COMMENTS

READING THE TEXT OF THE CONFRONTATION CLAUSE:
"TO BE" OR NOT "TO BE"?

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INTRODUCTION

The Confrontation Clause of the Sixth Amendment reads simply. "In all criminal prosecutions," it says, "the accused shall enjoy the right . . . to be confronted with the witnesses against him." But the meaning of this facially simple language has proved elusive, leading to schisms in the Supreme Court's interpretation of the rights afforded by the Sixth Amendment.

For instance, during two of the most recent Supreme Court Terms, Justice Scalia, joined by Justice Thomas, has dissented from the denial of certiorari in cases involving the Confrontation Clause. In the first of these, Danner v. Kentucky, the defendant invoked his right "to confront his accuser" when the trial court allowed the complaining witness, defendant's fifteen-year-old daughter, to testify via closed-circuit television. A year later, Marx v. Texas involved a similar situation, in which the trial court granted a prosecution motion for a thirteen-year-old girl to testify via closed-circuit television, after hearing testimony that the girl might suffer distress from testifying in open court in the defendant's presence. As in his dissent in Mary-

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2 U.S. CONST. amend. VI.


4 Id. at 1010 (Scalia, J., dissenting from denial of certiorari).

5 Id. at 1011. Justice Scalia objected that the trial court's finding about the need to protect the child witness was based on her "vague[] protest[ations] that she could not be near" the defendant while testifying. Id. at 1010.


7 Id. at 1038. As Justice Scalia pointed out, the testimony was far from conclusive: the girl's
land v. Craig, the 1990 case that set the constitutional standard for such rulings, Justice Scalia argued that permitting a child witness to testify via closed-circuit television in order to avoid the trauma of being in the immediate presence of the defendant violated what he saw as the defendant's absolute right to the face-to-face confrontation guaranteed by the Sixth Amendment.8

Craig had condoned such proceedings, in appropriate situations, in order to balance that important Confrontation Clause right with public policy considerations that merited departing from it, primarily the State's compelling interest in protecting children.9 Writing for the majority, Justice O'Connor stated that "[t]his interpretation derives not only from the literal text of the Clause, but also from [the Court's] understanding of its historical roots."10 This more interpretative reasoning, in Justice Scalia's view, "subordinat[ed] ... explicit constitutional text to currently favored public policy"11 in an impermissible manner.

But the debate over the proper scope and reading of the Confrontation Clause has not been limited to cases involving children.12

mother testified that her daughter "could probably" testify, id. at 1036, and a doctor who had examined the girl testified that she "would probably testify okay," although she "couldn't say for sure that there would not be" distress, id. at 1037.

7 Maryland v. Craig, 497 U.S. 836 (1990) (O'Connor, J.). Craig involved closely similar facts: pursuant to a Maryland statute, a six-year-old girl was allowed to testify via closed-circuit television upon the trial court's determination "that testimony by the child victim in the courtroom [would] result in the child suffering serious emotional distress such that the child [could] not reasonably communicate." Id. at 841.

8 See Craig, 497 U.S. at 860-70 (Scalia, J., dissenting); cf. Coy v. Iowa, 487 U.S. 1012 (1988) (Scalia, J.) (holding unconstitutional a trial procedure that allowed child witnesses to testify behind a screen). In Coy, James Avery Coy was accused of sexually assaulting two thirteen-year-old girls. Over Coy's Sixth Amendment objection, the trial court approved the use, pursuant to Iowa statute, of a screen behind which the girls could testify, in view of the jury and in partial view of the defendant, but without being able to see him. Id. at 1014-15.

9 See Craig, 497 U.S. at 852-55; see also Spigarolo v. Meachum, 934 F.2d 19, 22-23 (2d Cir. 1991) (holding that a Connecticut statute allowing videotaped testimony of child witnesses in sexual abuse cases was constitutional given the State's compelling interest in protecting the children). See generally Annotation, Closed-Circuit Television Witness Examination, 61 A.L.R. 4th 1155 (Supp. 2000) (collecting and analyzing cases addressing whether closed-circuit television can be used to present the testimony of witnesses who are not physically in the courtroom).

10 Craig, 497 U.S. at 844.

11 Id. at 861 (Scalia, J., dissenting).


Commentators have noted the ease with which the *Craig* decision could be expanded to other classes of witnesses. For instance, some suggest extending the *Craig* rationale to groups such as the elderly or the disabled. Courts’ tolerance for the practice has been mixed: some have been reluctant to thus broaden the *Craig* reading; more recently, a District Court allowed testimony by two-way closed-circuit television in a criminal case by a terminally ill witness in the Federal Witness Protection program.

Another, more thoroughly analyzed line of cases implicating adults and the Confrontation Clause involves the admissibility of incriminating statements by one co-defendant against another during a joint trial. In *Bruton v. United States*, the Court held that testimony by a third party that a non-testifying defendant, Evans, had confessed to a robbery and implicated himself and a co-defendant, Bruton, violated the Confrontation Clause by precluding Bruton’s right to cross-examine the witnesses against him (i.e., Evans). This constitutional prohibition on the admission of a non-testifying defendant’s confession at a joint trial, even when edited or redacted, was repeated in subsequent cases, but led to some disagreement in 1987 in *Richardson v. Marsh*. In *Marsh*, the prosecution introduced such a confession that had been edited not only to eliminate Marsh’s name, but to eliminate any reference to her at all. Challenged on Confrontation Clause grounds, admission of the confession was nevertheless upheld because, by eliminating any reference to Marsh, it was not sufficiently
incriminating to her as to require cross-examination on her part. In dissent, however, Justice Stevens rejected this reasoning, arguing that it "demean[ed] the values protected by the Confrontation Clause." Those values, Justice Stevens suggested, required the opportunity for cross-examination even given the redacted confession, because of the possibility that the jury would use it against her in light of additional prosecution evidence. Most recently, disagreement about this line of co-defendant confession cases has led to calls both by members of the Court and by commentators for reconsideration of the Confrontation Clause jurisprudence as "both too narrow and too broad."

Interpretation of the Clause has thus been a matter of ongoing dispute, despite its "plain" text. Indeed, it is clear that despite the fact that the Clause was only minimally debated before ratification, and despite the "faded parchment" on which its history is allegedly written, it has played, and continues to play, an important role in case law concerning defendant rights, judicial discretion, and the precarious balancing of constitutional rights against developing policy innovations. In efforts to resolve such balancing issues and in light of this ongoing disagreement, numerous commentators have reviewed the history of the confrontation right from ancient times through common law and up to the present, seeking to ascertain its true meaning and intent. In the traditional view, the right to confrontation developed as an American response to procedural abuses in seventeenth-

21 Id. at 208.
22 Id. at 212 (Stevens, J., dissenting).
23 Id. at 214 (Stevens, J., dissenting).
25 Mattox v. United States, 156 U.S. 237, 243 (1895) (stating that strict textual interpretation must occasionally be influenced by public policy and the necessities of the particular case).
26 See Howard W. Gutman, Academic Determinism: The Division of the Bill of Rights, 54 S. CAL. L. REV. 295, 332 n.181 (1971) (claiming that the Confrontation Clause was only debated for five minutes before its adoption).
27 California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) (arguing that history does not clearly indicate the intended scope of the Confrontation Clause).
century English trials, typified by the trial-by-absent-accuser of Sir Walter Raleigh in 1603.  

Some commentators, however, believe that the Clause is less autonomous than the traditional account assumes, arguing instead for an “alternative” history that conjoins the Clause with other guaranteed features of an adversarial system.  

Still others have sought to apply these histories to questions of legal and social policy, such as jury instructions about demeanor evidence, prosecutor misconduct, the overlap between the Clause and the rule against hearsay, and, reflecting some of the Court’s disagreement, the accommodations made for child witnesses in child sexual abuse cases.  

\[^{29}\] E.g., Roger W. Kirst, The Procedural Dimension of Confrontation Doctrine, 66 Neb. L. Rev. 485, 490 (1987). But see infra note 71 (contrasting ordinary criminal trials to the more commonly discussed treason trials, such as that of Sir Walter Raleigh). Other commentators propose that colonists emphasized the right in response to the near-inquisitorial prosecutions of the English vice-admiralty courts that administered the Stamp Act and other customs laws. E.g., Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model, 76 Minn. L. Rev. 557, 578-80 (1992); Pollitt, supra note 28; see also infra notes 81-84 and accompanying text.  

\[^{30}\] See Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. Rev. 557, 581-82 (1988) (suggesting that the Sixth Amendment right to confrontation developed in the context of an emerging American adversarial system); see also 30 Wright & Graham, supra note 28, § 6346 n.8 and accompanying text (“[C]onfrontation did not stand alone; it was viewed as one of the incidents of trial by jury.”); Akhil Reed Amar, Foreword: Sixth Amendment First Principles, 84 Geo. L.J. 641 (1996) (suggesting that Sixth-Amendment language be read in light of the Constitution’s other, similar language). Note, however, that taking the Framers’ choices of language and emendations seriously offers one response to this line of reasoning. The Framers were clearly willing—in both open debate and in the Select Committee charged with shaping the Bill of Rights—to address and debate discretely several of the clauses included in the Sixth Amendment. See infra notes 120-37 and accompanying text. For instance, there was an enormous amount of debate about the Amendment’s vicinage requirement, but little or no debate concerning the right to confrontation or to counsel.  

\[^{31}\] See generally Blumenthal, supra note 13.  


broad, Craig-like constructions have been at the heart of arguments in favor of increasing such legal and social accommodations, seeking to balance the Clause’s intent with practical concerns, even, critics object, at the expense of a defendant’s confrontation rights. There are strong objections to these interpretations that champion a defendant’s more robust right to the face-to-face confrontation of prosecution witnesses, objections that have rested on stricter interpretations of the Clause and are allegedly based on reading the Clause literally. Justice Scalia’s review of the Clause’s history, for instance, analyzed the very etymology of the word “confront,” contending that that literal reading of the text indicates precisely what its drafters intended.

Yet such “literal” readings championing face-to-face confrontation as inviolable may, strangely enough, in fact not be based on a literal reading of the Confrontation Clause. I have discussed elsewhere the shortcomings of relying, in certain contexts, on conventional claims for the Clause’s authority, such as President Eisenhower’s address concerning his hometown of Abilene, Kansas, and Shakespeare’s language in Richard II. In this Comment I will address another gap in the interpretation of the scope and purpose of the Confrontation

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(1997) (balancing the child’s trauma against the defendant’s right to proceed pro se).
35 *See* *Maryland v. Craig*, 497 U.S. 886 (1990); *Mattox v. United States*, 156 U.S. 237, 243 (1895); *see also* articles cited *supra* note 34.
37 *Coy v. Iowa*, 487 U.S. 1012 (1988) (holding that the Confrontation Clause provides a criminal defendant the right to “confront” face-to-face the witnesses giving evidence against him at trial); *California v. Green*, 399 U.S. 149 (1970) (holding that a declarant’s out-of-court statements may only be admitted if that person is testifying as a witness and subject to full cross-examination, thus satisfying the Sixth Amendment); *see also* *White v. Illinois*, 502 U.S. 346, 364-65 (1992) (Thomas, J., concurring in part and concurring in the judgment).
38 *Coy*, 487 U.S. at 1015-20 (tracing the Clause’s lineage back to Roman law).
40 *See* Blumenthal, *supra* note 13, at 1183-85 (discussing Justice Scalia’s “literal” reading in *Coy*).
41 *Coy*, 487 U.S. at 1017-18 (“President Eisenhower once described face-to-face confrontation as part of the code of his hometown of Abilene, Kansas. In Abilene, he said, it was necessary to ‘[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry . . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.’” (citation omitted)).
42 *Id.* at 1016 (“Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: ‘Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accused freely speak . . . .’” (citation omitted)).
Clause: the neglect even by "literal" readings of its text to examine what the text actually says.

Literal readings have focused on the importance both of physically confronting witnesses, and of cross-examining them, and the apparent intent of those seeking to preserve and reify the right to do so. The Confrontation Clause, however, does not give a defendant the right to "confront" the witnesses against him, and its language and history do not suggest that this is what was intended. Rather, the Clause specifically confers the right "to be confronted with" those witnesses.

The distinction between these two phrases is fine but nevertheless important. Indeed, understanding the difference may help reconcile some of the disagreement concerning the scope and interpretation of the Confrontation Clause, especially in child sex-abuse cases such as Craig and Coy v. Iowa and in co-defendant cases such as Bruton and Lilly v. Virginia. Accordingly, this Comment will describe the slippage between the two phrases and review Supreme Court cases interpreting the Clause as affording a right to "confront." This review will illustrate how that interpretation has inaccurately led to the conclusion that cross-examination is the focal right afforded by the Clause rather than the narrower function the Confrontation Clause originally served. In doing so I will discuss the limited legislative history of the Clause and suggest that its debate and ratification reveal that narrower goal. I will trace in part the evolution of the right and its interpretations during pre- and post-Colonial periods, and its judicial and scholarly glosses since that time, illustrating where interpretation has strayed from the Clause's original purpose. I then suggest a more appropriate reading that can show how both the "literal" and "liberal" readings of the Clause are accurate to an extent and how each captures some part of what the Confrontation Clause was intended to achieve.

I. HISTORICAL BACKGROUND OF THE RIGHT TO BE CONFRONTED

In one sense, the dichotomy between the literal and liberal perspectives of the confrontation right is not so precise. The Court has

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43 Id. ("We have never doubted ... that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.")
44 5 Wigmore, Evidence § 1397(a)(1) (Chadbourn rev. 1974) (asserting that at common law the confrontation right was indistinguishable from that of cross-examination).
45 U.S. Const. amend. VI.
50 Justice Scalia in Coy did differentiate between confrontation and cross-examination, 487 U.S. at 1017, a distinction that the dissenters essentially rejected, see id. at 1028-29 (Blackmun, J., dissenting). However, his literal reading of "confrontation" equated it with the physical act of face-to-face confrontation, which was not the whole of the original intent.
indeed acknowledged that the confrontation right is not absolute and that exceptions may be allowed under certain circumstances. \(^{51}\) "Our precedents recognize a right to face-to-face confrontation at trial, but have never viewed that right as absolute." \(^{52}\) This concession stems from two sources. The first was the Court's decision in *Mattox v. United States*, \(^{53}\) in which testimony from two deceased witnesses was admitted at a defendant's retrial, because "th[o]se witnesses were present and were fully examined and cross-examined on the former trial." \(^{54}\) The second was the influential work of John Henry Wigmore, who argued that the "essential purpose" of the confrontation right was to provide for cross-examination; \(^{55}\) indeed, that "[t]here never was at common law any recognized right to ... confrontation as distinguished from cross-examination." \(^{56}\) This reading was subsequently adopted by Justice Harlan, concurring in *Dutton v. Evans*. \(^{57}\) "If one were to translate the Confrontation Clause into language in more common use today, it would read: 'In all criminal prosecutions, the accused shall enjoy the right to be present and to cross-examine the witnesses against him.'" \(^{58}\)

These two authorities (*Mattox* and the "Wigmore-Harlan" view) have laid the groundwork both for those viewing the Clause as more of a procedural right and those who interpret it less literally, as more of a substantive right, essentially equating the confrontation right with a right to cross-examine. \(^{60}\) For those who read the Clause proced-
durally, the right is one that brings accuser and accused face-to-face, in order to "confound and undo the false accuser" through cross-examination and through the effect on a witness of testifying before a defendant. Under the more substantive reading, cross-examination is again at the core of the goals of the Clause: "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." As discussed further in Part II, the Supreme Court has suggested that the purpose of confrontation is served by a confluence of its four elements: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." Of course, despite the persistence of the oath's administration to witnesses, it has been criticized in its ability to make a substantial difference in the validity of a witness's testimony. Demeanor also, though lauded as a means of evaluation, clearly can be misleading rather than helpful in evaluating whether or not a witness is lying.

Further, this "four-element" approach, focusing primarily on cross-examination, is likely not the most accurate interpretation. Confrontation was not intended to equal cross-examination, regardless of that common interpretation. Most obviously, despite Justice Harlan's translation, "it is well to remember that the authors of the sixth amendment did not provide that 'in all criminal prosecutions the accused shall enjoy the right... to cross-examine witnesses against him,' but instead selected" the broader language actually

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61 Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (Scalia,J.). Justice Scalia did not explicitly equate the Clause and cross-examination, but he did declare that face-to-face confrontation and cross-examination "serve[ ] much the same purpose." Id. at 1019-20.


63 Id. at 846; see also Ohio v. Roberts, 448 U.S. 56, 69 (1980) (stating that oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement'" (quoting California v. Green, 399 U.S. 149, 166 (1970)). This substantive or functional approach to confrontation, identifying it with cross-examination, was praised by Blackstone as well. See Shaviro, supra note 28, at 343 n.37.


65 Larkin, supra note 55, at 69-70.
used. If the Framers had intended the Clause to grant a right to cross-examination, the language that they chose was clearly inappropriate, "if only because the phrase 'be confronted with the witnesses against him' is an exceedingly strange way to express a guarantee of nothing more than cross-examination."

As a historical matter as well, the two rights were clearly viewed differently. In colonial America, for instance, the Maryland Declaration of Rights afforded the right to "be confronted with" adverse witnesses separately from the right to examine them. In a concededly less explicit example, this distinction mirrors an even older one from the early eighteenth century: in praising English over Continental criminal procedure, one English writer noted that in England, witnesses "are produced face to face and deliver their evidence in open court, the prisoner himself being present, and at liberty to cross-examine them."

Moreover, despite that "liberty to cross-examine," even in traditional English common law trials, where such cross-examination was supposedly integral to "confound[ing] and undo[ing]" a witness before the eyes of the jury, there is little evidence for the early exercise of the right. Ordinary English trials were typically brief, often with

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67 Coy v. Iowa, 487 U.S. 1012, 1018 n.2 (1987). Professor Jonakait has suggested a somewhat different interpretation, that, contrary to the traditional readings, "the Confrontation Clause . . . constitutionalized [criminal] procedures already used in the states," and that "[d]efense cross-examination was central to this." Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 124 (1995). Accordingly, for Professor Jonakait, "the Sixth Amendment sought to guarantee defense cross-examination in the Confrontation Clause." Id. Despite Professor Jonakait's thorough review, however, there seems to be stronger evidence that cross-examination was not the primary focus of the Sixth Amendment's Framers, as I discuss infra. Ironically, however, although the Court has repeatedly denied an intent to so constitutionalize rules of evidence, it has progressively moved in that direction. See infra note 189.

68 Maryland Declaration of Rights, ¶ 19 (1776) ("[I]n all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against him, . . . and to examine the witnesses for and against him on oath . . .") quoted in The Complete Bill of Rights: The Drafts, Debates, Sources, & Origins 403 (Neil H. Cogan ed., 1997).


70 Coy, 487 U.S. at 1020.

71 Professor Langbein has shown in detail that procedure at an ordinary criminal trial was different from the more commonly discussed treason trials. See John H. Langbein, The Criminal Trial Before the Lawyers, 45 U. Chi. L. Rev. 263 (1978). This is an important qualification, because the conventional account of the Confrontation Clause considers it a "reaction to the perceived injustice of the treason trial of Sir Walter Raleigh in 1603." Shaviro, supra note 28, at 341; see also, e.g., Dutton v. Evans, 400 U.S. 74, 86 n.16 (1970); Alfredo Garcia, The Sixth Amendment in Modern American Jurisprudence 73 (1992) (discussing "[w]hether the nexus between the Raleigh case and the Sixth Amendment is fact or myth"). But see Kenneth W. Graham, Jr., The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99, 100 n.4 (1972) (calling the claim that the Raleigh trial led to the Sixth Amendment a "convenient but highly romantic myth"). Where commentators look to the more conspicuous treason trials as instantiating a particular trial right, the actual development of such a right (which may be quite different) might be misrepresented.
several a day before the same jury,\textsuperscript{72} and, the records suggest, typically involved little cross-examination, even when formal witnesses were brought.\textsuperscript{73} This remained so until the late eighteenth and early nineteenth centuries; it was only over those decades that defense counsel gradually incorporated the skill of examining witnesses into their repertoire.\textsuperscript{74} In fact, by the early part of the nineteenth century, the primary function of the English defense attorney was indeed cross-examination.\textsuperscript{75} This function, however, seemed to be conceived as less of a positive right than as a palliative for the prohibition on defense counsel addressing the jury—that is, absent any other means of conveying to the jury a defendant's story, counsel was forced "either to cross-examine or do nothing."\textsuperscript{76} Moreover, because defense counsel were further constrained by not being entitled to view witness depositions, cross-examination could be a hazardous undertaking that could easily backfire: "If the witness were honest, had told all he or she knew, and would not be intimidated, then the inevitable result of the cross-examination was to reinforce the prosecution case."\textsuperscript{77} In contrast to these relatively late, qualified developments, however, the "right" to face-to-face confrontation can be traced in treason cases\textsuperscript{78} and in English statute at least back to the mid-sixteenth century,\textsuperscript{79} and perhaps as far back as the early thirteenth century.\textsuperscript{80}

A similar situation existed in colonial America immediately before the Revolution. One thread of historical analysis of the right to confrontation traces it as a reaction to the near-inquisitorial procedures of the admiralty courts in the second half of the eighteenth century.\textsuperscript{81} These procedures were in turn reactions to a growing tendency toward jury nullifications.\textsuperscript{82} With juries in colonial courts refusing to convict merchants and others caught violating what they perceived as unconstitutional laws constraining shipping, the English Parliament

\textsuperscript{72} See, e.g., Langbein, supra note 71, at 277-78 (observing that during a typical two-day session at the Old Bailey in 1678, thirty-two cases were processed to verdict, all of them full trials on pleas of not guilty); see also John H. Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900 13, 18-19 (Antonio Padoa Schioppa ed., 1987) (noting that during a single three- or four-day session, the court would conduct between fifty and one hundred felony trials).

\textsuperscript{73} Langbein, supra note 71, at 282-83.


\textsuperscript{75} See Cairns, supra note 74, at 47.

\textsuperscript{76} Id. (citation omitted). Cairns believes that this constraint of thus having to convey an accused's story to the jury through cross-examination, rather than through any direct address, may be the origin of leading questions on cross-examination. See id. at 47-48.

\textsuperscript{77} Id. at 48.

\textsuperscript{78} But cf supra note 71 and accompanying text.

\textsuperscript{79} See Friedman, supra note 69, at 1024 & n.73.

\textsuperscript{80} See infra notes 146-47 and accompanying text.

\textsuperscript{81} See, e.g., Berger, supra note 29, at 579; Pollitt, supra note 28, at 396-97.

\textsuperscript{82} Pollitt, supra note 28, at 396.
broadened the admiralty courts' jurisdiction to handle customs suits. As a result, trials were no longer before a jury but before a single judge, with the deposition being the typical means of taking testimony. According to this history, such procedures "reawakened in the colonists the need to assert what were considered to be the inalienable rights of Englishmen," including trial by jury and, presumably, the opportunity to cross-examine.

In practice, however, it is not clear that that need in fact fully awoke. In Maryland, for instance, where a right to examine adverse witnesses was explicitly granted in 1776, James Rice has documented only a slowly developing tendency in the eighteenth century for defense attorneys to actually engage in cross-examination. Even after Maryland granted that right, criminal jury trials there (as in England) were typically quite short, lasting under one hour even into the nineteenth century. The same seems to have been true in eighteenth-century Virginia. In one apparently typical County Court, the court heard ninety-seven cases of varying types over a two-day period. Similarly, at one of the most celebrated trials of the Revolutionary Era—that of the perpetrators of the so-called "Boston Massacre"—attorneys conducted little cross-examination. This was true even given pre-trial deposition of all of the witnesses, a long delay before trial to examine those depositions, and an apparently atypical stipulation that the trial take place over more than one day.

These examples illustrate the dichotomy in both English and American colonial history between cross-examination on the one hand and confrontation on the other. Contrary to the traditional equation of the two rights in Supreme Court jurisprudence, these examples help demonstrate the conclusion—reached in one of the most extensive discussions of the history of the Confrontation Clause—that even by the time of the Revolution "the relationship be-

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83 Id. at 396-97.
84 Id. at 397-98.
85 Id. at 397-98.
86 See supra note 68 and accompanying text.
88 Id.
89 CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA 1772-1804 39-40 (1987). "On the first day, this court heard twenty-eight cases, a small number . . . . On the second day, the court . . . heard sixty-nine cases . . . . This was a normal case load for one day, which indicates the small amount of time spent on each case." Id. at 40. Not all of these were full-blown trials, of course, id., but it is clear that brevity characterized those trials that did occur. Id.
90 See 30 WRIGHT & GRAHAM, supra note 28, § 6345 n.747 and accompanying text. But see Jonaitis, supra note 67, at 137-38 (arguing that Boston Massacre defense lawyers such as John Adams cross-examined witnesses).
91 See 30 WRIGHT & GRAHAM, supra note 28, § 6345 n.747 and accompanying text.
between confrontation, cross-examination, and the hearsay rule was still indistinct to the point of invisibility.\footnote{91}

II. DEVOLUTION OF THE CONFRONTATION CLAUSE
UNDER THE SUPREME COURT

This last quote evokes another commonly discussed rule designed to ensure the reliability of the testimony presented at trial, the hearsay rule.\footnote{92} Although a comprehensive discussion of the rule is beyond the scope of this Comment,\footnote{93} analysis of the hearsay rule and of the Confrontation Clause have been closely intertwined. In fact, this close relationship has in part contributed to the Supreme Court's current, arguably misleading, interpretation of the Clause.

This reading began about one hundred years ago, in \textit{Mattox v. United States}.
\footnote{94} The \textit{Mattox} holding has become a bedrock of the Supreme Court's Confrontation Clause analysis:

The primary object of the constitutional provision in question was to prevent depositions or \textit{ex parte} affidavits, . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Three years later, however, the Court spoke in language that was at least arguably more ambiguous: it held that a factual question could only be decided against an accused "by witnesses who \textit{confront} him at the trial, upon whom he can look while being tried, whom he

\footnote{91} Id. § 6346 n.12 and accompanying text.  
\footnote{94} 156 U.S. 237 (1895). The Court had addressed issues falling under the confrontation rubric previously, such as the importance of demeanor evidence leading to appellate deference to the trial court regarding witness credibility. \textit{See}, e.g., \textit{Sparf v. United States}, 156 U.S. 51, 75 (1895) (noting that the jury's opportunity to see witnesses' demeanor affords assistance in weighing evidence); \textit{The Quickstep}, 76 U.S. (9 Wall.) 665, 669 (1869) (stating that the trial court is best able to reconcile differences in witnesses' testimony based on opportunity to "observe their demeanor, and compare their degree of intelligence").  
is entitled to cross-examine, and whose testimony he may impeach....

The Court had little cause to revisit Confrontation Clause issues until the 1960's, when the Clause was held applicable to the States through the Fourteenth Amendment in *Pointer v. Texas.* That same year saw the birth pangs of disagreement about the scope of the right(s) that the Clause affords: although some readings of *Mattox* may have implied that both physical confrontation and cross-examination were fundamental to satisfying the Clause, the Court argued over whether either was truly indispensable and which was more important.

Both won. Exceptions to the absolute right of physical confrontation were sanctioned; but physical confrontation where possible was considered crucial to the Confrontation Clause in order to enable cross-examination. The two rights thus became conflated in the Court's subsequent analysis, because physical confrontation was seen as a means of ensuring cross-examination, the "greatest legal engine ever invented for the discovery of truth." This trend, and the conflation of the Confrontation Clause with the hearsay rule, continued in subsequent Supreme Court cases. In 1980, the Court in *Ohio v. Roberts* combined the two explicitly, establishing a two-prong test for the application of the Confrontation Clause when hearsay evidence is proposed. The test focused explicitly on hearsay values or criteria—unavailability of the declarant and

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96 Kirby v. United States, 174 U.S. 47, 55 (1899) (emphasis added). The Court's statements are "ambiguous" because they use both justifications ("confront" and "cross-examine") and could thus mean that the two were not equated. Further, it is not clear whether what is in fact meant is "confront" or "be confronted," and thus whether either was seen as equal or unequal to cross-examination.

97 380 U.S. 400, 406 (1965) (holding that the "confrontation guarantee...is to be enforced against the States under the Fourteenth Amendment" (internal quotation marks and citation omitted)).

98 Compare *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (taking the *Mattox* and *Craig* approach and stating that "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation"), *with California v. Green*, 399 U.S. 149, 157 (1970) ("[T]his literal right to 'confront' the witness at the time of trial [forms] the core of the values furthered by the Confrontation Clause."). Compare also Justice Harlan's concurring opinion in *Green*, id. at 172 (Clause satisfied without physical confrontation), with Justice Brennan's dissenting opinion in the same case, id. at 189 (Clause requires physical confrontation at trial).

99 WIGMORE, supra note 44, § 1367 at 32. Cf *Peters v. Hobby*, 349 U.S. 331, 351 (1955) (Douglas, J., concurring) (arguing that confrontation and cross-examination are essential, because "[u]nder cross-examination [witnesses'] stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory").

100 448 U.S. 56 (1980).

101 Id. at 65.
indicia of reliability. In its most explicit conflation of the two rights, the Roberts Court noted that testimony can satisfy the Clause’s "reliability" safeguards, “where the evidence falls within a firmly rooted hearsay exception.” Under Roberts, then, “hearsay falling within a traditional or ‘firmly rooted’ exception to the [hearsay] rule will be admissible under the Confrontation Clause.” Accordingly, the Roberts Court laid down the proposition described above: actual face-to-face confrontation is not the focal right; rather, oath, cross-examination, and demeanor provide “all that the Sixth Amendment demands: ‘substantial compliance with the purposes behind the confrontation requirement.’” This trend continued through the 1980’s, with a departure from the focus on physical confrontation and an assumption that, as with the hearsay rule, the reliability of the testimony was the object of the confrontation right. Accordingly, the Roberts hearsay factors were the focus of that right.

Finally, the end of the 1980’s brought the tension discussed above between Coy v. Iowa and Maryland v. Craig, focusing again on whether the procedural or the substantive aspect of the confrontation right was paramount, and placing the issue squarely in the context of child sex abuse cases. Again, however, each decision focused on the importance of one of the two interpretations of the confrontation right: affording the opportunity to test the reliability of the witness by cross-examination and by observation of his or her demeanor.

Despite this jurisprudence, I suggest here that as a matter of text and history, the right to confrontation implicates something different from the hearsay rule, different from the opportunity for cross-examination—indeed, different from the opportunity to test the reliability of witnesses’ testimony before a jury.

What then does the right entail? A more detailed examination, focusing on perhaps under-appreciated aspects of the Clause’s text and history, may help resolve its scope and meaning.

104 Id.
105 Id. at 66.
106 2 McCormick on Evidence, supra note 93, § 252, at 128.
107 Roberts, 448 U.S. at 69 (citation omitted).
108 See Lee v. Illinois, 476 U.S. 530, 540 (1986) (stating that the Clause serves symbolic goals and promotes reliability); Kentucky v. Stincer, 482 U.S. 730 (1987) (stating that rights under the Clause are aimed at ensuring reliability at criminal trials). But see 30A Wright & Graham, supra note 28, § 6361, at 776 & n.73 (citing approvingly a law review note that "helps to differentiate the hearsay rule from the right of confrontation because the latter is concerned with more than merely the reliability of evidence used to prove guilt").
109 See supra notes 9-12 and accompanying text.
112 Cf. Kay v. United States, 255 F.2d 476, 480 (4th Cir. 1958) (stating that the Clause was intended “to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule”).
113 See supra notes 66-91 and accompanying text; infra notes 138-73 and accompanying text.
III. READING THE TEXT, STUDYING THE HISTORY

A. Textual Origins of the Right to be Confronted

A number of developments suggest a different, perhaps narrower, characterization of the Confrontation Clause. One factor, mentioned above, is the obvious, but consistently ignored, fact that the Clause is drafted in the passive voice—the right granted is “to be confronted,” not “to confront.” Most discussions in case law and by commentators transpose or conflate these terms without explanation, with the natural result that the right is discussed in terms of a defendant’s active role in confronting, or examining, adverse witnesses.

Yet there is every reason to believe that the Framers’ choice of terms was quite deliberate. For instance, the alternative formulation is present in the first State Constitution to be ratified, that of North Carolina. The Declaration of Rights in that State’s Constitution granted every criminal defendant the right “to confront the accusers and witnesses with other testimony.” Noteworthy is that not only is the language chosen there in the active voice, but the Declaration also grants a defendant the right to confront adverse witnesses “with other testimony”—i.e., the right, essentially, to cross-examine them in order to impeach. Similarly, a more explicit right of physical confrontation, the right to meet an accuser or witness “face to face,” was granted in the Bills of Rights of at least two States. Although both of these constructions were available to the drafters of the Bill of Rights, they chose neither.

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114 See, e.g., Coy v. Iowa, 487 U.S. 1012 (1988) (holding that the Confrontation Clause provides criminal defendants the right to confront adverse witnesses); California v. Green, 399 U.S. 149, 157 (1970) (discussing the right to confront the witness at trial).
115 For a notable exception, see Friedman, supra note 69, at 1036 (noting the passive voice).
116 FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 22 (1951) (emphasis added). See also Maryland’s proposal in reaction to the initially drafted Federal Constitution, affording a criminal defendant the right “to be confronted with the witnesses against him but adding a separate right to examine the witnesses for and against him,” supra note 68.
117 See HELLER, supra note 116, at 22.
118 Massachusetts and New Hampshire. See infra note 160.
119 Another, perhaps, less definitive textual argument is that the Clause entitles a defendant to be “confronted with” the witnesses against him, rather than “confronted by” them. The latter, perhaps reminiscent of the ancient, even more literal “confrontations” of trial by battle, might suggest a literal face-to-face confrontation. The former, however, might suggest having witnesses present in court to give their testimony—i.e., the point is to produce the witnesses and their testimony. This could as easily be done by affidavit or deposition, simply having the defendant “confronted with” the witnesses’ testimony. See, e.g., Herrmann & Speer, supra note 28, at 543-44 (the goals of “respond[ing] to a witness’s testimony and [having] questions put to the witness . . . could have been achieved simply by providing the defendant with the names of the witnesses against him and their statements”). For that reason the Clause specifies being confronted with the witnesses. See the discussion of the term “witnesses against” infra note 134 and accompanying text.
Additional textual evidence about the intent of the Clause’s drafters stems from its scant legislative history. During the First Congressional Congress, James Madison organized the development of the constitutional amendments proposed by the various States that would eventually become the Bill of Rights.\(^\text{120}\) On June 8, 1789, Madison submitted his proposed amendments to the House of Representatives; of the nine submitted, one, later to be adopted (with only two changes) as the Sixth Amendment, read as follows:\(^\text{121}\)

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, [by an impartial jury of the State and district wherein the crime shall have been committed:] and to be informed of the nature and cause of the accusation; to be confronted with his accuser(s) and with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

On July 21 the proposed amendments were passed off to a select Committee of Eleven, comprised of one member from each State.\(^\text{122}\) Although this group completed its work within one week, discussion of the amendments was tabled. On August 18, Madison spoke with “anxiety” in favor of finally discussing the proposals, and debate began. On August 17 and 18 the House of Representatives considered, among others, the above proposal. Most debate centered around the vicinage requirement, focusing on allowing a defendant to be tried where the offense was committed. The change relevant to the current discussion was that the language securing a defendant’s right to be confronted with his accuser(s) was deleted by the Committee.\(^\text{123}\) On August 20 this slightly altered amendment was passed, and on August 24 was sent to the Senate for its approval. There is no indication that this latter body suggested further changes regarding the confrontation language,\(^\text{124}\) and in its present form the amendment was submitted for the States’ ratification.

The Clause, then, was in fact substantively edited during its ratification. Historical sources, however, give no indication at whose behest the deletion was made and provide no records of this Commit-

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\(^{120}\) \text{Heller, supra note 116, at 28.}
\(^{121}\) Bracketed text was added during the amendment’s ratification; struck-out text was removed.

\(^{122}\) \text{1 Annals of Cong. 452 (Joseph Gales ed., 1789).}

\(^{123}\) \text{Heller, supra note 116, at 30.}

\(^{124}\) \text{1 Annals of Cong., supra note 122, at 784-789.}

\(^{125}\) Professor Heller notes that Senator William Maclay (Pennsylvania), “whose journal is the principal source of information on the proceedings of the Senate in the First Congress, was ill during the period the amendments were debated in the Senate, and hence we are without knowledge of the Senate’s action on, and individual senators’ reaction to, the proposed amendments.” Heller, supra note 116, at 31-32 (internal footnote omitted). Although individual senators may have discussed the text, the Senate did not formally suggest changes in the Confrontation Clause language before sending the amendments back to the House.
Nevertheless, several potential explanations for the deletion may give some idea of the Committee members’ intent.

First, the deletion might have been accidental; perhaps in the Committee’s recopying and redrafting, the words were inadvertently omitted. This explanation does not seem credible; as the timeline sketched above suggests, there was ample time and opportunity to correct such an oversight.

Second, the Clause may have been intended explicitly not to apply to “accusers,” only to adverse “witnesses.” The distinction in fact raises one of the ongoing discussions by the Supreme Court and by commentators about the precise scope of the term “witnesses.” If, as some suggest, the two terms were historically distinct, then the emendation could reflect approval of either the sixteenth- and early seventeenth-century English practice of distinguishing the “accusing witness” (required to testify under oath) from other witnesses (who did not), or of the older tradition of identifying a definite person (i.e., other than the State) who brought suit against a defendant. Given Colonists’ distaste of common law English criminal procedure, however, these distinctions seem implausible as well.

Finally, the words may have simply been seen as redundant; the Committee may have believed that the right to be confronted with an accuser was already present, presumably elsewhere in the Sixth Amendment. If so, this redundancy was most likely located either in the phrase “to be informed of the cause and nature of the accusation” (i.e., a reading that some form of notice of the charge or of the indictment itself might satisfy the right), or in the phrase under discussion, “witnesses against him.” This latter gloss is in fact the most common reading. “Witnesses against,” though with some debate, generally has been taken to comprise both in-court testimony as

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126 See Heller, supra note 116, at 33; see also E-mail from Charlene Bickford, Director, First Federal Congress Project, to Jeremy Blumenthal (May 7, 1998, 17:27:53 EDT) (on file with author) (“Unfortunately there are no records from the [Select Committee] meetings . . . .”).


128 See 30 Wright & Graham, supra note 28, § 6343, at 326; id. § 6347, at 764 & n.801.

129 See id. § 6343, at 323. Despite a historical distinction, of course, the terms’ meanings may have coalesced by Colonial times, which would suggest an explanation closer to the redundancy approach discussed next.

130 See Leonard W. Levy, Origins of the Fifth Amendment 7 (1968) (noting the Norman custom requiring “a definite and known accuser, some private person who brought formal suit and openly confronted his antagonist”).

131 See, e.g., Jonakait, supra note 67, at 110-11 (suggesting that Revolutionary times brought strong Colonial aversions to many English institutions, including the reliance on the common law).

132 See, e.g., Mosteller, supra note 28, at 748 n.277.

133 U.S. Const. amend. VI.
well as "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." A final, perhaps less explicit, suggestion that "accusers" and "witnesses" were not seen as explicitly distinct comes again from the minimal ratification debates: a change was proposed to the language of the Sixth Amendment that no criminal prosecution could be had by way of "information." The proposal was deferred, and then the next day defeated, apparently on the grounds that the existing text already provided such protection.

B. Historical Elements of the Right to be Confronted

As the preceding section suggests, both the text of the Clause and some of the scant background of its ratification indicate that its drafters were motivated by something distinct from the right to cross-examine. But it seems evident, as well, that they intended something more than the literal, procedural face-to-face confrontation. The history before the ratification of the Bill of Rights, therefore, may also give a sense of what was intended by those who incorporated the right into the various State Constitutions, as well as by those who initially reacted to the ratified federal Constitution.

A helpful starting point is, surprisingly enough, medieval times. In an excellent historical review, Professor Frank Herrmann and Brownlow Speer have meticulously traced the existence of a right to confrontation from ancient Roman law through the Middle Ages. They describe two more or less parallel threads of a confrontation right: the opportunity for a defendant to be present at his trial and the "right to have accusing witnesses physically produced." Although at times they conflate the two to some extent, they do identify what I suggest is the primary focus of the confrontation right: ensuring that an adverse witness be brought into court to prove the validity of his testimony. This testing of the validity of the evidence (i.e., as-

134 White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment). Professor Friedman would use as a heuristic to determine whether evidence falls under this phrase for Confrontation Clause purposes whether it is formally "testimonial," i.e., intended to be used against a defendant at trial. Friedman, supra note 69, at 1025-26.

135 See CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 190 (Helen E. Veit et al. eds., 1991) (quoting proposed amendment by Mr. Burke).

136 Id. (quoting response by Mr. Hartley).

137 Id. See THE COMPLETE BILL OF RIGHTS, supra note 68, at 390.

138 Of course, this is not surprising to some who trace the history of the Confrontation Clause back even further, to Biblical and Roman origins. See, e.g., Coy v. Iowa, 487 U.S. 1012, 1015-16 (1988) (asserting that Roman custom dictated that a man could not be put to death without having first faced his accuser).


140 See Herrmann & Speer, supra note 28, at 483.
certaining that a particular witness and his testimony exist and that
the witness actually testifies to that which is adverse to a defendant),
as distinct from its reliability (i.e., the witness's credibility or the weight
to be accorded his testimony), actually was captured in medieval
times by precisely the words in question, "be confronted," rather than
"confront." Specifically, in fourteenth-century heresy trials, where
witnesses were typically interrogated secretly and there was little if any
opportunity for any kind of cross-examination, an Inquisitor's "hand-
book" nevertheless instructed that where inquisitors suspected that a
witness was testifying falsely against an accused, "they should arrange
for the accused to 'be confronted' (confrontari) with the suspected
false witness." 1

Note that the traditional reading of the Confrontation Clause re-

ducts this approach, but only in part. As described above, confronta-
tion analysis has historically relied heavily on the early Mattox lan-
guage. 14 Such analysis sees face-to-face confrontation as ensuring a
right of cross-examination. 14 However, as sketched above, this tradi-
tional gloss focuses too much on cross-examination. A better inter-
pretation of the Clause would have ended the Mattox language after
"prisoner," and the Dowdell language after "ex parte affidavits." 15

Such an interpretation would also better conform to the English
statutory (and sporadic common law) protections that afforded a
right to some form of confrontation. The confrontation right in this
sense, ensuring an accusation's validity, may reach back even to

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1 Id. at 536.
14 Continental procedure concerning hearsay—concerning the reliability of testimony—did
exist in medieval times. See generally Herrmann, supra note 139. However, the rules against
hearsay gradually became lax across the thirteenth, fourteenth, and fifteenth centuries, as they
increasingly became subject to judicial discretion and abuse. See, e.g., Jeremy A. Blumenthal,
Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern
Perspective, 13 PACE INT'L L. REV. (forthcoming May 2001). More important, the extent to which
Romano-Canonical procedure of the medieval period in fact influenced developing English
customary law remains unclear. See, e.g., Barbara J. Shapiro, "Beyond Reasonable Doubt" and
"Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence 193-
200 (1991) (noting the difficulty of tracing the influence of European hearsay procedure on
English procedure).
15 See supra note 95 and accompanying text.
14 See supra Introduction.
15 "The primary object of the constitutional provision in question was to prevent depositions
or ex parte affidavits, ... being used against the prisoner ...." Mattox v. United States, 156
U.S. 297, 316 (1895). The Confrontation Clause was "intended to prevent the conviction of the
accused upon depositions or ex parte affidavits." Dowdell v. United States, 221 U.S. 325, 330
(1911).

There is no question but that the opportunity to cross-examine is a right of paramount impor-
tance, see infra notes 181-84, and when it does "confound the false accuser," it does serve to test
the reliability of evidence. But it is not the right that the Confrontation Clause was designed to
protect.
Magna Carta in 1215.¹⁴⁶ Chapter 38 prohibits an officer (a “bailiff”) from putting “any man on trial upon his simple accusation without producing credible witnesses to the truth thereof”¹⁴⁷—that is, without producing a valid accuser or witness. If one credits this language as representative of the confrontation right, one must question the nexus between the Confrontation Clause and the cross-examination and hearsay rules to the extent that these two rules stem from a desire to guard against an impressionable jury. At this time, the jury as trier of fact (i.e., rather than as a body of witnesses with knowledge of the events in question) was in its infancy.

Next, in 1554, Parliament enacted a law that prescribed, in part, that any adverse witness “shall, if living, and within the Realm, be brought forth in Person before the party arraigned if he require the same, and ... say openly in his Hearing, what they or any of them can against him.”¹⁴⁸ Just four years later, a similar Act was passed which in part required that “no [person] shall be hereafter indicted or arraigned for any offences [under] this act, unless [the accusing witnesses] shall be brought forth in person face to face before the party to be arraigned.”¹⁴⁹ As Raleigh's subsequent trial indicated, however, Parliament's effort to afford that confrontation right was soon defeated by judges hostile to the idea.¹⁵⁰ In the mid-1600's, for instance, John Lilburne was repeatedly tried for publishing treasonous writings, and repeatedly he argued that “due process of the law [required that] I and my accusers come face to face ... before an ordinary magistrate [to see whether] they had any thing to lay to my charge.”¹⁵¹ Later, at Sir John Fenwick's 1696 trial for high treason, he argued that “[o]ur law requires persons to appear and give their testimony 'viva voce,'”¹⁵² though he too alluded to demeanor and cross-examination as important tests of witness credibility and evidence re-

¹⁴⁶ See Pollitt, supra note 28, at 384-87 (suggesting that confrontation in some form was recognized in England well before the right to jury trial).
¹⁴⁷ See The Essential Bill of Rights: Original Arguments and Fundamental Documents 14 (Gordon Lloyd & Margie Lloyd eds., 1998) (noting the “essential” right of a man not to be put on trial without the production of “credible witnesses”).
¹⁴⁸ 1 & 2 Philip and Mary, ch. 10 (1554), quoted in Blumenthal, supra note 13, at 1177. Note that the strictest of textual readings of this statute would in turn defeat the claim of face-to-face confrontation as the core of the confrontation right—it implies that a defendant need only hear the adverse witness. Thus, for instance, under a literal reading of this Act the Coy screen would be approved.
¹⁴⁹ The Supremacy Act, 1 Eliz., ch. 1, § 37 (1558), quoted in 30 Wright & Graham, supra note 28, § 6342 n. 274.
¹⁵⁰ See 30 Wright & Graham, supra note 28, § 6342, at 228; cf. Wigmore, supra note 93, at 449 (mid-sixteenth-century efforts at statutory grant of confrontation right "remained by judicial construction a dead letter").
¹⁵¹ See also Pollitt, supra note 28, at 389-90. Although Lilburne was acquitted, it was not due to any violation of this right. Moreover, he was also denied cross-examination, 30 Wright & Graham, supra note 28, § 6343 n.404 and accompanying text; again, the two rights were perceived as distinct, despite the "Wigmore-Harlan" interpretation.
¹⁵² Fenwick’s Trial, 13 How. St. Tr. 537, 591-92 (1696), quoted in Blumenthal, supra note 13, at 1178.
Focus on the confrontation right preceded caution about ensuring cross-examination, and such focus certainly preceded the development of a rule guarding against derivative evidence in general and against hearsay in particular. Research continues to develop that despite some concern throughout Continental history about hearsay evidence, the rule against hearsay emerged only slowly in Anglo-American legal practice. Professor Gallanis, for instance, has recently documented this slow evolution, suggesting that the rule only took its fully modern shape in English trial practice in the last twenty years of the eighteenth century. Early Colonial history demonstrates a similar concern for ensuring the validity of testimony and accusations in the first place, before questions about reliability arose. At about the same time that Lil-

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155 See Blumenthal, supra note 13, at 1178.
154 Herrmann, supra note 139; see also Blumenthal, supra note 142.
156 Id. at 534-35. "By the close of the eighteenth century . . . the contours of the modern rule against hearsay were largely in place." Id. at 535. It is also important in this context to note that the rationale for the hearsay rule was in flux at this time—according to Professor Gallanis, it was not until 1791 that the "modern" concern about the absence of cross-examination appeared. Instead, for earlier scholars the reliability of derivative evidence was questioned because the testimony was not given under oath. Id. at 533 (citing eighteenth-century treatises on evidence). Even so, cross-examination was seen by the English public, at least, as an "entangle[ment]," as a means of "confusing what is clear, and involving what is simple," id. at 546, 540 n. 298.

Tension exists between Professor Gallanis's discussion and the history traced in Wigmore, supra note 93 (though the samples of cases they examined, of course, were different). Wigmore documents cases from the 1600's and 1700's in which hearsay evidence—statements by extra-judicial speakers about evidence in the case—was at times excluded. In contrast to Gallanis, Wigmore suggests that it was "between 1675 and 1690 that the fixing of the [rule against hearsay] takes place," id. at 445, and that by the "early 1700's" the reason for excluding hearsay was the absence of cross-examination, id. at 448. Wigmore further proposes that Parliamentary debates about hearsay during Fenwick's trial "must have burned into the general consciousness the vital importance of . . . cross-examination." Id. at 455. Noting the quotes adduced by Gallanis, supra note 155, as well as the discussion supra notes 70-77 and accompanying text, Wigmore's claim seems overly optimistic. In any case, although Wigmore's article is not cited, Gallanis certainly acknowledges the challenge in his history of Wigmore's standard account. Gallanis, supra note 155, at 505, 516.

For another useful discussion of this hearsay history and of cases from both equity and law in the sixteenth through eighteenth centuries, see Michael R.T. MacNair, The Law of Proof in Early Modern Equity 258-62 (1999).

157 Professor Gallanis's evidence about the slow development of the hearsay rule in English trial practice is interesting to juxtapose with other evidence discussed here. First, his account is another useful example of a potential distinction between ordinary trials and the more commonly analyzed, higher-profile treason cases. See supra note 71. Second, it is useful to compare English practice with American practice of the same time. For instance, hearsay was referred to in eighteenth-century American appellate case law at about the same time as Professor Gallanis states that trial objections were developing in English practice, Gallanis, supra note 155, at 540. See, e.g., Hollingsworth v. Leiper, 1 U.S. (1 Dall.) 161 (1786); Strickland's Lessee v. Poole, 1 U.S. (1 Dall.) 14 (1765); Albertson v. Robeson, 1 U.S. (1 Dall.) 9 (1764). As noted above, however, in practice it is not clear to what extent American trial procedure in fact served to guard against any perceived deficiencies in derivative evidence. See supra notes 81-90 and accompanying text.
burne was being tried in England, colonists were developing their own reactions to English criminal procedure and to those royal Governors in the Colonies who represented that country. Virginia colonists, for instance, complained in 1624 of their Governor, who not only encouraged trials "without giving the accused person any opportunity of knowing his accusation or accuser," but also pursued accusations of his own choosing "while the person accused is not admitted to be confronted with, or defend against his defamers." Analagous concerns about royal Governors, and/or about ensuring some right to know one's accusers, were expressed in seventeenth-century Massachusetts, Connecticut, New Jersey, and Pennsylvania.

Similarly, such concerns found their way into most of the State Charters and Bills of Rights that States drafted in the seventeenth and eighteenth centuries. But the murkness of the Clause's historical development is present here as well: many historians agree that in sifting and reworking the amendments from the State Constitutions and the hundreds of State proposals reacting to the Federal Constitution, James Madison was influenced most by the Declaration of Rights of his home state, Virginia. When he drafted the Confrontation Clause, however, Madison did not use Virginian author George Mason's language; indeed, his proposed language was more of an amalgam of many State proposals, coming closest to those of New York and Maryland.

The important point is that despite the many available models referring to face-to-face confrontation of witnesses, to the examination of witnesses, and to a related right to "confront" witnesses, the language ultimately selected, "to be confronted with," most closely reflects a preference for ensuring the validity of an accusation or a witness's testimony; other procedural rights as well as rules of evidence were developing—albeit slowly—to ensure the reliability of such testimony.

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158 Pollitt, supra note 28, at 391. Note not only the wording of the right sought to be recovered, but its separation from the right of examination.
159 Id. at 391-95; see also THE COMPLETE BILL OF RIGHTS, supra note 68, at 402-13 (collecting language from State Constitutions).
160 See 30 WRIGHT & GRAHAM, supra note 28, § 6346, at 611-12 (Virginia: "to be confronted with the accusers and witnesses;" North Carolina: "to confront the accusers and witnesses with other testimony;" Delaware: "to be confronted with the accusers or witnesses;" Pennsylvania and Vermont: "to be confronted with the witnesses against him;" Maryland: "to be confronted with the witnesses against him;" Massachusetts and New Hampshire: "to meet the witnesses against him face to face").
161 See id. § 6347, at 760-61.
162 The language of New York's proposal was "to be confronted with his accusers and the witnesses against him," id. § 6347, at 761, and this language was ultimately proposed to the Select Committee, see supra note 122. For Maryland's form of the confrontation right, see supra note 68.
163 See Gallanis, supra note 155.
C. The Concurrence in White v. Illinois

Finally, a focus on the validity/reliability distinction reflects a tension in one of the Court's most recent Confrontation Clause cases, White v. Illinois, where the Court rejected a historical reading with some similarity to the validity/reliability approach. At issue was testimony by several adult witnesses concerning a four-year-old victim's out-of-court statements to them about the defendant's actions. The child's mother was allowed to testify that shortly after the assault, the child told her that the defendant "had choked and threatened her." Similarly, the police officer who responded to the mother's call was allowed to testify to his interview with the child, and various medical personnel who examined the child were also allowed to testify to her statements to them. The child, however, did not testify at trial.

The Court rejected a historical reading suggested by the United States as amicus curiae, that,

the Confrontation Clause's limited purpose is to prevent a particular abuse common in 16th- and 17th-century England: prosecuting a defendant through the presentation of ex parte affidavits, without the affiants ever being produced at trial. Because [the child's] statements do not fit this description, the United States suggests that [she] is not a "witness against" [the defendant] within the meaning of the Clause.

The Court considered this approach too narrow a reading of the Confrontation Clause, as it would "eliminate its role in restricting the admission of hearsay testimony," and as such the argument came "too late in the day to warrant reexamination of the approach" to the Clause previously taken by the Court.

In his concurrence, Justice Thomas questioned whether this need be so. Consistent with the discussion here, Justice Thomas suggested that the White Court's approach may have "unnecessarily . . . complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence." In particular, he noted that the reading suggested by the United States (and by this Comment) may in fact better reflect the text and history of the Confrontation Clause; otherwise, the rights afforded by the Clause take the contours of the hearsay rule and little else.

Justice Thomas is correct that the Court's line of Confrontation Clause interpretation this century has focused too closely on the

165 Id. at 349.
166 Id. at 349-50.
167 Id. at 352.
168 Id. at 352-53.
169 Id. at 358 (Thomas, J., concurring in part and concurring in the judgment). Justice Scalia joined in the concurrence. Id.
170 Id. at 364-66 (Thomas, J., concurring in part and concurring in the judgment).
nexus between the Clause and the hearsay rule, a nexus that is perhaps more attenuated than has been assumed. The fact that a more accurate historical reading would reduce the Confrontation Clause's role in restricting the admissibility of hearsay testimony is not a significant criticism, and is hardly a fatal flaw. Despite claims as to their similar focus, the Confrontation Clause and the hearsay rule have distinct purposes and histories.

Justice Thomas's interpretation is inaccurate, however, in his assumption that "the text of the Sixth Amendment supports the Wigmore-Harlan view," i.e., that the Confrontation Clause rights bottom themselves on the opportunity for cross-examination. My approach thus agrees with the problems that Justice Thomas, and more recently Justice Breyer, identified in the Court's Confrontation Clause jurisprudence, but disagrees with his reasoning as to why. Neither cross-examination nor the hearsay rule is the basis for the right to confrontation. Both focus on the reliability of testimony; the Clause was designed to ensure its validity.

CONCLUSION

I have suggested, based on the text and the history of the Confrontation Clause, that the Supreme Court's current equation of the confrontation right with either precluding hearsay and/or ensuring cross-examination (i.e., testing the reliability of the evidence), or with simple face-to-face, physical confrontation, departs from the history, scope, and original intent of the Clause. That intent was more focused: based on the historical abuses that its Drafters wanted to protect against, they designed the Clause to ensure that valid testimony (accusations in particular) was the only means of convicting a defendant. Again, in the language I have used, its Framers' intent was to ensure the validity of adverse witnesses' testimony, rather than its reliability.

171 See id. at 356 ("[W]here proffered hearsay [fits] within a firmly rooted exception to hearsay rule, the Confrontation Clause is satisfied."); California v. Green, 399 U.S. 149, 155 (1970) (observing that "it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values").

172 Justice Thomas pointed out that the Court "has never explored the historical evidence on this point," White, 502 U.S. at 362 (Thomas, J., concurring in part and concurring in the judgment). The Court has, of course, but its historical readings have been problematic, due to its conflation of the Confrontation Clause and the hearsay rule.

173 See also, e.g., Lilly v. Virginia, 527 U.S. 116, 140 (1999) (Breyer, J., concurring) (noting that "the Confrontation Clause itself has ancient origins that predate the hearsay rule").


175 In other contexts, the Court has noted the distinction between validity and reliability. See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 n.9 (1993) ("We note that scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?").
ability, the related, still-developing right of cross-examination was seen as serving that function.

Is it, however, "too late in the day" to recapture this narrower meaning of the Clause? What would be the implications of adopting such a meaning?

In one sense, perhaps little would change. Both "sides" of the debate, the procedural (physical face-to-face confrontation) and the substantive (reliability or cross-examination focus), are to some extent correct—on one hand, the need to produce witnesses is a procedural one, in order to show that an accusation or piece of testimony is not trumped-up. But it is not true that literal face-to-face confrontation is the core of this Sixth Amendment right. If it were, such language was available to James Madison when he drafted the amendments and could easily have been incorporated into what is now the Sixth Amendment, as it was in the Massachusetts and New Hampshire Constitutions. Similarly, though the term "cross-examination" may or may not have been in common usage, some variant could have been used had that specific right been explicitly intended. Finally, the right to "confront" was an explicit alternative, in contrast to the right that was chosen, "to be confronted." The choice evidently made must be taken seriously, if we are to credit the plain meaning of the Confrontation Clause.

Similarly, what impact would such narrowing have on the right to cross-examine? The right certainly has been located in the Sixth Amendment right of confrontation, but under my proposed reading, is it still of constitutional dimension?

Perhaps a simplistic answer is an appeal to precedent: by now the right to cross-examine—to test the reliability of evidence brought at trial—is considered essential and fundamental to a fair trial. Acc...
cordingly, its importance cannot be reduced even if it was not precisely intended to be a feature of the Confrontation Clause. Given the procedural nature of cross-examination, and the perception of how integral it is to a fair trial, it might plausibly be considered a feature of substantive (or procedural) due process instead. Alternatively, of course, the right to cross-examine still could be implicit in the Clause, as is generally assumed. Wigmore and others may simply have been wrong in assuming that cross-examination was all the Clause stood for. It seems just as reasonable, based on the Clause’s text and history, to suppose that although the goal of the Confrontation Clause was to ensure the validity of testimony, rather than its reliability, one obvious consequence of requiring that a witness be brought into court is what can then be done with that witness—e.g., cross-examine him.

Finally, returning to the first part of this Comment, what specific implications might this narrower reading of the Clause have, especially in the context of child sex abuse prosecutions? Are Justice Scalia’s strong objections warranted?

Although the reading here may ultimately result in consequences closer to Justice O’Connor’s looser interpretation in Craig, both the literal and the liberal interpretations are partially correct (and partially incorrect). Justice Scalia’s objections in Craig, Danner, and Marx focused over-much on the use of closed-circuit television to facilitate the presentation of a child witness’s testimony, and therefore focused on the lack of face-to-face confrontation between defendant and witness. But as shown above, aspects of Justice Scalia’s reading are essential to maintain as well. The Constitutional rights afforded by the

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183 U.S. CONST., amends. V, XIV. See also Chambers v. Mississippi, 410 U.S. 284 (1973), where confessions exculpating the defendant were excluded, and the confessors were not cross-examined. As the confessions had been given “under circumstances that provided considerable assurance of their reliability,” id. at 300, the exclusion was held improper, though it was unclear as to how strongly this holding was based in the confrontation right. To use language from Justice Thomas’s concurrence to emphasize the point here, “[r]eliability is more properly a due process concern.” White v. Illinois, 502 U.S. 346, 363-64 (1992). See also Pointer v. Texas, 380 U.S. 400, 409-10 (1965) (Harlan, J., concurring in the result); Edward R. Becker, Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses be Applied?, 151 F.R.D. 153, 168-69 (1999) (procedural aspects “of the Due Process Clause subsume[] confrontation values”); Mukasey, supra note 32, at 1438 (arguing that evidentiary reliability should be enforced “through the due process clause, not the confrontation clause”).

184 Indeed, too extreme a reading of the discussion here could frame the Clause as only requiring a prima facie showing as to a witness’s testimony that is then more rigorously tested by cross-examination, a notion that would simply return to Wigmore’s view that “confrontation [is] merely the dramatic preliminary to cross-examination.” Gutman, supra note 26, at 333 (quoting S. Greenleaf, A Treatise on the Law of Evidence § 163f (16th ed. J. Wigmore ed. 1899)). As should be clear from my discussion of Wigmore’s approach, that is, of course, not the intended point.

185 See supra note 2.
Confrontation Clause must be more robust than rules of evidence, and it is essential that the accuser and his testimony be rigorously tested in order to ensure its validity. Thus, this reading might reconcile the two approaches, the "liberal" and the "literal," in the context of child sex abuse cases. For instance, it would condone live testimony by a child witness by means of closed-circuit television, the live closed-circuit television testimony in Gigante, or even the screen that Justice Scalia ruled unconstitutional in Coy, because the testifying or accusing witness has been brought to court, supporting the evidence's validity (and is subject to cross-examination, which can evaluate its reliability). Accordingly, the Court was correct to deny certiorari in Marx and Danner, and was right in Craig. It was correct, however, for the wrong reasons, and it is important to understand the somewhat narrower reasons by which it should have made its decisions, especially if calls to re-evaluate the Court's Confrontation Clause jurisprudence are heeded. Mattox was right in focusing attention on the absent accuser, but its language, and the language in the Supreme Court cases following it, suggesting a confluence of the Confrontation Clause and the hearsay rule have been misleading. This Comment has traced in part that narrower basis for the confrontation right involved in those decisions; when the Court heeds such calls for reconsideration, the present discussion may help clarify the scope of the Clause, emphasizing the important right "to be confronted," rather than "to confront."

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186 See Friedman, supra note 69.
189 The testimony may of course still be subject to the rule against hearsay, and though satisfying confrontation analysis, testimony may nevertheless be excluded under evidentiary rules (one way of testing testimony's reliability). But as has been repeatedly avowed—in theory, anyway—the Confrontation Clause was not intended to constitutionalize the rule against hearsay. California v. Green, 399 U.S. 149, 155 (1970). But see supra Introduction; see also White v. Illinois, 502 U.S. 346, 366 (Thomas, J., concurring in part and concurring in the judgment) ("Although the Court repeatedly has disavowed any intent to [suggest that the Confrontation Clause constitutionalizes the hearsay rule], I fear that our decisions have edged ever further in that direction.") (citations omitted); 2 Mccormick on Evidence, supra note 93, § 252, at 126 & n.14 ("recent decisions of the Supreme Court seem to point strongly in [that direction]"). But cf. Jonakait, supra note 67, at 81 ("[T]he Confrontation Clause, and related Sixth Amendment provisions, sought to constitutionalize criminal procedure as it then existed in the states. ").