and in either situation, the defendant lacked the procedural protection of an opportunity to confront the witness against him.

#### CONCLUSION

The *Roberts* approach, as developed and weakened by later Supreme Court decisions, provided incomplete protection of the confrontation right. However, as to the troubling hearsay presented in *Wright*,<sup>126</sup> it proved adequate to exclude the hearsay. As noted earlier, where the Framers established a procedural protection to help ensure the reliability of evidence by face-to-face confrontation and cross-examination, it is hardly ridiculous to have a residual protection where face-to-face confrontation and cross-examination are not afforded to test facially unreliable statements (the functional equivalent of a witness) admitted against the accused. *Crawford* was right to note that judges were not to be entrusted with admitting the most historical suspect statements simply because the judge believed the statement to be reliable. The Framers feared judges could not be broadly trusted to protect individual rights,<sup>127</sup> and

---

<sup>126</sup> The hearsay involved accusatory statements by a young child solicited by a pediatrician using suggestive questions. *Id.* at 826. *Wright* does not stand alone. One area where *Roberts* has been used reasonably frequently to exclude problematic hearsay involves statements of children in sexual abuse cases. See Robert P. Mosteller, *The Maturation and Disintegration of the Hearsay Exception for Statements for Medical Examination in Child Sexual Abuse Cases*, 65 LAW & CONTEMP. PROBS. 47, 84-85 (Winter 2002) (examining treatment of federal circuits under *Roberts* in child sexual abuse cases and noting Eighth Circuit's particular concern where no treatment interest is shown by the child).

<sup>127</sup> The Court described the Framers' distrust of judges as follows:  
We have no doubt that the courts below were acting in utmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They

*CONFRONTATION AS CRIMINAL PROCEDURE* 723

therefore it was theoretically and factually correct to fear that judges would do a poor job in providing protection through their ad hoc approach to reliability. However, charging judges with the duty to exclude particularly unreliable hearsay that has not been confronted as supplemental protection was no more prohibited by the Framers than *Miranda*. *Roberts* did nothing to harm the core protection that *Crawford* and *Davis* describe and begin to define.

*Roberts* is gone, and with it almost certainly, is *Wright*. They were, however, in good company with other aspects of contemporary constitutional criminal procedure that, although inconsistent with originalist analysis, remain valid doctrine. *Roberts* and *Wright* should have been permitted to continue to “live” within the federal Confrontation Clause and to provide their modest but important supplemental protection. Perhaps some part of their sound functional concept that highly problematic hearsay should be subject either to confrontation or to an examination as to reliability will find a home elsewhere. Unfortunately, the protection of the Confrontation Clause of the Sixth Amendment is to be determined solely by interpretation of the word “testimonial.”

---

knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. . . . By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh’s—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear. It is difficult to imagine *Roberts*’ providing any meaningful protection in those circumstances.

*Crawford*, 541 U.S. at 67-68.