THE CONTENT OF CONFRONTATION

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ABSTRACT

This piece comments on the state of the Supreme Court's Confrontation Clause jurisprudence at the close of the October 2010 Term. The 2004 Crawford v. Washington *decision established that criminal defendants have a Sixth Amendment right to cross examine witnesses whose testimonial out-of-court statements are introduced into evidence. The seemingly categorical quality of that precedent is called into question by the Court's reasoning in* Michigan v. Bryant. *The Court appears to have come full circle since* Crawford*:* Bryant *suggests that an out-of-court statement is admissible even absent confrontation if a multi-factor balancing test verifies its reliability. That inquiry closely resembles the* Ohio v. Roberts *framework that* Crawford *purportedly overruled, and the* Bryant *decision leaves lower courts with an open-textured analysis once again. The Court has all but held that the Confrontation Clause applies if an out-of-court statement provides the sort of evidence that implicates the Confrontation Clause. One way out of that loop might be to look more closely at the content of the right to confrontation, which the Court equates with cross examination. Focusing on the undertheorized role of cross examination itself—including the extent to which it has any potential to ensure reliability—could clarify when the right applies and address open questions about what confrontation requires as well.*

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I. INTRODUCTION

The Supreme Court's recent decisions on the Confrontation Clause focus on the admissibility of out-of-court statements, or hearsay declarations, that inculpate criminal defendants. In order to satisfy the right to confrontation, the Court has concluded that witnesses who make "testimonial" hearsay statements must be subject to cross examination. The 2004 *Crawford v. Washington*[1] decision purportedly introduced this categorical approach, but it has proven difficult to determine which statements meet the definition of "testimonial" and thus require confrontation. The shift from a construction of the confrontation right grounded in substantive reliability concerns to a focus on its procedural guarantees at first appeared marked. Yet with each iteration of *Crawford*'s meaning, the essential claims in different opinions sound increasingly similar. Despite surface distinctions, the decisions reveal underlying agreement about the epistemic aspirations of confrontation and about the sole means to achieve them: cross examination. Accordingly, as one approach to the remaining questions about the definition of testimonial, the Court might consider the potential utility of cross examination. Attention to the undertheorized question of what cross examination actually accomplishes at trial could also ensure that the right to confrontation has some force when it applies.

II. "WITNESSES AGAINST"

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[2] Although the rules of evidence exclude many statements made by out-of-court declarants, they also provide for numerous exceptions to that rule, grounded in the necessity or reliability of hearsay evidence.[3] Read literally, the Confrontation Clause would preclude any hearsay declarants from serving as "witnesses against" a criminal defendant, absent confrontation. The Confrontation Clause does not, however, impose an absolute bar to hearsay, and the Court has long recognized that some hearsay is admissible against criminal defendants.[4]

1. 541 U.S. 36, 68 (2004).
2. U.S. CONST. amend. VI.
3. *See* FED. R. EVID. 801–04.
4. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 64 (1980).

A. Overlap between the Hearsay Prohibition and the Confrontation Right

A central conflict in Confrontation Clause jurisprudence is whether the same accuracy concerns that animate the hearsay prohibition and its exceptions also provide the rationale for the Confrontation Clause, and thus help determine when the constitutional protection applies. The Court's first systematic effort to reconcile hearsay exceptions with the Confrontation Clause's requirements yielded largely coextensive treatment of the hearsay prohibition and constitutionally mandated exclusion. Beginning with *Ohio v. Roberts*[5] in 1980, the Court spent a quarter century refining the idea that the Sixth Amendment's guarantee of the right to confront witnesses applies only where the prior statement does not bear sufficient indicia of reliability.[6] Under *Roberts* and its progeny, two signals of reliability emerged: a statement's fit within a firmly rooted hearsay exception and its "particularized guarantees of trustworthiness."[7] As the Court proceeded to hold most hearsay exceptions "firmly rooted," the Confrontation Clause added little force to the hearsay prohibition.[8] Where the Court did examine the trustworthiness of a statement more broadly, it focused on the context in which the statement was produced and considered factors such as the level of spontaneity and the speaker's likely motivations.[9]

In a series of cases beginning with *Crawford v. Washington* in 2004, the Supreme Court "reconstitutionalized" the right to confrontation. Writing for the Court in *Crawford*, Justice Scalia declared reliability "an amorphous, if not entirely subjective, concept" and rejected it as a touchstone for application of the right to confrontation.[10] He later

5. *Id.*

6. *Id.* at 66; *see also* United States v. Inadi, 475 U.S. 387 (1986); Idaho v. Wright, 497 U.S. 805 (1990); White v. Illinois, 502 U.S. 346 (1992); Lilly v. Virginia, 527 U.S. 116 (1999).

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

8. Only the residual, "catch-all" hearsay exception and an accomplice's custodial confessions were excluded from the category of "firmly rooted" exceptions. *See Lilly*, 527 U.S. at 134; *Wright*, 497 U.S. at 817.

9. *See Wright*, 497 U.S. at 806.

10. Crawford v. Washington, 541 U.S. 36, 61, 67–68 (2004) (emphasizing that confrontation is a procedural right animated by concerns apart from the accuracy of the trial's outcome). The most persistent champion of the Confrontation Clause's disentanglement from hearsay doctrine has been Richard Friedman. *See, e.g.*, Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1027–29 (1998) (arguing that the confrontation right does not arise from reliability concerns); Richard D. Friedman, *The Confrontation Right Across the Systemic Divide*, *in* CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF PROFESSOR MIRJAN

amplified his objection that the *Roberts* regime allowed the Court to "create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood."[11] According to the textual and historical reasoning in *Crawford*, the confrontation right arises from the nature, rather than the quality, of the out-of-court statement. The term "witness" in the Confrontation Clause, the Court concluded, reaches any out-of-court declarant whose statement constitutes "testimony."[12] All testimonial statements, then, are barred by the Confrontation Clause unless the out-of-court declarant is present for cross examination at the criminal trial, or unavailable and subject to a prior opportunity for cross examination.[13] Although the *Crawford* Court did not define "testimonial," it explained that the term at least covered responses to police interrogations and other assertions that amount to prior testimony, including statements at a preliminary hearing, before a grand jury, or at a formal trial.[14]

B. Circularity in the Meaning of Testimonial

The stated goal of the *Crawford* decision was to fashion a more "categorical" guarantee of confrontation.[15] But the failure to put any hard edges on the meaning of "testimonial," beyond identifying the obvious substitutes for trial testimony, led almost immediately to its dilution. The Court concluded, for example, that a laboratory analyst's affidavit certifying that a substance is cocaine engages the confrontation guarantee because its sole purpose is to establish the identity of the substance in court.[16] Once courts tried to use the *Crawford* "rule" in off-brand situations that do not have labels like affidavits, however, the inquiry acquired an open texture.

Davis v. Washington,[17] decided in 2006, first exposed the lack of precision in the *Crawford* formula. In *Davis*, the Court confronted 911 calls and police questioning in the domestic violence context, endeavoring to categorize statements that do not resemble trial

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DAMAŠKA 266 (John Jackson, Máximo Langer & Peter Tillers eds., 2008) (applauding *Crawford* because it "detached the meaning of the Clause from the hearsay rule").

11. *See* Giles v. California, 554 U.S. 353, 374 (2008).
12. *Crawford*, 541 U.S. at 51.
13. *Id.* at 68.
14. *Id.*
15. *See id.* at 67–68.
16. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009).
17. 547 U.S. 813 (2006).

testimony but can inculpate defendants to the same extent.[18] The Court held that statements are testimonial when their "primary purpose" is to "establish or prove past events potentially relevant to later criminal prosecution."[19] Statements are nontestimonial when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[20]

Divining the "purpose" of a statement—as the *Michigan v. Bryant*[21] decision illustrates—ends up looking a great deal like the *Roberts* determination as to whether a statement was sufficiently reliable to forgo confrontation. *Bryant* involved statements made by a shooting victim as he lay bleeding on the pavement of a Detroit gas station.[22] Police were dispatched to the scene at 3:25 AM, and five officers responded.[23] When they arrived at the gas station, they asked the victim "what happened."[24] The victim indicated that he had been shot half an hour before, and officers summoned emergency medical assistance.[25] Meanwhile, police continued questioning him about the details of the shooting until paramedics arrived a few minutes later.[26] When they asked the victim who shot him, he named "Rick" (Bryant) as the gunman and gave officers the location of the incident, which was six blocks away.[27] The victim died shortly thereafter at a hospital, and his statements were admitted at Bryant's murder trial.[28]

Justice Sotomayor, writing for the *Bryant* majority, concluded that the statements were not a "substitute for trial testimony," but rather a response to an ongoing emergency involving a "victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim."[29] The Court asserted that it was applying an objective approach, based on the totality of the circumstances, to determine whether the victim's statement was the functional

18. *Id.* at 817–19.
19. *Id.* at 822.
20. *Id*.
21. 131 S. Ct. 1143 (2011).
22. *Id.* at 1150.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1150, 1170.
28. *Id.* at 1150.
29. *Id.* at 1156.

equivalent of testimony.[30] *Davis* also purported to articulate an objective test, yet the factors that *Davis* and *Bryant* offer the lower courts as a guide to determining whether a statement is testimonial import a high degree of subjectivity and leave judges with broad discretion. Among the considerations—many of which could point to opposite conclusions—are the nature and timing of the questions, the lapse of time between the incident described and the statement, the declarant's use of the present or past tense, the location of the encounter that produces the statement, the formality of the interrogation, whether a violent crime is at issue, whether a gun or other weapon is involved, and the physical and emotional condition of the declarant.[31]

Justice Scalia authored the *Davis* opinion, which instituted most of these factors, but vigorously dissented from *Bryant* because of an additional (and familiar) consideration that surfaced in that case: whether the statement would be admissible pursuant to the "standard rules of hearsay, designed to identify some statements as reliable."[32] That factor reintroduces the connection between the reliability principles in the hearsay rules and the scope of the Confrontation Clause right. The majority noted that the reliability-based hearsay exceptions "rest on the belief that certain statements are, by their nature, made for a purpose other than use in a prosecution and therefore should not be barred by hearsay prohibitions."[33] The Court cited, for example, the logic underlying the excited utterance exception to the hearsay rule: that one does not formulate falsehoods in a state of agitation.[34] The *Bryant* opinion also conflated the theory behind hearsay exceptions with the evolving definition of "testimonial." According to the Court's reasoning, the rationale for *Davis*'s primary-purpose test is that "the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished, [and] the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."[35]

30. *Id.*

31. *See* Davis v. Washington, 547 U.S. 813, 830–32 (2006); *Bryant*, 131 S. Ct. at 1158–59, 1162–66; *see also id.* at 1162 (the assessment of whether a statement is testimonial accounts for "all relevant circumstances").

32. *Bryant*, 131 S. Ct. at 1174.

33. *Id.* at 1157 n.9 (citing hearsay exceptions).

34. *Id.* at 1162 n.12.

35. *Id.* at 1157 n.9.

Justice Scalia's critique of the *Bryant* Court's "unprincipled" analysis has some force, but the *Bryant* decision brings several passages from *Crawford* itself to mind.[36] In *Crawford*, Justice Scalia argued that the divergent lower court opinions on the applicability of the Confrontation Clause provided a "self-contained demonstration" of the flaws in the *Roberts* framework.[37] The Supreme Court's own range of opinions in *Bryant* similarly underscores the ill-defined boundaries of testimonial statements and the mutability of the *Crawford* standard. *Bryant* conveys the sense that, in most circumstances, the factors the Court articulated could be applied in an outcome-driven way. The majority and dissenting opinions express disagreement in part about extending the *Davis* standard, but more broadly about the interpretation of the facts.[38] Looking at the same raw data, the Justices simply differed about how best to characterize the purpose of either the police questioning or the victim's statement. The multi-factor balancing test that emerges from *Davis* turns out to be every bit as discretionary as the *Roberts* scheme, and the salience of the victim's statement combined with the seriousness of the murder prosecution appear to have weighed on the majority.[39]

On the surface, *Bryant* may do little to change the *Crawford* framework, but it does highlight the shortcomings of *Crawford* and its extensions. It seems that the more effort the Court makes to clarify the meaning of "testimonial," the cloudier the picture becomes. There may be inconsistent interpretations of a declarant's intent, just as conclusions differed as to a statement's reliability. The aim of any statement is difficult to isolate and discern, whether the trial courts focus on the primary purpose of the declarant, of the statement, or of the interrogation as a whole. Indeed, the entire "emergency response" doctrine can be explained "as much as an exception to the inadmissibility of testimonial statements as a limit on the scope of the category."[40] It is simply not the case that in every emergency, "the speaker and hearer [will] be more concerned about resolving the emergency than with gathering statements for use in prosecution," or that they would have said the same thing "even if there were no

36. *Id.* at 1175 (Scalia, J., dissenting); *see* Crawford v. Washington, 541 U.S. 36, 56 (2004).

37. *Crawford*, 541 U.S. at 66.

38. *See Bryant*, 131 S. Ct. at 1170–72 (Scalia, J., dissenting).

39. *See id.* at 1170 ("If the defendant 'deserves' to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial.").

40. Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 1, 57 (2007).

prosecution forthcoming."[41] Similarly, a witness may make statements to assist criminal prosecutions that describe past, present, or future events.[42] Instead of offering real guidance and imposing meaningful limitations, those factors have become discretionary points of entry for judges assessing how valuable lost evidence—particularly the statements of now-silenced victims—would be.

Justice Scalia's own reformulation of the *Davis* test in his *Bryant* dissent focuses on the declarant's intent alone, but otherwise provides a definition of "testimonial" that is equally circular and just as likely to produce inconsistent results. A testimonial statement, he writes, is one made with "the understanding that [the statement] may be used to invoke the coercive machinery of the State against the accused."[43] According to Justice Scalia's reasoning, a purposive test differs from a reliability-based test because weaker substitutes for live testimony may or may not be reliable.[44] True, but Justice Scalia has also repeatedly said that weaker substitutes for live testimony are the appropriate focus of the Confrontation Clause precisely because it is those statements that require reliability testing.

A second Confrontation Clause decision from the October 2010 Term, *Bullcoming v. New Mexico*,[45] sounded a similar note about the aim of the testimonial category. In *Bullcoming*, the Court held that the prosecution may not introduce forensic laboratory reports through the in-court testimony of analysts who did not certify the results or personally observe the tests.[46] *Bullcoming* was in many ways an unsurprising application of the Court's holding in *Melendez-Diaz v. Massachusetts*[47]—that certificates of analysis from a state forensic laboratory are "affirmation[s] made for the purpose of establishing or proving some fact" and therefore testimonial.[48] *Bullcoming* offers further evidence, however, of both the core dispute about the significance of reliability, and the futility of resolving it through the definition of "testimonial." Although Justice Ginsburg's opinion asserts that reliability tells us nothing about whether a statement is

41. *Id.*

42. *Id.* at 56 (giving the example that "[a] speaker who tells the police his neighbor just finished selling drugs, is currently selling drugs, or will be selling drugs in one hour is offering a testimonial statement in all three instances").

43. *Bryant*, 131 S. Ct. at 1169 (Scalia, J., dissenting).

44. *Id.* at 1175.

45. 131 S. Ct. 2705 (2011).

46. *Id.* at 2713.

47. 129 S. Ct. 2527 (2009).

48. *Id.* at 2532.

testimonial, it does acknowledge that testimonial statements are those that require scrutiny of their reliability.[49] Justice Sotomayor's concurrence responds to characterizations of the *Bryant* opinion and explains that reliability remains "relevant" but is not "essential."[50] In Justice Kennedy's dissent, he objects to the Court's rejection of "reliability [as] a legitimate concern" and insists that statements could "provide sufficient indicia of reliability and other safeguards to comply with the Confrontation Clause as it should be understood."[51]

Although these formulations illustrate continuing disagreement about the role of reliability in determining *when* the Confrontation Clause applies, they uniformly cite the testing of evidence for accuracy as the reason *why* it should. There is no dispute that the Clause applies in order to ensure a certain level of epistemic competence at trial. Having demonstrated that a test focused on the purpose of the declarant can produce results as inconsistent as a reliability inquiry, the Court should perhaps begin to account for the purpose of confrontation instead. Future applications of *Crawford* could work backwards from the utility of confrontation and apply a content-driven standard to clarify the category of out-of-court statements that merit testimonial treatment.

III. "TO CONFRONT"

If the Court is to find common ground, or even maintain a stable majority for any approach to the post-*Crawford* Confrontation Clause, it may need to use a different lens to evaluate whether hearsay implicates the "Sixth Amendment's core concerns."[52] Efforts to define which hearsay declarants are "witnesses against" the defendant have not produced consistent results, and looking instead to what it means "to confront" a hearsay declarant could prove more fruitful. The Court agrees, after all, that testimonial statements are those that should be tested through a particular kind of reliability guarantee. Confrontation, Justice Scalia wrote in *Crawford*, is "the only indicium of reliability sufficient to satisfy constitutional demands."[53] Justice Scalia made a similar statement in his dissenting

49. *Bullcoming*, 131 S. Ct. at 2715.
50. *Id*. at 2720 n.1 (Sotomayor, J., concurring).
51. *Id.* at 2725, 2727 (Kennedy, J., dissenting).
52. Crawford v. Washington, 541 U.S. 36, 51 (2004).
53. *Id.* at 69.

opinion in *Maryland v. Craig*,[54] where he asserted that the Confrontation Clause "guarantees specific trial procedures that were thought to assure reliable evidence."[55] The Court has repeatedly stated that those procedures refer to cross examination of accusing witnesses.[56] As the *Bryant* Court affirmed, the "basic objective" of the Confrontation Clause is to safeguard the "opportunity to cross-examine the declarant about statements taken for use at trial."[57]

A. An Intertwined Substantive and Procedural Guarantee

This piece suggests that one way out of the interpretive difficulties with the testimonial concept might be to ask when cross examination serves the purposes of confrontation. As David Sklansky argues, inconsistencies in the Court's jurisprudence on the Confrontation Clause arise in part from the failure to consider its underlying goals and identify those cases in which applying the right can make a "functional difference."[58] In other words, in order to identify which out-of-court statements are improper substitutes for live testimony, the Court might give fuller consideration to the potential that cross examination has to test those statements in court. That idea, only briefly explored here, requires further work on implementation. It also risks running afoul of Justice Scalia's rigorous distinction between procedural and substantive guarantees of reliability.[59] There is a close relationship, however, between the procedural means and the substantive, epistemic ends.[60] Confrontation protects against

54. 497 U.S. 836 (1990).

55. *See id.* at 862.

56. *See* California v. Green, 399 U.S. 149, 158 (1970) (the appearance of a declarant who testifies at trial about the prior hearsay statement vindicates the right to confrontation, as does a prior opportunity to cross examine an unavailable declarant); *see also* Bruton v. United States, 391 U.S. 123, 137 (1968); Mattox v. United States, 156 U.S. 237, 241–42 (1895); David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1644–45 (2009) (stating that the meaning of confrontation—"cross-examination of prosecution witnesses by defense counsel in front of the jury"—has been settled for decades).

57. Michigan v. Bryant, 131 S. Ct. 1143, 1155 (2011).

58. *See* Sklansky, *supra* note 56, at 1655–56; *see also* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 49 (discussing the approach often termed "liberal originalism," which considers the harms a constitutional provision seeks to prevent and asks "how we can best be faithful to those purposes today"); *cf.* Jeffrey L. Fisher, *What Happened—and What Is Happening—To the Confrontation Clause?*, 15 J. L. & POL'Y 587, 626 (2007) ("[T]he confrontation right needs to be protected with doctrine that reflects confrontation values.").

59. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) (explaining that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner").

60. By way of contrast, the Fifth Amendment protection against compelled testimonial self-incrimination is a hybrid. Coercive interrogation techniques can produce false confessions,

abuses of government power,[61] but its specific concern is those abuses that produce inaccuracies. The "principal evil" at which the Confrontation Clause was directed, according to the Court in *Crawford*, "was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[62] The Justices may differ on the weight of potential government manipulation of evidence versus more general reliability issues,[63] but they share a "concern for the accuracy of the truth-determining process in criminal trials."[64] The "abhorrence" of *ex parte* affidavits, for example, arises from apprehension about their trustworthiness.[65] "The danger is that innocent defendants may be convicted on the basis of unreliable, untested statements by those who observed—or claimed to have observed—preparation for or commission of the crime."[66]

Given the objectives of the Confrontation Clause, courts should apply it in those cases where cross examination has the potential to reveal a declarant's calculation or error. Much of that potential can be assessed *ex ante* through the substance, rather than the circumstances, of the out-of-court statement. One problem with the test that has divided the Court is that "primary purpose"—"why" a declarant made a statement (or the purpose an investigator had in questioning her)—is not easily identified.[67] But the content of a statement—what

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but they also violate extra-epistemic values. The Fourth Amendment's prohibition on unreasonable searches and seizures is purely procedural. An illegal search may yield highly reliable evidence, such as a stash house full of narcotics, but privacy and liberty concerns nonetheless require its exclusion from trial.

61. *Crawford*, 541 U.S. at 56 n.7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."). Of course, the Court's claims about the historical origins of the Confrontation Clause are themselves contested. *See id.* at 69 (Rehnquist, C.J., concurring in the judgment) ("The Court's distinction between testimonial and nontestimonial statements, contrary to its claim, is no better rooted in history than our current doctrine."); *see also generally* Thomas Y. Davies, *What Did the Framers Know and When Did They Know It?: Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105 (2005).

62. *Crawford*, 541 U.S. at 50.

63. That distinction is apparent in the debate about whether the declarant's or the questioner's intent controls in the "primary purpose" test. *See* Transcript of Oral Argument at 24, Michigan v. Bryant, 131 S. Ct. 1143 (2011) (No. 09-150).

64. Dutton v. Evans, 400 U.S. 74, 89 (1970).

65. *See Crawford*, 541 U.S. at 48–50 (written evidence taken *ex parte* "very seldom leads to the proper discovery of the truth").

66. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2726 (2011) (Kennedy, J., dissenting).

67. *See* Davis v. Washington, 547 U.S. 813, 839 (2006) (Thomas, J., dissenting) ("[P]rimacy requires constructing a hierarchy of purpose that will rarely be present—and is not reliably discernible.").

it conveys—lies closer to the surface. That content, including the extent to which it makes or amplifies an accusation, and whether it concerns the fault or identity of a perpetrator, could help determine whether a declarant is bearing witness within the meaning of the Confrontation Clause.

B. Cross Examination in Theory and Practice

Any assessment of whether a statement lends itself to useful dissection through cross examination requires some reflection on how cross examination supposedly establishes reliability. In theory, cross examination accomplishes three things: perjury prevention, error identification, and some vindication of dignity interests. Perhaps the most consistent justification for its centrality in confrontation jurisprudence is that it prevents perjury.[68] Cross examination has been widely touted as the "greatest legal engine ever invented for the discovery of truth."[69] It is also theorized as a method for exposing errors.[70] False testimony, of course, does not always arise from outright dishonesty or even susceptibility to manipulation. The hearsay dangers include inaccurate perception, memory, or description of what occurred,[71] and adversarial questioning can detect those errors. Cross examination works as counter narrative as well; it "dramatizes for the jury not only that there are two stories to tell about most events, but also that there is always a discontinuity between any event and even the best telling of it."[72]

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68. *See, e.g.*, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2537 (2009) (stating that a forensic analyst "who provides false results may, under oath in open court, reconsider his false testimony").

69. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourne ed., 1974); *see also* Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIAMI L. REV. 1069, 1072 (1992) (discussing the primary concerns of evidence law and identifying the prevention of witness perjury as the core).

70. *See, e.g.*, *Melendez-Diaz*, 129 S. Ct. at 2537 ("Confrontation is designed to weed out not only the fraudulent analyst but the incompetent one as well.").

71. *See* Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 188 (1948) ("[C]ross examination can and does reveal . . . peculiarities in the use of language . . . [and] expose[s] faults in perception and memory."); *see also* Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1341 (1987) (accuracy is maximized if the jury has "more information about the specific circumstances affecting [the declarant's] perception and memory of the events"); *cf.* ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 19 (2009) ("The assumption underlying cross-examination is that the witness has chosen to cut into the great booming, buzzing confusion of life in a way that is consciously or unconsciously willful, that he or she has left out something important that changes the meaning of everything.").

72. BURNS, *supra* note 71, at 17.

These theories have force, but the effect of cross examination in practice is largely an "article of faith";[73] it has rarely received critical evaluation, and there is little empirical evidence on its efficacy.[74] Cross examination is basically a "blunt instrument," and only a "hit-or-miss safeguard against the truth-bending and truth-concealing effects of placing partisans in charge of the production and presentation of the evidence."[75] Even John Henry Wigmore—who gave cross examination that notorious endorsement as the "greatest engine" for discovering truth—acknowledged that it can be manipulated to create false impressions with partial truths.[76] The extant psychological studies, moreover, suggest that cross examination has only limited utility as a tool for identifying error and falsehood.[77] Criminal procedure doctrine generally has incorporated empirical data and the insights of social science at a glacial pace.[78] But the comparatively new and still-evolving right recognized in *Crawford* could be informed by current research on the function of cross examination, which suggests that

73. *See* Richard O. Lempert, *Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System*, 49 HASTINGS L.J. 343, 345 (1998) ("[T]he likely effectiveness of cross-examination in getting at the truth is seldom examined—numerous court opinions and commentaries rely on Wigmore's conclusion . . . rather than on empirical evidence.").

74. *See, e.g.*, Roger C. Park, *Adversarial Influences on the Interrogation of Trial Witnesses*, *in* ADVERSARIAL VERSUS INQUISITORIAL JUSTICE 131 (Peter J. Van Koppen & Steven D. Penrod eds., 2003).

75. JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 270 (2003).

76. JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF EVIDENCE 3 (2d ed. 1913) (cross examination, although "the most efficacious expedient ever invented for the extraction of truth," may be "almost equally powerful for the creation of false impressions"); WIGMORE, EVIDENCE IN TRIALS, *supra* note 69, § 1367, at 32 (adversaries can "make the truth appear like falsehood" and "do anything [they want] with cross examination").

77. H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 787–88 (1993) (stating that repeated experiments have documented that observing nonverbal behavior does little to reveal lying and that "we can hardly afford to ignore the cumulative conclusion, painful as it may be to some cherished assumptions of the process").

78. *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (noting the "ever-widening gap between Fourth Amendment consent jurisprudence, on the one hand, and scientific findings about the psychology of compliance and consent on the other"); *cf.* John E.B. Myers, et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS 3, 8 (2002) (the idea that "trauma momentarily stills the capacity or motivation to lie" is "unsupported by empirical evidence"). For one context in which social science and legal standards are beginning to align, consider the increasing use of hearings to determine the reliability of eyewitness identifications and instructions to jurors on the influences that heighten the risk of misidentification. *See, e.g.,* Benjamin Weiser, *In New Jersey, Rules Are Changed on Witness IDs*, N.Y. TIMES, Aug. 24, 2011, at A1. Courts have cited recent social science on mistaken identifications and empirical research documenting that eyewitness misidentifications are the leading cause of wrongful convictions. *See generally* BRANDON L. GARRETT: CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 45–83 (2011).

cross examination does less work than the Court assumes. In some cases, the opportunity to test the substance of a prior statement and compare it with in-court testimony could broadly impact reliability. In others, the observation of a live witness may serve only as a distraction.

Consistency between statements can indicate truthfulness, but it turns out that demeanor and confidence provide few cues to deception.[79] One researcher, for example, consulted judges on the standards by which jurors are asked to assess credence and found that "internal inconsistency and external contradictions" rated at the top of the scale.[80] Other experiments indicate that mock jurors can distinguish between direct testimony from eye witnesses and hearsay declarations, even without the opportunity to observe that distinction, and can weigh the evidence appropriately.[81] Moreover, recent empirical work challenges the idea that there are "universal behaviors that reveal deceit"; if liars exhibit demeanor cues, "they do so in many diverse and barely perceptible ways."[82] Nonverbal signals may actually mislead. The level of confidence and certainty that eye witnesses display, for example, enhances jurors' assessments of their credibility, but does not correlate with the accuracy of their identifications.[83] Simply put, experimental data suggests that "ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying."[84]

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79. *See* Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 335 (2004); *see also* Chris William Sanchirico, *"What Makes the Engine Go?" Cognitive Limitations and Cross-Examination*, 14 WIDENER L. REV. 507, 514–15 (2009) ("Cognitive limitations imply that the task of presenting consistent, detailed, and robust testimony draws a much heavier cognitive load for the fabricating witness than for the witness who honestly recounts her actual memories."); Aldert Vrij, et al., *Outsmarting the Liars: The Benefit of Asking Unanticipated Questions*, 33 LAW & HUM. BEHAV. 159, 164 (2009) ("[C]ompared to truth tellers, liars gave relatively inconsistent answers to the unanticipated questions.").

80. *See* Uviller, *supra* note 77, at 825.

81. *See, e.g.*, Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 691–92 (1992).

82. Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 176–77 (2011).

83. *Id.* at 157–58 (summarizing the experimental research on witness confidence); *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 80–81 (2008).

84. Olin Guy Wellborn, III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991); *id.* at 1091 ("Transcripts are probably superior to live testimony as a basis for credibility judgments because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content."); *see also* Charles F. Bond, Jr. & Bella M. DePaulo, *Individual Differences in Judging Deception: Accuracy and Bias*, 134 PSYCHOL. BULL. 477, 483 (2007) (detection of testimonial accuracy in experimental subjects was not appreciably higher

Recognizing the substantive limitations of pure presence in the courtroom might encounter some resistance, in part because there is a third dimension to cross examination: the relationship between live testimony and intrinsic interests in both solemnity and fair play.[85] Confrontation primarily addresses accuracy concerns, but it also serves to "accord[] the defendant a degree of dignity, allowing him some agency in the adjudication process and treating his input and his objections as worthy of respect."[86] There is also a popular culture of cross examination—in legal thrillers and media accounts of high-profile trials—that treats it as the central plot point in the courtroom drama. The folklore of the adversarial trial privileges resolution through conflict, and cross examination fulfills expectations for some verbal skirmishes.[87] Various cases cite this performative aspect of live confrontation.[88] In *United States v. Yates*,[89] for example, the Eleventh Circuit found live, two-way video conferencing with overseas witnesses insufficient to satisfy the Confrontation Clause because it lacked the "intangible elements of the ordeal of testifying."[90] Physical presence can serve important expressive functions, but as discussed here, the essential purposes of confrontation are analytic ones, and the substantive interaction between prior statements and current testimony produces information that speaks more directly to those concerns.

IV. EPISTEMIC COMPETENCE AND REMAINING QUESTIONS ABOUT *CRAWFORD*

While the scope of confrontation extends beyond the hearsay rules, it also makes sense to design its reach in keeping with epistemic

than what would occur by chance); Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809–10 (2002) (same).

85. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 90 (1997) (citing the fairness rationales for confrontation); *cf.* Raymond LaMagna, Note, *(Re)Constitutionalizing Confrontation: Reexamining the Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1502–05 (2006) (arguing that the right cannot be vindicated by prior opportunities for cross examination and requires live testimony).

86. Sklansky, *supra* note 58, at 52.

87. *Cf.* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 61–65 (1980) (observing that, in the legal context, "[r]ational argument is . . . comprehended and carried out in terms of war").

88. *See* Coy v. Iowa, 487 U.S. 1012, 1017–19, 1021 (1988) (characterizing the right to face-to-face confrontation as the "irreducible literal meaning of the [Confrontation] Clause" and finding a violation of that right when child witnesses who had been victims of sexual assault testified from behind a screen).

89. 438 F.3d 1307 (11th Cir. 2006) (en banc).

90. *Id.* at 1313 (internal quotation marks omitted).

values. The ideal of confrontation is to subject evidence "to a scrutiny or analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal to estimate it at no more than its actual value."[91] Evaluating statements according to the potential for assessing evidentiary worth in court would be at least as consistent as the "primary purpose" test. That test "has made it significantly more difficult to convict the guilty, without improving the chances of vindicating the innocent."[92] Before deciding whether confrontation must occur, the Court might consider whether it can accomplish anything, and what shape it could take.

To be sure, any such inquiry recalls the reliability framework, and the *Crawford* majority has resisted an express turn back to reliability. There is a difference, however, between asking whether a statement's reliability has been established through means other than confrontation—as in the *Roberts*-like analysis that Justice Scalia expressly rejected in *Crawford*[93]—and asking whether cross examination itself will contribute to reliability. Take, for example, an illustration that the *Bryant* case provides. The statement in question was the victim's identification of his assailant. Focusing on the content of the statement, rather than the question whether it "shares key characteristics with trial testimony," the statement is testimonial in the sense that it transmits "information for use in prosecution."[94] The victim, Anthony Covington, had been buying cocaine from Bryant for more than three years and had recently used cocaine when he died.[95] Although he named the perpetrator, it is unlikely that Covington actually saw him because the bullet passed through the closed backdoor of Bryant's house.[96] Furthermore, Covington identified the shooter by his voice, but gave law enforcement a physical description

91. WIGMORE, EVIDENCE IN TRIALS, *supra* note 69, at § 1360 at 1; *see also* Kentucky v. Stincer, 482 U.S. 730, 737 (1987) (cross examination is a "'functional' right designed to promote reliability in the truth-finding functions of a criminal trial").

92. Donald A. Dripps, *Controlling the Damage Done by* Crawford v. Washington*: Three Consecutive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 535 (2010); *see also* Tom Lininger, *Prosecuting Batterers After* Crawford, 91 VA. L. REV. 747, 749–50 (2005) (stating that after *Crawford*, hundreds of domestic violence cases were dismissed or lost at trial because of evidentiary problems with prior statements by recanting witnesses).

93. *See* Crawford v. Washington, 541 U.S. 36, 62 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because the defendant is obviously guilty.").

94. *See* Richard D. Friedman, *Grappling with the Meaning of Testimonial*, 71 BROOK. L. REV. 241, 248, 251 (2005).

95. People v. Bryant, 768 N.W.2d 65, 67 (Mich. 2009), *vacated*, 131 S. Ct. 1143 (2011).

96. *Id.*

that did not match Bryant's.[97] Whether he could have testified coherently and consistently under cross examination would provide some answers to obvious questions about accuracy.[98]

A content-driven evaluation of statements like these does not turn on fit with the hearsay exceptions, and it also has the potential to achieve confrontation's broader goals. Although the Court has at times disavowed any interest in whether cross examination "would actually serve a useful purpose,"[99] some decisions do contemplate the likely effectiveness of cross examination.[100] That focus, moreover, accords with Justice Scalia's reasoning that Covington's statement warranted confrontation because the exchange with police officers conveyed the same information that would have emerged from a "routine direct examination" at trial.[101] If the primary concern of the Confrontation Clause is to prevent potential government manipulation,[102] then the susceptibility of a statement to cross examination—in terms of its centrality to the prosecution's case and the likelihood that questioning will reveal the involvement of government officers in its production—ought to be another relevant factor.

Increased accounting for the capacity of cross examination also sheds light on questions about its adequacy. Appearance in the courtroom now amounts to both the minimal requirement for cross examination and a sufficiency standard. For twenty years, the Court's decision in *United States v. Owens*[103] has defined what constitutes an opportunity to cross examine a hearsay declarant who testifies at trial.

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97. *Id.*

98. *See* Sanchirico, *Cognitive Limitations*, *supra* note 79, at 512–13 (concluding that the law exploits cognitive limitations of bad actors in ways that have significantly less impact on sincere actors); *id.* at 517 ("Unlike the fabricating witness, the sincere witness is aided in providing consistent testimony by the fact that what she is relating did actually happen, and is therefore in accord with the laws of physics and chemistry.").

99. Sklansky, *supra* note 58, at 53; *see also* United States v. Owens, 484 U.S. 554, 560 (1988) ("[S]uccessful cross-examination is not the constitutional guarantee.").

100. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 63 n.1 (1987) (Blackmun, J., concurring).

101. Michigan v. Bryant, 131 S. Ct. 1143, 1171 (2011) (Scalia, J., dissenting).

102. *See, e.g.*, Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach But Not a Robust Right*, 105 MICH. L. REV., FIRST IMPRESSIONS 16, 19, 21 (2006) (noting that *Crawford* and subsequent decisions presume that the goal of confrontation is to expose governmental coercion or manipulation in the production of testimony). *But see* Randolph N. Jonakait, *The Right to Confrontation: Not a Mere Restraint on Government*, 76 MINN. L. REV. 615, 616 (1992) (preventing government abuse only partially animates the Confrontation Clause; it "operates not as a direct restraint on abusive governmental practices, but as a grant of positive rights to those charged with a crime").

103. 484 U.S. 554 (1988).

In that case, the witness—a correctional officer who had been the victim of an assault that caused traumatic head injuries—had no memory of the underlying event but professed recollection of his prior identification of the assailant while he was in the hospital.[104] The Court concluded that as long as a declarant has some memory of the circumstances surrounding the statement, that will suffice for purposes of confrontation.[105] Courts have relied on *Owens* to drop the standard still lower, deciding that witnesses with no memory of prior conversations can be cross examined effectively because the jury can observe demeanor.[106] Asserting a privilege, or otherwise refusing to testify altogether, does not afford an opportunity for cross examination,[107] but willing submission to questioning, even if the proffered answers are entirely nonresponsive, is enough.[108]

The foregoing discussion suggests, however, that the opportunity to cross examine must include questioning about the subject matter of the prior statement and not simply the making of the statement itself.[109] Even if a jury observes the demeanor and capacity of a witness at trial, it may not accurately evaluate the reliability of the prior statement in question. Although the person in the witness chair and the out-of-court declarant are one and the same, intervening events and information may have effected changes in the witness. She is different, in potentially meaningful ways, from the witness who

104. *Id.* at 556.

105. *See id.* at 559 (Stevens, J., concurring) ("[T]hat opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief.").

106. *See, e.g.*, State v. Holliday, 745 N.W.2d 556, 566 (Minn. 2008) (witness had memory loss attributed to drug use, but was nonetheless sufficiently present for cross examination); State v. Price, 146 P.3d 1183, 1192 (Wash. 2006) (child victim could not remember the incident or prior statements, but was held to be subject to cross examination because present in court).

107. *See, e.g.*, California v. Green, 399 U.S. 149, 161 (1970) (to vindicate the right to cross examination, the inquiry must be sufficient to "afford the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement"); Douglas v. Alabama, 380 U.S. 415, 419–20 (1965) (defiantly silent witness cannot be confronted); United States v. Torrez-Ortega, 184 F.3d 1128, 1132–33 (10th Cir. 1999) ("legal availability" of a hearsay declarant is insufficient); United States v. Spotted War Bonnet, 933 F.2d 1471, 1474 (8th Cir. 1991) (mere presence of a child witness does not satisfy the Confrontation Clause); United States v. DiCaro, 772 F.2d 1314, 1322–25, 1324 n.6 (7th Cir. 1985) (a "total memory lapse" with respect to both the prior statement and its contents would preclude cross examination); Barksdale v. State, 453 S.E.2d 2, 4 (Ga. 1995) (a witness who appeared in the courtroom but flatly refused to testify was not subject to cross examination).

108. *See, e.g.*, United States v. Keeter, 130 F.3d 297, 302 (7th Cir. 1997) (even feigned amnesia is not an impediment to adequate cross examination).

109. *See, e.g.*, State v. Canady, 911 P.2d 104, 115–16, 116 n.14 (Haw. Ct. App. 1996) (a witness "should be subject to cross examination about the subject matter of the prior statement" and should "be capable of testifying substantively about the event" to ensure that the statement is trustworthy).

made the earlier statement. And only when she recalls both the underlying past events, and the circumstances of speaking about them before, can the jury assess the inconsistencies and inaccuracies that might signal error and falsehood.

This conception of confrontation not only increases the likelihood of vindicating the right, but also addresses some situations in which confusion about the meaning of "testimonial" has had unintended consequences for the integrity of the evidence.[110] In certain cases, the prior statement may be considered the superior evidence. Particularly in the domestic violence context, the witness who appeared before the grand jury is often preferable, in terms of credibility, to the one refusing to testify in court. The witness, after all, is often just a prop during cross examination, with the examining lawyer providing most of the content. Indeed, various researchers have documented a truth-hindering effect of vigorous cross examination,[111] particularly with regard to the testimony of vulnerable witnesses.[112] Jurors may be better positioned to appraise the out-of-court statement because there is a higher accuracy rate for deception detection with respect to unprepared statements and unrehearsed testimony.[113] As for the jury's ability to assess potential manipulation by interrogators, subsequent cross examination may also run a distant second place to verbatim recordings of the original exchange between government agents and potential witnesses.[114] Further, an understanding of the limitations of physical presence opens up the possibility that video uplinks, satellite testimony, or closed-circuit questioning could supply meaningful confrontation. In cases that feature traumatized witnesses, substitute cross examination may offer the only possibility for confrontation.[115]

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110. *See* Sklansky, *supra* note 58, at 58–59 ("Even when a conviction can be secured without use of the victim's statements, but especially when it cannot, refusing to allow the jury to hear the victim's own words can erode the 'moral credibility' of the criminal justice system.").

111. *See, e.g.*, Tim Valentine & Katie Maras, *The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony*, 25 APPLIED COGNITIVE PSYCHOL. 554 (2011).

112. *See, e.g.*, Rachel Zajac & Harlene Hayne, *I Don't Think That's What Really Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports*, 9 J. EXPERIMENTAL PSYCHOL. APPLIED 187, 193 (2003).

113. *See* Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 227 (2006) (summarizing findings that listeners "achieve higher lie-truth detection accuracy when judging unplanned rather than planned messages").

114. *Cf.* Simon, *supra* note 82, at 182 ("Factfinders would gain much by being able to compare witnesses' courtroom testimony with the exact statements they initially gave the police.").

115. *See* Maryland v. Craig, 497 U.S. 836, 850 (1990) (holding that two-way closed-circuit video cross examination satisfied the right to confrontation because reliability was assured by

In others, the hearsay in question—if it takes a form such as a recorded deposition—affords a better opportunity to review for accuracy, consistency, and the suggestiveness or manipulability of the initial questioning.[116]

Finally, the Court continues to face questions about sufficient confrontation of expert forensic testimony. Many potential witnesses have contact with the samples submitted for forensic testing, and the Court has been assessing case-by-case which of those witnesses must be available for cross examination. In June 2011, the Court granted certiorari in *Williams v. Illinois*,[117] which raises the issue of whether an expert witness can rely on a nontestifying declarant's hearsay statements about the results of DNA testing.[118] That hearsay can be imported into an expert opinion pursuant to the rules of evidence, so long as it is a statement on which experts ordinarily would rely, and the court deems that reliance reasonable.[119] Demonstrating reliability within the meaning of the hearsay rules, however, does not fully address the constitutional concern. A content-driven assessment as to whether the absent analyst could reveal sources of bias and error under cross examination might help determine when confronting a surrogate expert is an adequate test of reliability.[120]

V. CONCLUSION

This brief contribution suggests that uncoupling confrontation from reliability has done little to clarify the scope of the confrontation right because the two concepts are inextricably intertwined. A clearer understanding of what cross examination means and does could help sort those statements that serve as substitutes for in-court testimony,

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the oath and the opportunity to observe the questioning, and the procedure avoided trauma to the witness); *see also, e.g.*, Davis v. Alaska, 415 U.S. 308, 315 (1974) (confrontation "means more than being allowed to confront the witness physically").

116. The limited utility of cross examination may also point to a broader meaning of confrontation, including access to evidence and expertise. *See, e.g.*, Sklansky, *supra* note 58, at 7 ("[T]he kind of 'confrontation' a criminal defendant needs and deserves may in many cases have little to do with excluding hearsay evidence—or, for that matter, with sitting in court and watching a witness testify, on direct and then on cross-examination.").

117. People v. Williams, 939 N.E.2d 268, 278 (Ill. 2010), *cert. granted*, 131 S. Ct. 3090 (U.S. June 28, 2011) (No. 10-8505).

118. *Id.*

119. *See* FED. R. EVID. 703.

120. *See* Jennifer L. Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington, 15 J. L. & POL'Y 791, 854–55 (2007) (surrogate testimony by qualified experts might be permissible where the original analyst is unavailable, the original testing was well documented, and retesting is not feasible).

and therefore merit in-court scrutiny. It might also lead to more comprehensive standards for the opportunity to cross examine where it is required, and recognition that some alternatives to in-court testimony can vindicate the confrontation right.