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## CONFRONTING *CRAWFORD*: JUDICIAL HISTORIOGRAPHY AND THE SIXTH AMENDMENT

### I. BACKGROUND: CONFRONTATION, *CRAWFORD*, AND THE TESTIMONIAL DICHOTOMY

Professor John H. Wigmore wrote that common law's right of confrontation served primarily two purposes: to secure for the opponent the right of cross-examination, and to enable "the judge and jury . . . to obtain the elusive and incommunicable evidence of a witness' *deportment while testifying*," where "a certain subjective moral effect is produced upon the witness."<sup>1</sup> Justice Scalia confirms this through his introduction to discussion of the Sixth Amendment's Confrontation Clause in *Coy v. Iowa*.<sup>2</sup> Citing to ancient sources of law, American common law, and even the etymology of the word "confrontation," Scalia generates the same rationale as that of the Court's plurality opinion in *Pennsylvania v. Ritchie*, that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination."<sup>3</sup>

Initially, the decision explicated in *Crawford v. Washington* seems in accordance with the general aims of confrontation as articulated in previous cases. Writing for the Court, Scalia articulated the rule of *Crawford*, being that out-of-court statements which qualify as testimonial are not admissible under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness.<sup>4</sup> In doing so, Scalia expressed a historical statement as much as one of law: that the principal evil for which the Confrontation Clause was directed was the civil-law model of criminal procedure which allowed ex-parte examinations to be admitted into evidence against the accused.<sup>5</sup> This statement is as much a historical statement as it is a legal determination in that there is a necessary codependent relationship between the Court's legal rationale and its historiography of criminal procedure. Thus, to properly understand the legal conclusions made in *Crawford*, and the legal rationales which animated them, it is critical to recognize the Court's historiographic analysis.

*Crawford* and nearly a decade of its progeny were followed by *Williams v. Illinois*, which held that when a court seeks to identify the primary purpose of an out-of-court statement, in determining whether it is testimonial or not and therefore implicates the Confrontation Clause, it must apply an objective test; that court looks to the primary purpose to which a reasonable person would have ascribed such a statement.<sup>6</sup> In doing so, the Court

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1. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, at 94–96 (2d ed. 1923).

2. *Coy v. Iowa*, 487 U.S. 1012 (1988).

3. *Coy*, 487 U.S. at 1017 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987)).

4. *Crawford v. Washington*, 541 U.S. 36 (2004).

5. *Id.* at 50.

6. *Williams v. Illinois*, 567 U.S. 50, 83 (2012).

held that an expert's testimony referring to a DNA profile as having been produced from semen found on the victim did not violate the Confrontation Clause.<sup>7</sup> This decision engendered a peculiar joining of minds for the dissent: Justices Kagan, Ginsburg, and Sotomayor, joined with Scalia in opposition to the decision offered by the plurality.<sup>8</sup> In a detailed, nuanced dissent, Justice Kagan articulated how the plurality's decision was directly inapposite to *Crawford* and its progeny.<sup>9</sup> The difficulty of the case centered on the question of what was "testimonial" for the purposes of the U.S. Constitution's Confrontation Clause.

The purpose of this Comment is to address the question of whether the Court, in *Crawford* and *Williams*, actually performed the correct inquiry. The testimonial/nontestimonial dichotomy as articulated by the *Crawford* Court was deeply informed, influenced, and directly responsive to the historical analysis proffered by Scalia, writing for the Court. Where the historiographic survey and analysis conducted by the Court animated the legal conclusions and rationales of the *Crawford* decision, the outcome of *Williams v. Illinois* entreats further exploration into *Crawford's* historical outlook. Therefore, this Comment seeks to examine the *Crawford* Court's historiography in detail, and determine whether or not this research adequately comes to terms with the core principles which animate the right of confrontation in common law jurisprudence. When historical sources are given their fullest treatment, it becomes clear that the *Crawford* Court's erroneous historiographic analysis set an improper standard which, in turn, set the stage for the arguably confused, but without a doubt widely conflicting opinions found in *Williams v. Illinois*.

The facts before the Court in *Crawford v. Washington* were clear: On August 5, 1999, Kenneth Lee was stabbed in his apartment, and later that same night, the police arrested the petitioner, William Crawford.<sup>10</sup> When William Crawford and his wife, Sylvia Crawford, were each interrogated twice, the petitioner ultimately confessed that the two had went out to search for the decedent, saying that Kenneth Lee had earlier tried to rape Sylvia.<sup>11</sup> What was of relevance, the true reason behind why this case had come before the United States Supreme Court, were divergent statements made by William Crawford and Sylvia Crawford; while Sylvia on the whole corroborated the story told by William, her account of the altercation between William and Kenneth Lee was particularly different with regard to whether the decedent had drawn a weapon before William Crawford assaulted him.<sup>12</sup> Whereas William Crawford told the investigators that he could possibly remember the decedent "reachin', fiddlin' around" for a weapon, Sylvia replied that she had not actually seen anything in Kenneth Lee's hands when the fight began.<sup>13</sup>

On these facts, resting primarily on Sylvia's conflicting statement that Kenneth Lee was apparently unarmed at the time of his death, the State charged William Crawford with assault and attempted murder, to which he claimed self-defense.<sup>14</sup> Since Washington's law of marital privilege bars a spouse from testifying against the other without consent, Sylvia

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7. *Id.* at 50.

8. *Id.* at 63.

9. *Id.* at 64–76.

10. *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

11. *Id.*

12. *Id.* at 39.

13. *Id.* at 39–40.

14. *Id.* at 40.

did not testify.<sup>15</sup> Without Sylvia Crawford to testify in court, the State sought to introduce her statements which had been recorded by the police in order to prove that William Crawford had not acted in self-defense.<sup>16</sup> The statements made to investigators were admitted under the hearsay exception for statements against penal interest, since Sylvia herself had admitted to leading William Crawford to Kenneth Lee's apartment—therefore facilitating the assault.<sup>17</sup>

To the admission of Sylvia's statements, William Crawford countered that admission of the statements "would violate his federal constitutional right to be 'confronted with the witness against him.'"<sup>18</sup> The trial court approached the question through the lens of *Ohio v. Roberts*, which "does not bar the admission of unavailable witness's statements against a criminal defendant if that statement bears an 'adequate indicia of reliability.'"<sup>19</sup> This exception allows admission of evidence which is either a "firmly rooted hearsay exception," or bear "particularized guarantees of trustworthiness."<sup>20</sup> The trial court believed Sylvia's statements to fall in the second category, finding a number of reasons to characterize them as trustworthy.<sup>21</sup> The Washington Court of Appeals reversed, and the Washington Supreme Court in turn reinstated the conviction, both of which applied similar methodologies of determining the trustworthiness of the statements.<sup>22</sup>

The Court's analysis in *Crawford* could have pursued a number of avenues of inquiry in addressing the question at bar, whether the State's introduction of Sylvia's statement into evidence at trial violated the Confrontation Clause of the U.S. Constitution. Indeed, Justice Scalia noted the diversity of approaches which could be utilized in analyzing the question. Always the Formalist, Scalia begins by noting that "[t]he Constitution's text does not alone resolve this case. One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, those whose statements are offered at trial, or something in-between."<sup>23</sup>

Clearly alert to the varying constructions of confrontation, Scalia then simply concludes "[w]e must therefore turn to the historical background of the Clause to understand its meaning."<sup>24</sup> Scalia's "therefore" does not signal that the Court would approach these varying constructions of confrontation in light of a historical analysis, but rather Scalia seems to mean that the Court dismisses—if not entirely forecloses—the independent rationales which animate alternative constructions. Scalia devotes very little energy with reference to these alternative constructions once he has begun his own historical analysis, save to address the challenges posed by the historiographic statements expressed by Wigmore in his discussion of confrontation and the law of hearsay.

This approach presents something of a quandary for anyone reading the Court's opinion in *Crawford*: while being made aware of what appears to be a formidable body of

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15. WASH. REV. CODE § 5.60.060(1) (1994) (cited in *Crawford*, 541 U.S. at 40).

16. *Crawford*, 541 U.S. at 40.

17. Wash. R. Evid. 804(b)(3) (2003) (cited in *Crawford*, 541 U.S. at 40).

18. U.S. CONST. amend. VI. (cited in *Crawford*, 541 U.S. at 40).

19. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (cited in *Crawford*, 541 U.S. at 40).

20. *Roberts*, 448 U.S. at 66.

21. *Crawford*, 541 U.S. at 40.

22. *Id.* at 41.

23. *Id.* at 42–43 (citations omitted).

24. *Id.* at 43.

independent bases of analysis, they are, in a sense, entirely foreclosed from further consideration by the Court. The Court's approach therefore necessarily relies with a nearly complete exclusivity on its own historical analysis. This in turn means that any appraisal of the decision's efficacy necessarily requires a proper appraisal of the Court's historical analysis. It is only by "checking" the historiography offered by the Court, as articulated by Justice Scalia, can the validity of analysis be properly assessed. The Court begins upon the foundation that "[t]he Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."<sup>25</sup> Now, it is worth noting that in the face of such a solemn assertion, Scalia himself writes *in the very same opinion* that the Constitution's language alone is of little help to discern the purpose and procedure required by the Sixth Amendment.<sup>26</sup> With no guidance from the language of the Constitution itself, but through a survey of Western jurisprudence, Scalia and the Court held that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, particularly its use of *ex parte examinations* as evidence."<sup>27</sup> Emblematic of this "principal evil" is the sort of procedure evinced by the trial of Sir Walter Raleigh, from which the Framers sought to guard against in protecting the accused in "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."<sup>28</sup>

The Court's opinion is startlingly narrow in a sense, for it not only forcefully rejects the "open-ended" analysis developed in *Ohio v. Roberts*, but it also apparently rejects the notion that the Confrontation Clause "applies of its own force only to in-court testimony, and that its 'application to out-of-court statements introduced at trial depends on the law of the Evidence for the time being.'"<sup>29</sup> The Court's rejection of the latter, admittedly more malleable, approach is problematic; Wigmore, in discussing the interrelationship between confrontation and hearsay, more than adequately accounts for the constitutional implications of an evolving law of hearsay:

Now, the Hearsay rule is not a rule without exceptions; there was never a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to develop in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not care to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended. . . . The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created herein.<sup>30</sup>

There is no indication whatsoever that Wigmore shared the Court's concerns that such an approach would give rise to an alarming future jurisprudence envisioned by Scalia that "would render the Confrontation Clause powerless to prevent even the most flagrant

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25. *Id.* at 67.

26. *Crawford*, 541 U.S. at 42.

27. *Id.* at 50.

28. *Id.* at 68.

29. *Id.* at 50–51 (citing WIGMORE, *supra* note 1, § 1397, at 101).

30. WIGMORE, *supra* note 1, § 1397, at 101.

inquisitorial practices.”<sup>31</sup> Rather, convinced that such an approach would lead to a breakdown of constitutional protections, the Court embraced an analytical framework that appears as divorced from the aims of the Sixth Amendment’s Confrontation Clause as does the reliability test developed in *Ohio v. Roberts*: whatever qualifies as testimonial falls under the protections guaranteed by the Confrontation Clause, subject to the existing exceptions to the rule of hearsay at the time the Framers wrote the Constitution.<sup>32</sup> Perplexingly, in fashioning such an analytical framework, the Court in *Crawford* abstains from further elucidating on this point, simply stating that it “leave[s] for another day any effort to spell out a comprehensive definition of ‘testimonial.’”<sup>33</sup> Moreover, Scalia writes without any consciousness to the profound implications posed by this analysis in an increasingly Orwellian world, by stating that “[t]his focus” on a testimonial consideration read in light of the Raleigh case “suggests that not all hearsay implicates the Sixth Amendment’s core concerns[,]” that even “[a]n off-hand, overheard remark . . . bears little resemblance to the civil-law abuses the Confrontation Clause targeted.”<sup>34</sup> Essentially, in embracing this analytical framework that treats whether statements are testimonial or not as the threshold inquiry, the Court—fearing a species of abuses secluded to politically charged show trials—gives a free pass to statements which somehow pass as nontestimonial. That, however, is a question for another time.

As this Comment will discuss, the Court’s approach lays the groundwork for practices which may contravene the broader principles of the Sixth Amendment’s Confrontation Clause in resting upon a testimonial/nontestimonial dichotomy as a product of its imprecise historiography of confrontation. So, the guiding inquiry for this Comment focuses on whether or not the principles of confrontation in the history of criminal procedure hold true to the testimonial/nontestimonial dichotomy as a permissible threshold question in Confrontation Clause analysis.

## II. ANCIENT AND MEDIEVAL SOURCES OF CONFRONTATION: FOUNDATIONAL PRINCIPLES, OR DEAD END?

### A. *Origins of Confrontation in the Ancient World*

Scalia writes, “[t]he right to confront one’s accusers is a concept that dates back to Roman times.”<sup>35</sup> Naturally, the question begs to be asked: what exactly is the point of such a reference? Scalia does not devote much more than a passing reference to the ancient and medieval right of confrontation in *Crawford*. However, writing for the Court in *Coy v. Iowa*, Scalia dedicates enough information in the opinion to better understand the relevance of ancient traditions with regard to confrontation.<sup>36</sup> Justice Scalia writes that the very language of the Confrontation Clause comes “with a lineage that traces back to the beginnings of Western legal culture.”<sup>37</sup> Indeed, when mentioning Roman law’s approach to confrontation, he quotes the famous verses of Acts 25:16, where the Roman governor

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31. *Crawford*, 541 U.S. at 51.

32. *Id.*

33. *Id.* at 68.

34. *Id.* at 51.

35. *Id.* at 43.

36. *Coy v. Iowa*, 487 U.S. 1012, 1012 (1988).

37. *Id.* at 1015.

Festus asserts, “[i]t is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.”<sup>38</sup> Frustratingly, Scalia fails—in either *Crawford* or *Coy*—to identify or engage with any meaningful principles which might be found within ancient law to further illuminate the American common law understanding of confrontation, let alone the cases at bar.

The Court’s facial analysis is, on the whole, disappointing in that much could be gleaned as to the fundamental principles animating the doctrine of confrontation in ancient law. Frank R. Herrmann and Brownlow M. Speer provide an excellent study of ancient and medieval approaches to confrontation, and note that, fundamentally, “Roman criminal procedure, like that of the United States, was accusatorial.”<sup>39</sup> Despite the widely varying degrees of substantive and procedural justice during the Roman Republic and Empire, Herrmann and Speer’s research reveals that “Roman criminal procedure consistently demanded that defendants have the opportunity to be present at the proceedings against them,” which, combined with the requirement that the accuser be present in court to state the charge and produce evidence, forms what amounted to “the opportunity for a personal encounter with the accuser in court.”<sup>40</sup> While there was apparently no concrete, specifically-elucidated right of confrontation guaranteed to citizens in the Roman Republic and Empire analogous to the provision made in the Sixth Amendment, the combination of these ancient criminal procedures amounted to something which bears stark resemblance to the American right of confrontation. Indeed, Herrmann and Speer caution that the procedural patchwork in Roman criminal procedure described “does not, however, expressly state that the accuser and the accused must be present in court at the same time.”<sup>41</sup> However, apparently in response to this gap, a late fourth century imperial *constitutio* included the provision holding it “improper for whatever is said against an absent person, by him alone who is accusing, immediately to be considered as true, as if against one who is present and even convicted.”<sup>42</sup>

The critical inquiry when discussing the Roman legal approach to confrontation is, with regard to the American jurisprudence of confrontation, what principles or values that gave life to confrontation in the ancient world truly apply to today? Moreover, besides origin, what weight and significance should these principles attach to modern American jurisprudence? It is clear that Scalia, and thereby the Court, suffered this same inquiry, but to little avail.<sup>43</sup> Regardless of whether or not the Court saw much value in looking to ancient sources, it is clear in the lack of depth and attention paid to these sources—compared to what the Court devotes to early modern common law perspectives—that the Court ultimately devotes little more than the most cursory acknowledgements of jurisprudential lineage in *Crawford*.<sup>44</sup>

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38. *Id.* at 1015–16 (citing *Acts* 25:16).

39. Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT’L L. 481, 484 (1994).

40. *Id.* at 485–86.

41. *Id.* at 487–88.

42. *Id.* at 488.

43. *See Crawford v. Washington*, 541 U.S. 36, 36 (2004); *Coy*, 487 U.S. at 1012.

44. *Crawford*, 541 U.S. at 43.

B. *The Continental Rift and Inquisitional Practices*

Though the Court devotes little attention to the role ancient sources play in the evolution of confrontation in the common law, the split between practices which would become the common law—later transplanted and independently developed in the United States—and general trial practices which proliferated on the continent is at the very heart of Scalia’s analysis. Scalia writes that besides the common law tradition, “England at times adopted elements of the civil-law practice” including instances where “[j]ustices of the peace or other officials examined suspects and witnesses before trial . . . [and] read in court in lieu of live testimony.”<sup>45</sup> The Court cites to Marian reforms in legal practices which culminated in the “most notorious instances of civil-law examination,” the trial of Sir Walter Raleigh.<sup>46</sup> Despite explicitly stating the existence of a fundamental disconnect between common law and continental forms of confrontation, the Court stops short of meaningfully analyzing differences which underlie the tensions between the two forms; indeed, Scalia stops short by acknowledging simply “[w]hatever the original purpose, however, [ex-parte examinations] came to be used as evidence in some cases.”<sup>47</sup>

Notwithstanding the Court’s treatment of the question, it is critical to understand the nature and extent of divergence between the modes of criminal procedure—and their provisions for confrontation—between England and the continent. Understanding the similarities, differences, and potential compatibility, of civil law forms to an English common law model of trial practice is best explained by the divergent histories of these two forms, starting at the fall of the Roman Empire. As the dust from the fall of the Roman Empire began to settle, the thirteenth century began to define European jurisprudence “in the realms of both Church and State by an increasing emphasis on the detection and punishment of crime.”<sup>48</sup>

After his passing reference to the existence of confrontation in ancient jurisprudence, Scalia begins his historical analysis in earnest by making a seemingly innocuous, though simplistic statement: “English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials;” where the “common-law tradition is one of live testimony in court subject to adversarial testing, . . . civil law condones examination in private by judicial officers.”<sup>49</sup> Admittedly, the byword for the inquisitorial model was the confession: Hermann and Speer write that “[t]he continental jurisprudence of the late Middle Ages regard a defendant’s confession as the ‘queen of proofs’ (*regina probationum*) in criminal cases.”<sup>50</sup> This maxim envisions images reminiscent of the Spanish Black Legend, and such seems to be fairly confirmed by Hermann and Speer in writing that “[t]orture, which the Roman law authorized, was the legally sanctioned method of obtaining such a confession.”<sup>51</sup> However, this impression, perhaps implicitly enjoyed by Scalia writing for the Court in *Crawford*, is somewhat reductive and

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45. *Id.*

46. *Id.* at 44.

47. *Id.*

48. Hermann & Speer, *supra* note 39, at 522.

49. *Crawford*, 541 U.S. at 43.

50. Hermann & Speer, *supra* note 39, at 522.

51. *Id.*

unfairly characterizes comparisons between the common law and civil law models. Hermann and Speer develop a more complete—and nuanced—picture of the civil law inquisition system as something less than “notorious.”

From these facts, it might appear that inquisitional procedure dispensed entirely with in-court testimony of witnesses to prove a defendant’s guilt. In fact, however, this was not so. It is a remarkable paradox that in inquisitional proceedings, except in the special situation of the inquisition against heresy, the barbarity of torture coexisted with a careful observance of a defendant’s basic right to meet his accusers in court.<sup>52</sup>

While “paradoxical,” this model appears to be something less than a “notorious” model described by the Court as imported by Queen Mary, particularly with regard to the element of confrontation in civil law system. This nuanced and historically complicated mode of investigation and prosecution can only be explained by the unique history that drove the development of the civil law model of confrontation, borne of the inquisition.

Described as “a discrete procedure in the decretal legislation of a great lawyer-pope,” Innocent III (1198–1216), the inquisition began as a procedural solution to what Raymonde Foreville in his *Histoire des Conciles Oecumeniques* characterizes as a Church stricken with internal corruption.<sup>53</sup> The initial procedural responses implemented by Innocent III were, as Hermann and Speer describe, too cumbersome and protective, and ineffective in that it relied upon the individual accuser to serve as the primary force in seeking punishment of the high-ranking clergy.<sup>54</sup> In response, Innocent III provided updated procedures whereby the “inquisitio [was a] means by which his delegated judges could investigate the rumor (*fama*) of such misconduct.”<sup>55</sup> Critically, Innocent III envisioned the inquisition as a civil, rather than criminal, procedure for the removal of clergy from their offices for misconduct; no criminal penalties seem to have been contemplated.<sup>56</sup> Hermann and Speer theorize that the particular nature of the inquisition at its inception, the absence of any criminal penalties, or any repercussions other than removal from office, explain why “the Pope omitted any mention of a suspect’s right to be present at proceedings against him or to present a defense.”<sup>57</sup>

What was essentially an internal administrative adjudicatory procedure with little safeguards for the defendant due to a correspondingly limited remedy, was fundamentally inadequate for the purposes of criminal litigation. The Bolognese canonist Vincentius Hispanus articulated this concern, devoting particular attention with regard to the lack of procedural guarantees.<sup>58</sup> The concern that a civil law system of confrontation borne of its precursor inquisition was inapposite to proper confrontation, as Scalia articulated writing for the Court in *Crawford*, had already been voiced centuries before:

Query, whether an inquisition can take place against a person who is absent, as is accepted by many canonists [magistri]. But I have learned through experience that

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52. *Id.* at 522–23.

53. *Id.* at 523.

54. *Id.*

55. Hermann & Speer, *supra* note 39, at 523.

56. *Id.* at 524.

57. *Id.*

58. *Id.*

this is pernicious. If he were present, he would prove that on such-and-such a day he was not present when it is said that he killed so-and-so, and he would prove that the fama had its origin from his enemies in his absence; and although I would make inquisition, I would still hear from him afterwards in his defenses.<sup>59</sup>

These procedural concerns voiced by Hispanus would have been cold comfort to Sir Walter Raleigh, but were nevertheless profound in their effect on the continent: Innocent responded to the criticisms launched against the current model, and in decretal *Inquisitionis negotium*, the Pope directed that names and statements of accusing witnesses must be provided to an inquisitional defendant.<sup>60</sup> Later, the Fourth Lateran Council of 1215 rearticulated these protections, and included the right of a defendant to be present, notice of charges, and the ability to present a defense.<sup>61</sup>

As the procedural dynamics of inquisition evolved and responded to concerns, and as this procedure spread rapidly into secular law, neither the Pope nor the Lateran Council were able to address directly “the question of whether a defendant had the right actually to see the accusing witness.”<sup>62</sup> The uncertainty as to defendant’s rights continued, even as medieval Europe began to recover from the Dark Ages in its attempt to redevelop the first comprehensive territorial law since the fall of the Roman Empire. The legislation of Fredrick II of Sicily is remarkable for being the first sort of “territorial code of law” in medieval Europe since the Empire.<sup>63</sup> Notably, as this code fully embraced the inquisitional procedure, it contained many of the same protections provided by Innocent III and the Lateran Council, including provisions that ensured “the defendant would be furnished with the names and statements of the witnesses against him.”<sup>64</sup> These protections nevertheless suffered the same deficiency as that suffered by the procedural guarantees added by Innocent III and the Lateran Council in that “it did not provide that . . . witnesses could be physically produced before [the defendant].”<sup>65</sup>

Hermann and Speer note the inquisitional procedure developed by Innocent III, the Lateran Council, and later secular governments like Sicily all “fail[ed] to address the requirement of Justinian’s *Novel 90* that the adverse witness be produced in court in the presence of the defendant.”<sup>66</sup> This omission did not go without comment, however; the jurist Albertus Gandinus attacked the deficiency, focusing in on the distinction made by inquisition courts between criminal inquiries relating to a specific defendant of a general crime and the identity of the actor.<sup>67</sup> Gandinus concludes that “where the inquisitor is inquiring about a crime *in generali*, and not about a specific suspect, he does not summon anyone to be present at the introduction of the witnesses.”<sup>68</sup> Another complicating feature of the inquisition’s criminal procedure was the role torture played in the necessity of producing witnesses against the defendant in the first place. Particularly, as Gandinus laments,

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59. *Id.*

60. Hermann & Speer, *supra* note 39, at 525.

61. *Id.*

62. *Id.* at 526.

63. *Id.*

64. *Id.* at 526–27.

65. Hermann & Speer, *supra* note 39, at 527.

66. *Id.* at 528.

67. *Id.*

68. *Id.* at 530.

those special procedural innovations introduced for the benefit of a defendant might easily “have been evaded by the use of torture to obtain a confession from the defendant before any witnesses against him were produced.”<sup>69</sup> Gandinus’s study, though enlightening, left the question open as to whether—even with the prevalence of torture as a means of eliciting confessions—this effectively “nullified” the right of confrontation.

Bartolus (Bartolo de Sassoferrato), “whose commentaries on the Roman laws were looked upon by courts, scholars, and practitioners of the time, and for almost two centuries thereafter, as definitive,” answered that question.<sup>70</sup> In the fourteenth century, the inquisitional model was not only subject to changes subsequent to the criticisms of commentators like Gandinus, but was also subject to analysis under growing scholarship of Roman law which had long been unavailable to courts, scholars, and practitioners since the fall of Rome and Europe’s tortured crawl out from under the Dark Ages.<sup>71</sup> In the course of asking whether someone inculpated in a general inquisition (where confrontation was not required) could be subject to torture in order to obtain a confession regarding a specific crime, Bartolus wrote that the accused could not be tortured on “the ground that a defendant cannot be prejudiced by the testimony of witnesses whom he has not yet had an opportunity to see.”<sup>72</sup> Bartolus was not alone on his conclusion; “leading criminal law scholars of continental Europe over the next two centuries” including Angelus Aretinus (Angelo Gambiglioni) in his *Tractatus de maleficiis* (1438), and Hippolytus de Marsiliis in his *Practica causarum criminalium* (1528) followed his assertion. Nor was this perspective lost over the centuries; Hermann and Speer note the scholarship of Pierre Ayrault, writing fifteen years before the trial of Raleigh in his *Ordre, formalitae et instruction judiciaire*, which asserted the primary necessity of confrontation in terms anticipatory of the Sixth Amendment:

And in truth it seems that it is natural and consequently common to all men that the accused be heard; and that the witnesses who are charging him to be brought before him, to sustain face to face the crime of which they are accusing him, in order that if he has something to say against them, he may say it; and that the witness may see and recognize the person about whom they are deposing.<sup>73</sup>

These voices from the continent, as part of a chorus of scholarship placing significant weight in favor of confrontation, soundly refute the shallow historical approach relied upon by Scalia in defining the primary aims of the Confrontation Clause in his hunt for the chief evil. There is little sense that this is the civil law model, borne of inquisitional procedures, against which the Confrontation Clause is supposed to protect; Hermann and Speer’s survey of confrontation throughout the medieval and early modern periods indicates a linear evolution towards a procedural provision like that of Roman and Byzantine law.<sup>74</sup>

Admittedly, there was “one great exception to the requirement of production of accusing witnesses before a defendant,” under which “it became standard practice not to

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69. *Id.*

70. Hermann & Speer, *supra* note 39, at 530.

71. *Id.*

72. *Id.* at 530–31.

73. *Id.* at 541.

74. *Id.* at 512–15.

produce accusing witnesses before a defendant.”<sup>75</sup> Of course, as they note, the word “inquisition” today “stands for the antithesis of fair accusatorial procedure.”<sup>76</sup> This exception, however, belonged to the narrow realm of heresy. Where the models of procedure thus far discussed have applied as a civil Church procedure that was later transplanted into other polities’ civil and criminal procedure, this exception applied exclusively to Church prosecutions of heretical acts.<sup>77</sup> It is ironic then, that terms long embraced by the common law of evidence, “confront” and “face-to-face,” were born as legal terms in the “repressive context” of Nicolas Eymeric’s *Directorium inquisitorum*.<sup>78</sup> The *Directorium*, which details “the tricks and pressure tactics of inquisitors,” explicitly provides for the accused to be confronted (*confrontari*) with suspected false witnesses.<sup>79</sup> Additionally, the *Directorium* provides for cases where an inquisitor may wish to affront the resistant suspect “face to face” (*facie ad faciem affrontare*) with the witness.<sup>80</sup> Thus, even the language of modern confrontation itself was the product of the continent’s ongoing procedural evolution. This suggests that, while the inquiry of confrontation conducted by Scalia and the Court appear to understand the question as one of common law, the inquiry is inevitably also one of civil law.

Hermann and Speer chronicle the evolution of the inquisitional procedural model as a decidedly complicated one; a process itself subject to continuous criticism, revision, and further analysis as the Church and states within Europe began adopting this model for both civil and criminal proceedings. This survey of procedural development on the continent with regard to confrontation suggests particular inadequacies in Scalia’s characterization of the inquisition’s procedural progeny, the civil law system. Primarily, the overly-generalized characterizations of the civil law system should not be taken for granted as it is articulated in *Crawford*. In *Crawford*, Scalia’s historical narrative tracking the evolution of confrontation in the common law dedicates particular attention to the infamous trial of Sir Walter Raleigh, where Scalia quotes Raleigh’s protestations that he was being tried by the Spanish Inquisition.<sup>81</sup> From there, Scalia writes of the various judicial and statutory responses to “limit these abuses.”<sup>82</sup> However, as Hermann and Speer detail, the inquisitorial model does not readily yield to Scalia’s portrait of a civil law system as such by courts at the time of Raleigh’s trial. Moreover, the story of confrontation, while by no means devoid of common law influences, is one that must necessarily be also told from a continental perspective.

Further discussion of the English common law’s medieval and early modern trial procedure shows that the statutory and judicial responses to Sir Walter Raleigh’s trial is perhaps better described as yet another step in an evolutionary process which began on the continent, rather than the forceful rejection of infamous and foreign practices. However one approaches the concept of confrontation, what can be said with considerable certainty is that Scalia’s assertion that “English common law has long differed from continental

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75. Hermann & Speer, *supra* note 39, at 535.

76. *Id.* at 522.

77. *Id.* at 535.

78. *Id.* at 535–36.

79. *Id.* at 535.

80. Hermann & Speer, *supra* note 39, at 536.

81. *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

82. *Id.*

civil law in regard to the manner in which witnesses give testimony in criminal trials” is only accurate in a sense far away from the one implied.<sup>83</sup> Still, better illuminations as to the procedures utilized in the trial of Sir Walter Raleigh and the judicial and statutory responses that followed should be found in examining the English common law.

### III. THE COMMON LAW: VARIANCE AND CONTINUITY IN CONFRONTATION

The touchstone of the Court’s analysis in *Crawford* began with a distinction: “English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials.”<sup>84</sup> Scalia writes that where the common law’s “tradition is one of live testimony in court subject to adversarial testing . . . the civil law condones examination in private by judicial officers.”<sup>85</sup> The scholarship of Hermann and Speer makes it clear that Scalia wrote for the Court in *Crawford* with an undue degree of generality in his characterization of the civil law system. More problematic, however, is the degree of generality Scalia affords to characterizing the English common law of confrontation. Scalia begins by writing that “[t]he founding generation’s immediate source of the concept [of confrontation] was the common law,” and the primary definition of the English common law provided by Scalia being that “English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials.”<sup>86</sup> This circular and reductive definition is not helped much by the further characterization that “[t]he common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private judicial officers.”<sup>87</sup> To support this assertion, Scalia cites to a specific passage from William Blackstone’s *Commentaries on the Laws of England*, particularly his description of cross examination.<sup>88</sup> This source, written 165 years after the trial of Sir Walter Raleigh, bears consideration:

There are a few of the advantages attending this [cross examination], the English, way of giving testimony, ore tenus. Which was also indeed familiar among the ancient Romans, as may be collected from Quintillian; who lays down very good instructions for examining and cross-examining witnesses viva voce. And this, or somewhat like it, was continued as low as the time of Hadrian: but the civil law, as it is now modeled, rejects all public examination of witnesses.<sup>89</sup>

In reality, modern scholarship has proven the common law features of confrontation and cross examination are not as timeless, nor as monolithic, as Blackstone or Scalia propose it to be. It must also be remembered in this discussion that, as Wigmore notes, there was never “an indispensable thing called Confrontation as distinguished from Cross-examination.”<sup>90</sup> While the two concepts are distinct, they are nevertheless inextricably intertwined since “[t]here was a right to cross-examination as indispensable, and that right was

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83. *Id.* at 43.

84. *Id.*

85. *Id.*

86. *Crawford*, 541 U.S. at 43.

87. *Id.*

88. 3 WILLIAM BLACKSTONE, *Commentaries on the Laws of England* 373–74 (1768) (cited in *Crawford*, 541 U.S. at 43).

89. *Id.* at 373–74.

90. WIGMORE, *supra* note 1, § 1397, at 100.

involved in and secured by confrontation.”<sup>91</sup> Discussion of confrontation often cannot be disconnected from the concept of cross examination, and consideration by both early modern and modern scholars bears this out. With that in mind, whether the Court’s understanding of the common law’s approach to confrontation stands as unduly general as its treatment of the continental tradition bears further investigation.

Writing on the subject of process and examination in late medieval and early Tudor criminal law, John Bellamy writes “[e]xamination and the truncation of judicial procedure often approached close to doing justice summarily.”<sup>92</sup> Under the reigns of Henry V and Henry VI, statutes regulating the wages of servants and laborers gave justices of the peace “power to examine these employees, and also their master, on oath so as to discover if and how they had broken the statutes of 1349 and 1351.”<sup>93</sup> While this constitutes the first instance of witnesses being examined on oath in England, the question as to whether these statements might have been offered directly into evidence is unclear.<sup>94</sup> However, by 1433, it is clear that justices of the peace were given power to inquire by examination, search, and punish on the basis of these examinations while investigating particular business practices.<sup>95</sup>

Bellamy takes care to note that the regulations which entailed these procedures of examination on oath “were only [a] minor part of the criminal law legislation of the period” all of which “had a close connection with the master-servant relationship and were particularly difficult to conceal once committed.”<sup>96</sup> That being said, whatever the uniqueness of the exact legislative objectives, these forms of examination and summary adjudication by justices of the peace reached new heights in popularity in the reign of Henry VII.<sup>97</sup> Under his reign:

No fewer than ten statutes made use of these procedures: in four statutes examination was merely an alternative to presentment or indictment, in one it took their place, in five it served as an alternative to trial by petty jury and in three it replaced such a trial entirely.<sup>98</sup>

Statutes of this sort which introduced similar procedures into new areas of criminal law were scant under the reign of Henry VIII, but Bellamy suggests that these provisions “had already been established in all the most profitable areas during the reign of the previous king.”<sup>99</sup> Indeed, just as the inquisition on the continent led to the further development of secular criminal procedure, the Henrician Reformation led to important developments in procedure in the Church’s struggle to enforce conformity to Anglican practices.

Under the reign of Henry VIII, there was what Bellamy refers to as a “most distinct” shift in the history of witnesses, one which “was not a period when the criminal side of the common law developed according to its own principles and logic unmolested.”<sup>100</sup> Much

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91. *Id.*

92. JOHN G. BELLAMY, *CRIMINAL LAW AND SOCIETY IN LATE MEDIEVAL AND TUDOR ENGLAND* 8 (1984).

93. *Id.* at 12.

94. *Id.*

95. *Id.* at 13.

96. *Id.* at 15.

97. BELLAMY, *supra* note 92, at 15.

98. *Id.*

99. *Id.* at 22.

100. *Id.* at 37.

like on the continent, Bellamy describes the “strong pressures from outside and the prevailing influence was undoubtedly that of the ecclesiastical law.”<sup>101</sup> These influences were manifested in relevant statutes which were concerned with ecclesiastical matters, of which the government had a direct interest due to the heightened security concerns after England’s break with Rome.<sup>102</sup> These statutes established procedures that were administered by both the secular and ecclesiastical authorities, but the procedures themselves were a mix of traditional and novel practices. Two of these statutes left bishops the task of finding two witnesses, and both of these statutes stipulated for charges to “be obtained by presentment of twelve men in the common law fashion.”<sup>103</sup> In contrast, in statutes charged with combating the production of prohibited books, charges were brought upon the accusation of a private individual, and trial included witnesses from both the accusers and the accused before “either two members of the king’s council or the ordinary in conjunction with two justices of the peace.”<sup>104</sup> It is clear, therefore, that the ecclesiastical interests in enforcing conformity through modified procedures was unique to the inquisitions on the continent.

The criminal statutes under the reign of Henry VIII bear out a struggle over who administrated the procedures under the English Reformation rather than the procedures themselves; the differences in procedure that attended secular and ecclesiastical administration of these statutes were attendant factors rather than primary considerations in the eventual shift to common law in criminal proceedings.<sup>105</sup> Accusation by witness, even by two or more witnesses, “was no longer acceptable in 1544, whereas ten years earlier it ha[d] been introduced into the new heresy act . . . as a precaution against the preemptory seizure and examination of a heresy suspect . . . without proper process.”<sup>106</sup> Bellamy cautions that the shift towards common law rather than ecclesiastical administration “may well have been promoted as much by popular resentment at the latter as by the government’s belief in the judicial efficacy of the former.”<sup>107</sup> The most striking innovation of these statutory procedures was the allowance for the accused to prove their innocence by producing more witnesses than those who were produced against him to indicate their innocence, but the innovation itself evinces its novel origins in the English break with Rome.

None of this is to say that the Court’s analysis, evinced by Scalia’s opinion, was wholly reductive. Scalia’s statements that “England at times adopted element of civil-law practice” and that examinations by justices of the peace “were sometimes read in court in lieu of live testimony” might be construed as a concession regarding the imperfections of English common law rather than some assertion of invasive continental practices.<sup>108</sup> Moreover, the Court supplies ample reference to case law that undermines the generalized distinctions manufactured by Scalia in the opinion, noting cases from 1603, 1554, 1329, and 1637 respectively.<sup>109</sup> This balanced analysis breaks down, however, when Scalia shifts

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101. *Id.*

102. BELLAMY, *supra* note 92, at 37.

103. *Id.* at 38.

104. *Id.*

105. *Id.* at 37–40.

106. *Id.* at 38.

107. BELLAMY, *supra* note 92, at 39.

108. *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

109. *Id.*

attention to statutes under Queen Mary that permitted pretrial examination.<sup>110</sup> It is from these Marian bail and committal statutes and the trial of Sir Walter Raleigh that the Court extrapolates the “notorious instances of civil-law examination,” forming the principal evil which the Confrontation Clause was directed against.<sup>111</sup> However, Bellamy’s study of these bail and committal statutes indicates anything but a break with tradition.

Analysis of the Marian bail and committal statutes is only productive insofar as they are understood in context of the existing statutory scheme established and developed before. Bellamy writes, “[t]he statutes utilizing witnesses for the purpose of giving evidence and proving guilt passed since the beginning of the Reformation Parliament had in general dealt with offenses which were being put into the statute book for the first time.”<sup>112</sup> Moreover, the “vast majority of serious crimes were unaffected” by Henrician legal reforms after the break with Rome.<sup>113</sup> So, if statutes using witnesses for the purposes of giving evidence rather than requisites for summary adjudication by the justices of the peace were relative to the novelty of the offense they were meant to adjudicate; the question is to what degree—if any—these statutes depart from previous statutory standards. This, if anywhere, may serve to usefully establish the procedural baseline against whatever potential departures the Marian bail and committal statutes might be compared.

Bellamy writes, “[t]hat the ‘committal’ statute of 1555 borrowed procedural details from previous acts seems quite clear.”<sup>114</sup> Suggesting that the procedures of the committal statutes were not commonly used before 1555 is difficult, since Lord Chancellor Thomas More admits that in crimes of felony and treason the same procedure of examining the accused and taking information from the accusers were a matter of course.<sup>115</sup> Moreover, a similar certification procedure, by which the justices of the peace would produce evidence in the form of examinations of the accused, the apprehenders, and witnesses were prevalent in statutes before Queen Mary.<sup>116</sup>

In light of the Court’s preoccupation with the trial of Sir Walter Raleigh, particular attention should be devoted to the role previous statutory provisions under the law of treason played in the committal statute. Three acts before the 1555 statute, but since 1547, set forth definition and parameters regarding the role of witnesses in cases of treason.<sup>117</sup> Admittedly, these statutes do not contain material pertaining to the taking of examinations from the accused, apprehenders, or accusers, but simply state that witnesses were necessary for the indictment and arraignment of the accused.<sup>118</sup> The first act of treason under Edward VI provided that no one could be indicted, arraigned, or convicted for high treason unless accused by two “sufficient, lawful, and willing witnesses.”<sup>119</sup> The second act under Edward VI is somewhat more complicated, requiring two “accusers” to be in attendance at the indictment, arraignment, and conviction portions of the trial; additionally, if alive,

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110. *Id.*

111. *Id.* at 44.

112. BELLAMY, *supra* note 92, at 39.

113. *Id.* at 41.

114. *Id.* at 39.

115. *Id.* at 40.

116. *Id.* at 41.

117. BELLAMY, *supra* note 92, at 42.

118. *Id.*

119. *Id.*

they “should appear in person before the accused” to affirm the charges in the indictment.<sup>120</sup> The third act, notably under Philip and Mary, provided that the accused had a right to have at least two witnesses who had confessed or deposed against them.<sup>121</sup> Bellamy cautions, however, against weighing too much significance to these requirements; Bellamy writes that “[t]here was, however, no suggestion in this act that these witnesses were necessary adjuncts at the indictment.”<sup>122</sup> In fact, “no statute treats the issue of whether witnesses had to be present at felony trials,” but since they were required to be at certain portions of the trials, they “must surely have been available for both indictment and arraignment, which usually occurred on the same day.”<sup>123</sup>

Scalia makes reference to the trials of Throckmorton and Lilburn as examples where examinations were read into court in lieu of live testimony, one of those forays where “England at times adopted elements of the civil-law practice.”<sup>124</sup> This characterization is problematic, as these cases, in addition to the trial of William Thomas, were creatures of earlier statutory provisions, and were in fact influencers of the committal statutes.<sup>125</sup> Bellamy, writing on these treason trials, observed that “[t]here [were] . . . no references to the recording of evidence by the examiners, or binding over of witnesses or certifying of relevant material for use of the prosecution” but that “clearly the subject of witnesses, . . . their depositions or lack of them, their appearance in court, and the validity of their testimony, were all matters of concern.”<sup>126</sup> Responsive to these cases, it appears that the Marian statutes were “keeping in step with similar [earlier] provisions existing in regard to treason.”<sup>127</sup> Rather than standing as a turn against tradition as presupposed by the Court in *Crawford*, it appears that these statutes were part of a continuing evolution of confrontation in English criminal procedure. Whatever may be meaningfully gleaned from the trial of Sir Walter Raleigh, the statutory history of English criminal procedure—especially placed alongside its continental equivalents—envisages something less than an intrusion of civil law practices, but rather the continuation of a statutory scheme long accepted in English common law.

#### IV. AMERICAN JURISPRUDENCE AND CONFRONTATION ANALYSIS

Resting upon his appraisal of confrontation in the ancient world, civil law, and English common law histories, Scalia glances over practices in the Colonies and early state decisions regarding confrontation.<sup>128</sup> According to Scalia, writing for the Court, “[t]his history supports two inferences about the meaning of the Sixth Amendment.”<sup>129</sup> Primarily, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against

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120. *Id.*

121. *Id.*

122. BELLAMY, *supra* note 92, at 42.

123. *Id.*

124. *Crawford v. Washington*, 541 U.S. 36, 43 (2004).

125. BELLAMY, *supra* note 92, at 43.

126. *Id.*

127. *Id.*

128. *Crawford*, 541 U.S. at 47–50.

129. *Id.* at 50.

the accused.”<sup>130</sup> The coordinate conclusion, based upon the historiography articulated by Scalia, stands in direct opposition to Wigmore’s position that “witnesses against” means those whose statements are offered at trial: “Accordingly, we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon ‘the law of Evidence for the time being.’”<sup>131</sup> It is telling that these conclusions are immediately buttressed in the text by hearkening back to the trial of Sir Walter Raleigh, arguing “the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.”<sup>132</sup>

Despite his assertion that Wigmore’s model would “render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices,” Scalia devotes precious little attention to the analysis that underlies Wigmore’s assertion.<sup>133</sup> However, it bears noting the considerable historical and analytical force Wigmore provides to support the proposition that “witnesses against” means those whose statements are offered at trial. Wigmore asserts, uncontroversially, that “almost all Constitutions have given a permanent sanction to the principle of confrontation, by provisions requiring that in *criminal cases the accused shall be ‘confronted with the witnesses against him’* or ‘brought face to face’ with them.”<sup>134</sup> The real question, according to Wigmore, is “whether these constitutional provisions affect the common-law requirement of confrontation, otherwise by putting it beyond the possibility of abolition by an ordinary legislative body.”<sup>135</sup> Underlying this question, though, is Wigmore’s concern that “[t]he main and essential purpose of confrontation *is to secure for the opponent the opportunity of cross-examination.*”<sup>136</sup> Not only does this assertion comply with the historical evidence discussed *supra*, but Wigmore provides substantial English and American decisional law to support this; from Chief Justice Hale in 1680 commenting upon the 1552 statute of Edward VI, and other English cases from the late seventeenth and early eighteenth centuries, to a series of American cases throughout the nineteenth century, all of which endorse exactly this perspective.<sup>137</sup> Ancient, medieval, early modern, and modern treatments of confrontation appear to support Wigmore’s observation that the functional purpose of a “witness against” necessarily means those whose statements are offered at trial, subject to cross examination.

Nevertheless, coming to terms with the intersection of hearsay and confrontation does not conclusively resolve this analysis. Addressing the seemingly absolute language of the Sixth Amendment’s Confrontation Clause, Wigmore begins by reasserting the inextricable intertwinement of confrontation and cross-examination:

There never was at common law any recognized right to an indispensable thing called Confrontation as distinguished from Cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured

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130. *Id.*

131. *Id.* at 50–51.

132. *Id.* at 51.

133. *Crawford*, 541 U.S. at 51.

134. WIGMORE, *supra* note 1, § 1397, at 98.

135. *Id.* at 99.

136. *Id.* at 94.

137. *Id.* at 94–95.

by confrontation; it was the same right under different names.<sup>138</sup>

Wigmore observed that, historically, the “right of cross-examination thus secured was not a right devoid of exceptions.”<sup>139</sup> Wigmore draws the third element of this near-Trinitarian approach into analysis: “The right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination.”<sup>140</sup> Critically, the hearsay rule is not a rule without exceptions, and, as Wigmore observes, there never was a time when it was without them.<sup>141</sup> The Court, as Scalia writes, acknowledges these existing exceptions, but articulates the common law of hearsay and confrontation as having been frozen in time at the time of founding: the Sixth Amendment “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”<sup>142</sup> However, these rules are not, as Scalia articulates them, frozen into a static view of common law at the time of the founding of the nation according to Wigmore, but rather something of a constantly-developing dialectic. Wigmore explains: “The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not care to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended.”<sup>143</sup>

None of this is to say that any of Scalia’s observations are actually incorrect. Rather, they indicate an approach that has not fully embraced the complexity and nuance of the history of confrontation throughout history. Scalia’s analysis in *Crawford* leads to an approximate conclusion similar to that summarized by Wigmore. Where Scalia determined that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examination as evidence against the accused,” Wigmore’s analysis leads to the conceit that “the net result, then, under the constitutional rule, is that, *so far as testimony is required under the Hearsay rule to be taken infra-judicially*, it shall be taken in a certain way, namely subject to cross-examination—not secretly or ‘*ex parte*’ away from the accused.”<sup>144</sup> Despite what appears to be the conceptual equivalent of harmless errors, the critical divergence between these formidable jurists as to the question of confrontation lies in a more fundamental divergence in historical analysis and jurisprudence. Where there is only “the principal evil” in Scalia’s analysis, which leads to a testimonial/non-testimonial dichotomy, Wigmore provides for an adaptable analysis:

The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given *infra-judicially*—this depends on the law of Evidence for the time being—but only what mode of procedure shall be followed—i.e., a cross-examining procedure—in the case of such testimony as is required by the ordinary law of Evidence to be given *infra-judicially*.<sup>145</sup>

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138. *Id.* at 100.

139. WIGMORE, *supra* note 1, § 1397, at 100.

140. *Id.* at 101.

141. *Id.*

142. *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

143. WIGMORE, *supra* note 1, § 1397, at 101.

144. *Crawford*, 541 U.S. at 50; WIGMORE, *supra* note 1, § 1397, at 101.

145. WIGMORE, *supra* note 1, § 1397, at 101.

Simply put, Wigmore's approach stands for the principle that Confrontation "sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein."<sup>146</sup> In the sharpest contrast, Justice Scalia's historiography—and thereby his Constitutional approach—rests on a static view of both the common law and the historical forces which animated the rationale for the rule.

Poignantly, the Court's flat rejection of using the law of evidence as the baseline for Confrontation Clause analysis is exactly what Wigmore counseled against. Wigmore asserted that "[t]he revision and extension of those exceptions is gradually progressing, and it is well to appreciate fully that there is in this progress nothing inconsistent with constitutional sanctions."<sup>147</sup> Upon this statement rests a powerful policy argument, one which appears to have been vindicated by the confused and indeterminate results of *Williams v. Illinois*: "It is well to have the sound theory fully understood and accepted, because, if the other should temporarily prevail, its overthrow and the exposure of its fallacies might be thought to involve the overthrow of the exceptions to the Hearsay rule."<sup>148</sup>

## V. CONCLUSION

Writing for the Court, Scalia generates a testimonial/nontestimonial dichotomy; but the historiography that undergirds the analysis generating this framework—as this Comment has shown—inadequately comprehends the historical factors which animate this analysis. Scalia, in an attempt to freeze the federal constitutional law of confrontation, and thereby identify the chief evils sought to be protected against, developed static and reductive constructions of both the early modern civil law and the English common law. The cursory historical survey of ancient and early modern sources within this Comment belies the historical conclusions generated by Scalia, and therefore it quickly becomes clear that the Court in *Crawford* came to an arguably correct conclusion on an analytical framework based upon faulty historiography. The complex, inconsistent, and conflicting progeny of *Crawford*, namely *Williams v. Illinois*, serves as a warning against those sorts of jurisprudence which seek to assail the chief evils determined through an approach to history that views legal traditions as static and without adequate detail. Until the Court chooses to reexamine the question of the Sixth Amendment's Confrontation Clause, unchained from this inadequate historical analysis, confrontation will remain constrained by this faulty framework.

—Randall Young

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146. *Id.*

147. *Id.* at 104.

148. *Id.*