

Testimonial Is As Testimonial Does

Ben Trachtenberg

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TESTIMONIAL IS AS TESTIMONIAL DOES

*Ben Trachtenberg**

INTRODUCTION 467

I. HOW IS “TESTIMONIAL” HEARSAY DEFINED? 469

II. HOW SHOULD “TESTIMONIAL” HEARSAY BE
DEFINED? 471

III. NOW WHAT? 475

CONCLUSION..... 478

INTRODUCTION

In *Crawford v. Washington*,¹ the Supreme Court jettisoned a quarter-century of Sixth Amendment Confrontation Clause jurisprudence by announcing the death of *Ohio v. Roberts*² and its progeny. The Court announced that its new interpretation of the Confrontation Clause was in keeping with the “original understanding” of the Sixth Amendment.³ Under the new regime, a prosecutor cannot offer “testimonial” hearsay against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.⁴ As the *Crawford* Court intimated was likely, the Court subsequently held in *Whorton v. Bockting* that the admission of “nontestimonial” hearsay does not raise any Confrontation Clause problems whatsoever.⁵ Despite the tremendous importance of distinguishing “testimonial” hearsay from “nontestimonial” hearsay in the new system, the *Crawford* majority chose to “leave for another day any effort to spell out a

* Associate Professor, University of Missouri School of Law. I thank Professor Richard D. Friedman for taking the time to write such a robust response to my Article and the *Florida Law Review* for finding room for his piece and this reply. Further, I thank colleagues who took the time to read an earlier draft of this Essay.

1. 541 U.S. 36 (2004).

2. 448 U.S. 56 (1980).

3. *Crawford*, 541 U.S. at 60 (heeding suggestions to “revise [the Court’s] doctrine to reflect more accurately the original understanding of the Clause”); *id.* at 52 n.3 (disputing arguments made by Chief Justice Rehnquist, who wrote separately, that the majority opinion misconstrued the “original meaning of the Sixth Amendment”).

4. *Id.* at 68.

5. 549 U.S. 406, 420 (2007).

comprehensive definition of ‘testimonial.’”⁶

In the decade since *Crawford* declared “testimony” to be the touchstone of the Confrontation Clause, courts—from the humblest criminal trial court to the Supreme Court itself—have struggled with two problems. First, defining “testimonial” has proven difficult. Second, in certain cases, the results of defining “testimonial” as *Crawford* would seem to require have proven unappealing. Justice Antonin Scalia, the author of the majority opinion in *Crawford* and the most vocal cheerleader of its new doctrine, has consequently had trouble maintaining a majority of Justices for what would seem to be straightforward applications of the opinion.⁷ Professor Richard D. Friedman is troubled by this fact. I am not.

The difficulties confronting Justice Scalia should not surprise observers of the so-called “originalist” project. A continuing—and, at least in my opinion, unsolvable—problem with a system of constitutional interpretation based on “original meaning” or “original understanding” is that reasonable persons can disagree about what originalist theory commands in nearly any particular case. The U.S. Constitution was written some time ago, and the contemporary meaning (or understanding, or whatever) of its key phrases is obscure to modern readers. The problem becomes especially acute when judges and law clerks with little to no training as historians practice originalism. And the acute problem becomes dire indeed when judges with strong ideological commitments in particular cases practice originalism.⁸ The recent decision in *Shelby County v. Holder* is among the most vivid

6. *Crawford*, 541 U.S. at 68. The problems with this choice were apparent at the time. *See id.* at 75 (Rehnquist, C.J., concurring) (“[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of ‘testimony’ the Court lists [as examples of ‘testimonial’ hearsay] is covered by the new rule. They need them now, not months or years from now.” (citation omitted)).

7. *See, e.g.*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709–10 (2011) (applying the *Crawford* doctrine to surrogate analyst testimony with divisive results).

8. Compare, for example, Justice Scalia’s vote in *United States v. Morrison*, 529 U.S. 598, 615 (2000) (holding that gender-motivated violence had only an “attenuated” effect on interstate commerce and that a federal right of action for victims was beyond the Commerce Clause power of Congress), with his concurring opinion in *Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring) (holding that Congress could criminalize, under its Commerce Clause power, the intrastate, homegrown production and medical use of marijuana). A similar comparison could be made between his votes in *Raich* and in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2642 (2012) (concerning the health care insurance mandate). Consider also his vote in *Adarand Constructors v. Peña*, 515 U.S. 200, 224 (1995), in which he joined an opinion claiming that the Fifth Amendment (ratified in 1791) prohibited most racial discrimination by the federal government.

illustrations of the phenomenon.⁹ A general critique of originalism is beyond the scope of this brief reply Essay; I will focus henceforth on the particular problems with the *Crawford* doctrine.

I. HOW IS “TESTIMONIAL” HEARSAY DEFINED?

Absent a definition of “testimonial,” *Crawford* lacks coherence. An evaluation of the *Crawford* doctrine therefore required some patience. For example, how would the new regime treat recordings of 911 calls? What about lab reports with absent authors? Autopsies? What if, say, police find a mortally wounded man in a gas station parking lot and ask him about the shooter, who remains at large? As the Court wrestled with these questions, it revealed that the definition of “testimonial” might be no more predictable than the definition of a “firmly rooted” hearsay exception.

In *Williams v. Illinois*,¹⁰ the Court considered the admissibility of a lab report stating that the DNA profile of blood taken from a rape defendant matched the profile of semen taken from the victim’s vaginal swabs.¹¹ The result was a mess. Justice Samuel Alito wrote the primary opinion (for himself and three other Justices, two of whom were part of the *Crawford* majority)¹² and concluded that the lab report was nontestimonial.¹³ Justice Clarence Thomas provided the fifth vote for “nontestimonial,” using a definition of the term shared by no other justice.¹⁴ Writing for herself and three other Justices, Justice Elena Kagan dissented, arguing that under *Crawford* and subsequent Confrontation Clause cases, “this is an open-and-shut case.”¹⁵ Justice

9. See 133 S. Ct. 2612, 2618 (2013) (applying the previously irrelevant principle of “equal sovereignty” to the Voting Rights Act of 1965). For a thorough discussion of how principled originalism is inconsistent with the *Shelby County* majority, see Brief Amici Curiae of Constitutional Law Scholars and Constitutional Accountability Center in Support of Respondents at 14, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 432960, at *4–14; see also *Holder*, 133 S. Ct. at 2632–52 (Ginsburg, J., dissenting) (providing additional historical background on the intent of the framers of the Fifteenth Amendment and Congress’s passage and continued reauthorization of the Voting Rights Act).

10. 132 S. Ct. 2221 (2012).

11. *Id.* at 2227.

12. Justices Breyer and Kennedy joined both the Alito opinion in *Williams* and the majority in *Crawford*. *Id.*; *Crawford v. Washington*, 541 U.S. 36, 37 (2004). Also joining was Chief Justice Roberts, who, like Justice Alito, was not on the Court when it decided *Crawford*. *Williams*, 132 S. Ct. at 2227.

13. *Williams*, 132 S. Ct. at 2228.

14. See *id.* at 2259–60 (Thomas, J., concurring); *id.* at 2265 (Kagan, J., dissenting) (“[N]o other Justice joins [Thomas’s] opinion or subscribes to the test he offers.”).

15. *Id.* at 2264–65 (Kagan, J., dissenting); see also *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (Ginsburg, J.) (offering a definition of “testimonial”—for herself and

Kagan noted as well that because Justice Thomas—for reasons different than those of the dissenters—“reject[ed] every aspect of [the plurality’s] reasoning and every paragraph of its explication,” Justice Alito’s opinion is more like a dissent than a plurality for purposes of setting forth current Confrontation Clause law.¹⁶ Two members of the *Crawford* majority, Justices Ginsburg and Scalia, joined Justice Kagan in her dissent.¹⁷ In sum, as far as law reports go, it remains difficult to define “testimonial” nearly ten years after *Crawford*.

In *Michigan v. Bryant*,¹⁸ the Supreme Court considered the admission against a murder defendant of statements made by the victim to police.¹⁹ The victim, being dead, was not available for cross-examination, nor had he survived long enough for Bryant’s counsel to conduct a prior deposition.²⁰ Basic *Crawford* doctrine accordingly provides that if the victim’s statements to police were testimonial, the Confrontation Clause forbids their use.²¹ Writing for the majority, Justice Sotomayor held that under the circumstances—the victim was near death, and the police sought information from him to find the missing shooter—the “primary purpose” of the police questioning was responding to an “ongoing emergency,” not acquiring evidence for a prosecution.²² The majority therefore deemed the challenged statements nontestimonial.²³ Justice Scalia lamented, “[T]oday’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.”²⁴

Justice Scalia is correct that post-*Crawford* Confrontation Clause jurisprudence is confusing at best. Even summarizing the current blackletter doctrine in an intelligible manner is a complex undertaking. For example, the evidence law casebook that I assign issued a new edition in December 2012, and it incorporated voluminous Sixth Amendment materials that in recent years had appeared in

three other Justices—similar to that set forth in Justice Kagan’s dissent in *Williams*, 132 S. Ct. at 2266).

16. *Williams*, 132 S. Ct. at 2265 (Kagan, J., dissenting).

17. *Id.* at 2264. Also joining was Justice Sotomayor, who, like Justice Kagan, was not on the Court when *Crawford* was decided. *Id.*

18. 131 S. Ct. 1143 (2011).

19. *Id.* at 1150.

20. *See id.*

21. *Crawford v. Washington*, 541 U.S. 36, 52 (2004). For procedural reasons decided under Michigan state law, the Supreme Court in *Bryant* did not address a potential “dying declaration” exception to *Crawford*. *See Bryant*, 131 S. Ct. at 1151 n.1.

22. *Id.* at 1156–57, 1162–65.

23. *Id.* at 1150, 1166.

24. *Id.* at 1168 (Scalia, J., dissenting).

supplements.²⁵ Excluding the introductory material describing the pre-*Crawford* world, the Confrontation Clause section now spans 100 pages.²⁶ Subsections have titles such as “Cracks in the *Crawford* Coalition” and “Firm Footholds and the Confrontation Flowchart.”²⁷ The *Crawford* majority acknowledged that its new doctrine would “cause interim uncertainty.”²⁸ The accuracy of that statement depends upon a generous definition of “interim.”

II. HOW SHOULD “TESTIMONIAL” HEARSAY BE DEFINED?

Professor Friedman is “not happy” with the results of *Williams* and *Bryant*.²⁹ He is also disappointed by *Davis v. Washington*,³⁰ in which the Court held that statements to police officers accusing someone of a crime are not always testimonial.³¹ If the statement is made primarily to resolve an ongoing emergency, then the *Crawford* doctrine does not prohibit admission against a criminal defendant.³² Professor Friedman’s preferred holding—“that a statement to a known police officer accusing another of a crime is per se testimonial”³³—would certainly be simpler to administer than the rule fashioned in *Davis* and its companion case, *Hammon v. Indiana*. Indeed, the dispute in *Michigan v. Bryant* between Justice Sotomayor’s majority opinion and Justice Scalia’s pained dissent largely concerned a disagreement about the proper application of *Davis*.³⁴

One problem with Professor Friedman’s suggested per se rule is that it would lead to a highly unpleasant result in *Davis*. Specifically, the panicked 911 call by Michelle McCottry, a domestic assault victim³⁵—which plainly would have been admissible under *Ohio v. Roberts* because it falls within the “firmly rooted” hearsay exceptions for

25. See GEORGE FISHER, EVIDENCE vii (3d ed. 2013) (explaining that “with confrontation caselaw in disarray,” among other reasons, the book’s size has swelled despite the author’s best intentions).

26. See *id.* 594–694.

27. *Id.* at 624, 674 (“[W]ith so little certainty about the role of reliability in confrontation caselaw, it is useful to plot patches of firm ground.”).

28. 541 U.S. 36, 68 n.10 (2004).

29. See Richard D. Friedman, *The Mold that Shapes Hearsay Law*, 66 FLA. L. REV. 433, 441 (2014).

30. 547 U.S. 813 (2006).

31. *Id.* at 822.

32. *Id.*

33. See Friedman, *supra* note 29, at 441 n.50.

34. See 131 S. Ct. 1143, 1150 (majority opinion) (quoting *Davis* in opening paragraph while announcing holding); *id.* at 1168–69 (Scalia, J., dissenting) (quoting *Davis* extensively and arguing that “[i]nstead of clarifying the law, the Court makes itself the obfuscator of last resort”).

35. *Davis*, 547 U.S. at 817–18.

excited utterances and present sense impressions³⁶—would become inadmissible. Now sometimes letting a few criminals off the hook is the price we pay for constitutional liberties. But one can easily understand the hesitance among certain Justices to hold that their newfangled Confrontation Clause doctrine means that Mr. Davis walks.³⁷ Their hesitance is especially understandable because the purported originalist reasoning in *Crawford* is hotly contested.³⁸ It is one thing to say, “This rule may not seem perfect, especially in this case, but it’s required by the Constitution, obedience to which is essential to the rule of law.” It is another to say, “I’m not certain that the Constitution *requires* this rule, but it serves good purposes and generally has positive effects—for example, it mostly keeps out unreliable evidence and mostly lets in reliable evidence—so we should tolerate the bad result in this specific case as a price for keeping a generally good rule.” It seems to me quite different to say, “I’m not certain that the Constitution *requires* this rule, and I’m also not sure that it generally has positive effects, but we should tolerate a bad result in this case to preserve the rule regardless.”

If one is a principled originalist, willing to take the Constitution as it comes and always obey its original meaning, at least that’s an ethos. But there are no Supreme Court Justices who match that description.³⁹ Every Justice—in my mind, quite sensibly—recognizes the problems with originalism. In the first place, the doctrine often cannot provide much guidance because the historical sources are so obscure and our modern nation so different from that of the founding and reconstruction generations. Second, the results of principled originalism would occasionally be so offensive to widely shared beliefs about core American values that no one could stomach them.⁴⁰ For example, in

36. FED. R. EVID 803(1)–(2); *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (listing “excited utterances or statements made for purposes of medical diagnosis or treatment” as examples of reliable hearsay not barred by *Roberts*).

37. Nearly the entire Court joined the *Davis* majority opinion, which was written by Justice Scalia. Justice Thomas wrote separately, concurring in the judgment in part and dissenting in part. *Davis*, 547 U.S. at 815.

38. See, e.g., Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry*, 72 BROOK. L. REV. 557, 557–58 (2007); 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, 354 (2007); Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington, Noah Webster, and Compulsory Process*, 79 TEMP. L. REV. 155, 157 (2006); Daniel Shaviro, *The Confrontation Clause Today in Light of its Common Law Background*, 26 VAL. U. L. REV. 337, 340–41 (1991).

39. Justice Clarence Thomas may be the lone exception, especially in recent years.

40. If nothing else, Supreme Court nominees accurately asserting certain originalist positions at Senate hearings would have trouble winning confirmation.

Bolling v. Sharpe,⁴¹ which was decided the same day as *Brown v. Board of Education*,⁴² the Supreme Court prevented the District of Columbia from running segregated public schools.⁴³ Personally, I believe that *Bolling* cannot be justified by an appeal to the original meaning of the Fifth Amendment, and I find even less plausible theories that the Fourteenth Amendment (while talking exclusively about the states) somehow silently amended the Fifth Amendment's restrictions on the federal government. Because I am not an originalist, I have the luxury of not caring. *Bolling*'s result is obviously correct, and that's that.⁴⁴ If your constitutional theory rejects *Bolling*, that means something is wrong with your theory, not the Court's opinion.⁴⁵

Recall that in 2007, the Court stated explicitly that the *Crawford* doctrine is not concerned with the reliability of evidence. As the unanimous Court stated in *Whorton v. Bockting*:

Crawford overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of factfinding in criminal trials. Indeed, in *Crawford* we recognized that even under the *Roberts* rule, this Court had never specifically approved the introduction of testimonial hearsay statements. Accordingly, it is not surprising that the overall effect of *Crawford* with regard to the accuracy of factfinding in criminal cases is not easy to assess.⁴⁶

The Court continued:

[W]hatever 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

41. 347 U.S. 497 (1954).

42. 347 U.S. 483 (1954).

43. *Bolling*, 347 U.S. at 500.

44. "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*

45. Consider also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that antimiscegenation laws are unconstitutional). I will stand with Mr. & Mrs. Loving over the original understanding of the Fourteenth Amendment every time.

46. 549 U.S. 406, 419 (2007) (citation omitted).

reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.⁴⁷

Professor Friedman has no problem with the Court's lack of concern with reliability. Responding to my invocation of Dyer—the mariner who testified against Walter Raleigh, repeating the out-of-court statement of an anonymous Portuguese gentleman implicating Raleigh in treason—Professor Friedman is “not troubled.”⁴⁸

More recent cases reveal that at least some of the Justices feel differently; they cannot accept that their new Confrontation Clause doctrine cares not a whit about the reliability of evidence admitted against criminal defendants. In *Bullcoming v. New Mexico*, Justice Kennedy wrote a dissent (joined by Chief Justice Roberts and Justices Breyer and Alito), in which he lamented that under *Crawford*, states “often are foreclosed now from contributing to the formulation and enactment of rules that make trials fairer and more reliable.”⁴⁹ In *Michigan v. Bryant*, Justice Sotomayor wrote for the majority (consisting of herself and the four dissenters from *Bullcoming*), “In making the primary purpose determination [which controls whether the statement is testimonial and therefore whether potentially affected by the Confrontation Clause], standard rules of hearsay, designed to identify some statements as reliable, will be relevant.”⁵⁰ Other opinions have expressed similar interest in reviving reliability as a part of Confrontation Clause doctrine.⁵¹

47. *Id.* at 420.

48. Friedman, *supra* note 29, at 458 (“I acknowledge that under my approach, the confrontation right would probably not exclude evidence of the statement—but I do not regard this as troublesome.”).

49. 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting) (“Whether those statutes could provide sufficient indicia of reliability and other safeguards to comply with the Confrontation Clause as it should be understood is, to be sure, an open question. The point is that the States cannot now participate in the development of this difficult part of the law.”).

50. 131 S. Ct. 1143, 1155 (2011).

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements ‘relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,’ are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood.

Id. at 1157 (citation omitted) (quoting pre-restyled FED. R. EVID. 803(2)).

51. See *Williams v. Illinois*, 132 S. Ct. 2221, 2243 (2012) (plurality opinion) (“[R]eliability is a salient characteristic of a statement that falls outside the reach of the Confrontation Clause.”); *id.* at 2252 (Breyer, J., concurring) (“[S]hould the defendant provide

To sum up: *Crawford's* constitutional underpinnings are questionable, it sometimes excludes reliable evidence (previously admissible under prior Confrontation Clause decisions) that might help convict guilty defendants, and it sometimes admits unreliable evidence (heretofore barred under prior Confrontation Clause decisions) at American criminal trials. Further, lower courts have trouble applying it because the Supreme Court cannot agree on a meaning of “testimonial.” Is it any wonder that the Justices have attempted to evade the doctrine?

III. NOW WHAT?

I have argued that under *Ohio v. Roberts*, the Confrontation Clause “saved us” from the admission of certain unreliable evidence against criminal defendants that is now admissible.⁵² The Supreme Court has stated that if hearsay is nontestimonial, then a lack of reliability does not present a Confrontation Clause problem post-*Crawford*.⁵³ And it seems that while the Court has nonetheless recently turned its attention once again to reliability, so far that gaze has served only to define certain purportedly reliable evidence as nontestimonial and accordingly admissible. It has not yet been employed to deem unreliable evidence testimonial and accordingly inadmissible. This doctrinal fudging—that somehow exclusively assists the prosecution—is perhaps the inevitable result of the Court adopting a criminal procedural rule that occasionally prevents the conviction of guilty defendants. Like the *Miranda* Rule and the warrant requirement,⁵⁴ the *Crawford* doctrine invites meddling by Justices unhappy with the results in particular cases.

Because the Court is highly unlikely to adopt per se rules enshrining Professor Friedman’s vision of the Confrontation Clause into constitutional law, continued attention should be devoted to the admission under *Crawford* of unreliable hearsay against criminal defendants. The Justices have shown their willingness to tinker with the definition of “testimonial” when it allows the conviction of the

good reason to doubt the laboratory’s competence or the validity of its accreditation, then the alternative safeguard of reliability would no longer exist and the Constitution would entitle defendant to Confrontation Clause protection.”).

52. See Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 FLA. L. REV. 1669, 1700–03 (2012).

53. See *Whorton v. Bockting*, 549 U.S. 406, 419 (2007).

54. See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 382–86 (2010) (creating a broad presumption of waiver of *Miranda* rights); *United States v. Leon*, 468 U.S. 897, 905 (1984) (creating a “good faith” exception to the exclusionary rule in search and seizure cases); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (creating a “public safety exception” to *Miranda* Rule); *Nix v. Williams*, 467 U.S. 431, 444 (1984) (creating an “inevitable discovery” exception).

apparently guilty.⁵⁵ With the originalist façade cast aside, it seems only fair that they consider glosses on the *Crawford* doctrine that would decrease the likelihood of convicting the innocent. Such reconsideration would presumably require the rejection of its holding that nontestimonial hearsay never implicates the Confrontation Clause,⁵⁶ although perhaps sufficiently creative Justices could find a way to define certain unreliable hearsay as “testimonial” despite the lack of any motive to assist prosecutors when the hearsay was uttered.

Most coventurer hearsay—also called “lawful joint venture” hearsay—will have a difficult time fitting into any plausible definition of “testimonial.” The *Crawford* majority explicitly stated that its new Confrontation Clause theory would not affect evidence admitted under the coconspirator statement exception to the hearsay rule.⁵⁷ The lawful joint venture interpretation of the coconspirator statement exception posits that the word “conspiracy” in Federal Rule of Evidence 801(d)(2)(E) refers broadly to all joint enterprises, whether legal or illegal.⁵⁸ I have attacked this revisionist interpretation of the exception in some depth;⁵⁹ I will not revisit the sins of coventurer hearsay in this space. I will, however, thank Professor Friedman for agreeing with my “view that this doctrine extends the [coconspirator statement exception] beyond its intended meaning.”⁶⁰ Regardless of whatever light the lawful

55. Instead of saying “this hearsay evidence is testimonial, but prosecutors can use it anyway,” the Court has massaged the definition of “testimonial” so as not to include certain evidence that might appear “testimonial” under a straightforward reading of *Crawford*. The result is the same: The evidence is not barred by the Sixth Amendment.

56. See *Whorton*, 549 U.S. at 420 (contrasting how “[u]nder *Roberts* an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability,” but “[u]nder *Crawford* . . . the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability”). The problem created by *Whorton* mirrors that identified in the dissent in *Bullcoming*. 131 S. Ct. 2705, 2727 (2011) (Kennedy, J., dissenting). Whereas *Crawford* and *Bullcoming* discourage states from developing reliable systems for the creation of certain kinds of evidence because even reliable “testimonial” evidence will be excluded, *Whorton* tells states that certain evidence (i.e., “nontestimonial” hearsay) is freely admissible despite its unreliability. *Whorton*, 549 U.S. at 420.

57. See FED. R. EVID. 801(d)(2)(E); *Crawford v. Washington*, 541 U.S. 36, 56, 59 n.9.

58. See Trachtenberg, *supra* note 52, at 1685–95.

59. See Brief for Professors of Evidence as Amici Curiae Supporting Petitioners at 2–4, *Elashi v. United States*, No. 11-1390 (June 20, 2012), *cert. denied*, 133 S. Ct. 525 (2012); Ben Trachtenberg, *Coconspirators, “Coventurers,” and the Exception Swallowing the Hearsay Rule*, 61 HASTINGS L.J. 581, 583 (2010).

60. Friedman, *supra* note 29, at 463. This seems as good a place as any to assuage Professor Friedman’s concern that when the going gets tough for the prosecution, I wish to “bend principle and admit evidence that would otherwise be unacceptable.” *Id.* at 456. When I write that “necessity” is the real justification for the coconspirator statement exception, I am

joint venture theory shines on Confrontation Clause jurisprudence, the revisionist take on the coconspirator statement exception is simply erroneous statutory interpretation—a clear misreading of the Federal Rules of Evidence.

After this agreement, we part company as to the significance of the new hearsay doctrine and its relationship to new Confrontation Clause doctrine. Rather than redefine the hearsay rule to better match a vision of the Confrontation Clause that even post-*Crawford* Justices have recently found unpalatable, those concerned with the admission of unreliable evidence against criminal defendants may wish to turn our attention to strengthening the hearsay rule. For example, while I find it vaguely preposterous that the word “conspiracy” in Rule 801(d)(2)(E) has been redefined as “pretty much any joint undertaking” by multiple federal courts of appeal,⁶¹ the law of those circuits is what it is, not what I wish it to be. If the Supreme Court does not correct the errant interpretation of the federal coconspirator statement exception, Congress should amend Rule 801 to make clear that “conspiracy” means “conspiracy.”⁶² Other new (that is, not “firmly rooted”) hearsay exceptions prone to admitting lousy evidence (that is, evidence without “indicia of reliability”) may also justify amendments to federal and state evidence rules. State legislators and judges in particular should remember that the U.S. Supreme Court is not the supreme arbiter of state evidence law.

My concern about the admission of unreliable hearsay perhaps illustrates my old-fashioned thinking about evidence. Some modern authors argue that the hearsay rule and its jumble of exceptions are not worth the trouble they cause.⁶³ This debate raises important empirical

describing reality, not announcing my approval. Many legal rules are grounded on theories I dislike.

61. See, e.g., *United States v. El-Mezain*, 664 F.3d 467, 502 (5th Cir. 2011) (“Although the rule speaks of statements made in furtherance of a ‘conspiracy,’ we have recognized that admissibility under Rule 801(d)(2)(E) does not turn on the criminal nature of the endeavor. Instead, a statement may be admissible under Rule 801(d)(2)(E) if it is made in furtherance of a lawful joint undertaking.” (citation omitted)); *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006) (“[O]ur precedents hold that the doctrine [from Rule 801(d)(2)(E)] is not limited to unlawful combinations.”).

62. Federal Rule of Evidence 801(d)(2)(E), which exempts from the hearsay rule a statement “offered against an opposing party” that “was made by the party’s coconspirator during and in furtherance of the conspiracy,” could be amended to include the word “unlawful” in the phrase “in furtherance of the [unlawful] conspiracy.” Because conspiracies by their nature involve unlawful acts, see *BLACK’S LAW DICTIONARY* (9th ed. 2009) (“An agreement by two or more persons to commit an unlawful act . . .”), this amendment would not be necessary if courts read the existing rule correctly.

63. See, e.g., Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last*, 26 ME. B.J. 126, 127 (2011) (arguing that “the perceived dangers associated with

questions: Is hearsay less reliable than other forms of evidence freely admitted in American courts? Is hearsay admitted under existing exceptions more reliable than other hearsay?⁶⁴ Do juries overvalue hearsay, or do they appropriately discount it when deciding cases? The research of psychologists has provided valuable insights in recent years concerning how fact finders evaluate various sorts of evidence,⁶⁵ and their wisdom could help advance the hearsay debate. Natural experiments may be possible, comparing jurisdictions that have maintained traditional hearsay law with those that have relaxed the rule.

IV. CONCLUSION

In Confrontation Clause jurisprudence, “reliability” has proven resilient. Respected scholars, and even a unanimous Supreme Court, have declared its irrelevance. Yet it keeps showing up in opinions, with a majority of justices having recently joined one opinion or another asserting its importance. Considering how much of evidence law is devoted to keeping unreliable evidence from juries,⁶⁶ as well as evidence whose probative value is substantially outweighed by its unfairly prejudicial effect,⁶⁷ the continued attention to reliability should not cause much surprise. If a new constitutional doctrine purports to reject reliability as a criterion for the admissibility of evidence, scholars and judges concerned about fair and accurate trials will prove difficult to convince.

hearsay evidence no longer justify the exclusion of relevant hearsay evidence in civil litigation”).

64. See FED. R. EVID. 803(1)–(2) advisory committee’s note (questioning the traditional justification for the excited utterance exception).

65. See, e.g., Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177 (2006) (concluding that jurors commonly misunderstand what makes some pieces of evidence more reliable than others). See generally JENNIFER THOMPSON-CANNINO & RONALD COTTON, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009) (telling the story of a man wrongfully convicted of rape and the racial biases that impacted his trial before he was later exonerated by DNA evidence and developed a friendship with his accuser).

66. See, e.g., FED. R. EVID. 702, 802, 901.

67. See, e.g., *id.* 403, 404, 411.