
Volume 26

Number 1 *Symposium: The Bill of Rights
Yesterday and Today: A Bicentennial
Celebration*

pp.337-366

*Symposium: The Bill of Rights Yesterday and Today: A Bicentennial
Celebration*

The Confrontation Clause Today in Light of its Common Law Background

Daniel N. Shaviro

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Daniel N. Shaviro, *The Confrontation Clause Today in Light of its Common Law Background*, 26 Val. U. L. Rev. 337 (1991).

Available at: <https://scholar.valpo.edu/vulr/vol26/iss1/22>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



THE CONFRONTATION CLAUSE TODAY IN LIGHT OF ITS COMMON LAW BACKGROUND*

DANIEL SHAVIRO**

I. INTRODUCTION

The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .”¹ The words illustrate the difference between simplicity and clarity. While eloquent and spare, they lack not only detail, but clear reference. Even if the terms “criminal prosecutions” and “accused” have – as the expression goes – plain meaning, two ambiguities almost immediately become apparent. The first is what it means to “confront” the witnesses against one. To note two highly polar positions among the many that are possible, Dean Wigmore thought “confrontation” meant cross-examination,² and Justice Scalia thinks it means eye contact between the defendant and an accusing witness while the latter is testifying at trial.³ The second ambiguity is who these witnesses are. They might, for example, be only the persons actually appearing to testify at trial, or alternatively they might be all persons whose statements are used as evidence against the defendant.⁴

The usual resources of constitutional history provide little aid in resolving these ambiguities. In the oft-repeated words of Justice Harlan, the Confrontation Clause “comes to us on faded parchment.”⁵ True, we know something about its general purpose. Like the hearsay rules, it reflects

* © 1991 Daniel Shaviro. All Rights reserved.

** Professor of Law, University of Chicago Law School. Fall 1991, Visiting Professor at Columbia University School of Law. I am grateful to Abner Greene, John Langbein, Geoffrey Stone, and Richard Uviller for their comments on an earlier draft, and to the Russell Baker Scholarship Fund and the Walter J. Blum Faculty Research Fund for financial support. Portions of this article are adapted from an article that previously appeared in the *Hastings Constitutional Law Quarterly*. See Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383 (1990).

1. U.S. CONST. amend. VI.

2. 5 JOHN H. WIGMORE, EVIDENCE § 131 (3d ed. 1940) [hereinafter WIGMORE].

3. See *Coy v. Iowa*, 487 U.S. 1012 (1988); *Maryland v. Craig* 110 S. Ct. 3157, 3171-72 (1990) (Scalia, J., dissenting).

4. See *Maryland v. Craig*, 110 S. Ct. 3157, 3173 (1990); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 107 (1972).

5. *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

common-law abhorrence of the Tudor and Stuart practice of trial by affidavit, as in the notorious treason trial of Sir Walter Raleigh in 1603, where a sworn affidavit by Lord Cobham, possibly obtained under duress, led to Raleigh's conviction even though Cobham had recanted and was available to testify in person.⁶ Yet there is no direct evidence of the intent underlying the adoption of the Confrontation Clause. Moreover, the Supreme Court did not first squarely address the clause until 1895,⁷ and considered it only rarely before 1965,⁸ when the Court held for the first time that the clause applies against the states under the Fourteenth Amendment.⁹

Adding to the interpretive difficulty, the Confrontation Clause not only does not say what it means -- by failing to define "confrontation" -- but does not seem to mean what it says. On its face, in at least one respect the text is unambiguous: "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"¹⁰ This strongly suggests that uncontroverted hearsay testimony in the form of statements made out of court by the defendant's accusers can never be used to support a criminal conviction.¹¹ Yet this interpretation has long been rejected,¹² even by those who view defendants' rights most expansively.¹³ Nor could such an interpretation have been historically intended given the longstanding hearsay exception under which dying declarations were admissible as prosecution

6. See CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 244 (Edward W. Cleary ed., 3d ed. 1984); ERIC D. GREEN & CHARLES R. NELSON, PROBLEMS, CASES AND MATERIALS ON EVIDENCE 273 (1983).

7. *Mattox v. United States*, 156 U.S. 237 (1895) (On retrial of defendant, by the use of a transcript of testimony at the first trial by a subsequently deceased witness, the Confrontation Clause was not violated).

8. *But see Kirby v. United States*, 174 U.S. 47 (1899) (Confrontation Clause was violated by the use of evidence that other persons had been convicted of theft to prove that property received by the defendant had been stolen).

9. *Pointer v. Texas*, 380 U.S. 400 (1965).

10. U.S. CONST. amend. VI (emphasis added).

11. This conclusion depends, of course, on the assumption, which I discuss *infra* at text accompanying notes 141-43, that persons who do not appear in court are "witnesses" for Confrontation Clause purposes.

12. See *Mattox v. United States*, 156 U.S. 237, 243 (1895), in which the Court states: "There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards [i.e., in-court confrontation] even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."

13. Thus, for example, in *Lee v. Illinois*, 476 U.S. 530 (1986), Justice Brennan agreed that the Confrontation Clause often permits the use against the defendant of reliable out-of-court statements.

evidence of the cause of death in homicide cases.¹⁴

The lack of clear textual or historical guidance has encouraged the Supreme Court to follow a lurching course in its twenty-six years of active Confrontation Clause jurisprudence, but one whose direction now seems clear. After initially handing defendants a series of victories,¹⁵ the Court began in 1970 regularly to reject defendants' challenges.¹⁶ The few defendants' victories in confrontation cases over the last twenty years are of limited scope and may no longer command majorities given changes in Court personnel.¹⁷

The Court's current approach includes not only a fairly predictable outcome, in favor of the government, but a rough general principle.¹⁸ As construed by the Court, the Confrontation Clause bars the following: (1) excessive limitations on procedures relating to in-court witnesses,¹⁹ (2) the use

14. The dying declaration rule was well established by the time of the American Revolution. See MCCORMICK, *supra* note 6, at § 281.

15. See *Harrington v. California*, 395 U.S. 250 (1969); *Bruton v. United States*, 391 U.S. 123 (1968); *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

16. See *Maryland v. Craig*, 110 S. Ct. 3157 (1990); *United States v. Owens*, 484 U.S. 554 (1988); *Bourjaily v. United States*, 483 U.S. 171 (1987); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *United States v. Inadi*, 475 U.S. 387 (1986); *Del. v. Fensterer*, 474 U.S. 15 (1985); *Tennessee v. Street*, 471 U.S. 409 (1985); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Parker v. Randolph*, 442 U.S. 62 (1979); *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Nelson v. O'Neil*, 402 U.S. 622 (1971); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970).

17. I am aware of only four Supreme Court Confrontation Clause cases since 1970 in which the defendant prevailed. *Davis v. Alaska*, 415 U.S. 308 (1974), holding that cross-examination of an in-court witness could not be limited by a state rule preserving the confidentiality of juvenile court proceedings, may well remain significant. *Lee v. Illinois*, 476 U.S. 530 (1986), reversing a conviction based in part on co-defendant's out-of-court confession, prevailed by a vote of only five to four with Justices Brennan and Marshall among the majority. Even if not openly reversed, *Lee* can easily be ignored if the Court is so minded, since it is largely a fact-specific assessment of the reliability of the particular evidence at issue. In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Court barred the use of a screen to shield a child witness from having to see the defendant while testifying in a sex abuse case, the case was decided by 6-2 with Justices Brennan and Marshall in the majority. However, *Cox* was cut back significantly by *Maryland v. Craig*, 110 S. Ct. 3157 (1990). *Idaho v. Wright*, 110 S.Ct. 3139 (1990), overturned a child sex abuse conviction based on a doctor's testimony repeating what the child told him had happened, also was decided by only 5-4, with Justices Brennan and Marshall in the majority. The Court in *Idaho* held that the Confrontation Clause was violated by the state's failure to disclose to the defendant a file that contained the names of potential witnesses.

18. I described the Supreme Court's position somewhat differently in an earlier article, before the decision in *Maryland v. Craig*, 110 S. Ct. at 3157 changed the overall picture. See Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation*, 17 HASTINGS CONST. L.Q. 383 (1990) [hereinafter Shaviro].

19. See *Maryland v. Craig*, 110 S. Ct. 3157 (1990); *United States v. Owens*, 484 U.S. 554 (1988); *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Davis v. Alaska*, 415 U.S. 308.

of hearsay evidence that does not meet minimum standards of reliability,²⁰ and (3) the use of hearsay evidence from a witness who is available but not called, if the witness's appearance in court would have provided better evidence than the hearsay.²¹ There is also one prominent alternative to this position: Justice Scalia's claim that the Confrontation Clause principally creates a requirement of eye contact between the defendant and in-court witnesses.²² Thus, where eye contact is the issue he would be stricter than the rest of the Court on (one) above, while equivalent or laxer on (two) and (three), which he concedes might be "implicit in the Confrontation Clause"²³ albeit not at its core.

Surveying this doctrinal background, I have three reactions, one of historical and textual interpretation to the Court's approach, one of policy to the Court's approach, and one of both to Justice Scalia's approach. First, from a historical and textual perspective, I believe that the Court's framework of analysis is basically sound, but that in some instances it has allowed prosecutors too much leeway, due to its somewhat unsympathetic attitude in this area towards defendants. Second, if one ignores the Confrontation Clause and asks only what would be optimal rules for trials, the Court's position becomes more defensible, and might even be unnecessarily restrictive of prosecutors. One could argue powerfully for a more permissive approach to the conduct of trials than the Confrontation Clause seems to anticipate, relying on the adversary system to bring out the best evidence and on the jury to draw appropriate inferences from its non-production. Third, from the perspectives of both history and policy, I find Justice Scalia's approach deficient.²⁴

As the above paragraph may suggest, I believe that the historical record is not quite so blank as is commonly assumed. While we know little that is specific, something can be inferred from the broad shift towards recognizably modern trial procedures, occurring in England between the sixteenth and eighteenth centuries, since this shift provided the context for the adoption of the Confrontation Clause. The context does not answer definitively the close questions that have arisen since 1965, but it suggests a way of thinking that, if taken seriously, might lead to an approach more restrictive than either the Court wants (given the pattern of its holdings) or perhaps than I want (given my

20. See *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986); *Lee*, 476 U.S. 530 (1974).

21. See *Bourjaily v. United States* 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980). All three of these limitations apply solely for the benefit of criminal defendants.

22. See *Maryland v. Craig*, 110 S. Ct. at 3173-74 (Scalia, J. dissenting).

23. *Id.*

24. I have previously argued against Justice Scalia's approach based principally on policy. See Shaviro, *supra* note 18, at 397. In the present article I will evaluate his approach principally from a historical perspective. See *infra* text accompanying notes 144-45.

general preference for admitting relevant evidence).

The Confrontation Clause often is described as a reaction to the perceived injustice of the treason trial of Sir Walter Raleigh in 1603.²⁵ Although, to a degree, the relationship between the two is a "convenient and highly romantic myth,"²⁶ it contains an element of truth. Trials such as that of Raleigh, even if not that trial alone, did prompt the subsequent common law response that led to both the hearsay rules and the Confrontation Clause.²⁷

While the Clause has another important cause -- the colonists' reaction to England's use, beginning in the 1760s, of vice-admiralty courts to enforce controversial customs laws such as the Stamp Act²⁸ -- the implications of this reaction resemble those of the Raleigh case. The vice-admiralty courts denied not only confrontation rights but even the right to trial by jury, in effect following European civil law practice rather than granting colonists the common law rights of Englishmen.²⁹ The American reaction, embodied in the Confrontation Clause, was to require that English common law rights, including the right of confrontation evolved in response to abuses such as the Raleigh trial, would be mandatory under the Constitution.³⁰

I should clarify that, while assuming *arguendo* that the historical background is important to constitutional interpretation, I do not insist or rely upon anything approaching strict "originalism." I claim only that the approach is sufficiently interesting and important to be relevant to interpreting the Confrontation Clause. Finally, I should note that this article attempts only to lay out the basic historical landscape and re-trace ground that, to experts in the area, will be familiar. I frequently will mention leading theories about the Confrontation Clause without attempting either to add to them or choose

25. See, e.g., *Dutton v. Evans*, 400 U.S. 74, 86 n.16 (1970); Stanley Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1, 3 (1987); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986); Graham C. Lilly, *Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207, 208-09 (1984).

26. Graham, *supra* note 4, at 100 n.4.

27. See MCCORMICK, *supra* note 6, at § 281.

28. See Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67, 71-76 (1969) (mentioning as well England's threat to employ similar procedures in treason trials of colonists); Lilly, *supra* note 25, at 211; Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 396-97 (1959).

29. See Pollitt, *supra* note 28, at 396-97. The English chose to eliminate colonists' rights to be tried by jury and to confront their accusers due to concern about jury nullification, intimidation of prosecution witnesses, and prosecutorial convenience. See *id.*

30. During the process of ratifying the Constitution, demands for a bill of rights that would include a right of confrontation expressly relied on the danger that civil law trials, such as those of the Spanish Inquisition, would otherwise be constitutionally allowable. See *id.* at 399.

definitively between them. The aim is only to inform a general audience and, if possible, suggest directions for more rigorous and detailed inquiry.

II. THE COMMON LAW BACKGROUND TO THE CONFRONTATION CLAUSE

Sir Walter Raleigh was tried and convicted of treason, for allegedly plotting the overthrow and murder of James I, largely on the basis of a sworn affidavit from Lord Cobham, obtained by the prosecution while Cobham was being held prisoner in the Tower of London. Secondary evidence came from one Dyer, a boat pilot, who testified that, while in Portugal, he had ostensibly been told by a local gentleman that "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned."³¹ Raleigh repeatedly and eloquently demanded that Cobham be produced at the trial, offering absolutely to "put myself upon it" that Cobham would clear him.³⁴

By the time that the Constitution was enacted, Raleigh's position that an accusing witness such as Cobham ordinarily should be produced had been accepted in England. Moreover, while Raleigh had merely disparaged the evidentiary value of Dyer's testimony -- asking what evidence it was against him, when the conspirators might simply have been using his name without authorization³⁵ -- rules against the use of hearsay had been developed, under which it likely would be inadmissible, as evidence about an out-of-court statement (by the Portuguese gentleman) offered as proof of the matter asserted.

Raleigh's reason for wanting Cobham produced was obvious enough. As Raleigh stood at trial, he had a letter in his pocket from Cobham expressly recanting the accusation. Thus, he doubtless expected Cobham's appearance to destroy the prosecution's case. He was unaware that the prosecutor had a more recent letter from Cobham accusing Raleigh anew, and that Cobham ultimately would mount the scaffold continuing to affirm Raleigh's guilt.³⁶ Even had Raleigh known this, however, the demand for confrontation might still have been worth making. Would Cobham definitely repeat his accusation in the setting of a trial, where he was under oath, in public view, and exempt from immediate duress? Would he effectively condemn to death an old friend and ally to his face? Even if he would, might the jury regard him as a liar or as broken by fear of his jailers? If Raleigh were permitted to cross-examine him (although practice at the time did not permit this), there might be still more to gain from requiring Cobham to appear in court. For example, even without a recantation, Raleigh might be able to explore the pressures placed on Cobham

31. DAVID JARDINE, *CRIMINAL TRIALS* 436 (1832) [hereinafter JARDINE].

34. *Id.* at 435-36.

35. *Id.* at 436.

36. *See id.* at 446, 476-518.

to cooperate with the Crown or probe for holes and contradictions in Cobham's version of events.

All of these possible opportunities, whether or not they passed through Raleigh's mind, later were afforded to defendants by changes in English criminal procedure. The trial system changed from one where the accuser did not have to make his charges in public, under oath, uncoerced at the moment of speech, in view of the defendant and jury, and subject to cross-examination - to one where all of these specific opportunities generally were mandatory. In the course of changing criminal trial procedure, there was no occasion for anyone to pick and choose among the opportunities afforded to defendants by requiring in-court testimony. Confrontation rights and limits on the use of hearsay simply were adopted. Those who made the change thereby replaced one bundle of procedures, providing defendants with none of these opportunities, with another bundle that provided all (subject, of course, to exceptions, such as the allowable use of hearsay).³⁷ This choice was then replicated by the framers of the Sixth Amendment, when they chose to guarantee what was by then the well-developed English common law mode of trial and to bar the use of European civil law methods that, in their rules of evidence (if not their avoidance of a jury), resembled those used in the trial of Raleigh.³⁸

Why did anyone think that the new bundle of defendant opportunities was better than what it replaced? One obvious reason was the increased reliability of verdicts, and in particular the protection of the innocent against erroneous conviction. Raleigh had stressed this principle in his closing statement, when he warned the jury that none of them was safe if one could be convicted of treason "by suspicions and presumptions . . . without the open testimony of a single witness. . . ."³⁹ Blackstone later expressed a similar concern for reliability, describing the requirement of live testimony at trial as "much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer,"⁴⁰ and explaining that hearsay

37. Thus, for example, Blackstone praised the "open examination of witnesses viva voce, in the presence of all mankind," as preferable to the affidavit procedure still retained in European civil law, because it activates the witness's sense of shame, ensures that he can correct and explain his meaning, allows questioning by the judge, jury, and counsel, including the confronting of adverse witnesses, excites respect and awe in the witness by the presence of the judge, and allows the jury to observe the witness's demeanor. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (facs. of First Ed. of 1765-1769) [hereinafter BLACKSTONE].

38. See *supra* text accompanying notes 31-35. While Raleigh-era English trials resembled those of the civil law in allowing trial by affidavit, they of course differed not only in the use of a jury but in being conducted in public, with the defendant present, and with an at least nominally independent judiciary that ruled on issues of law not fact.

39. JARDINE, *supra* note 31, at 442.

40. BLACKSTONE, *supra* note 37, at 373.

generally is not admissible due to "the one general rule that runs through all the doctrine of trials . . . [which is] that the best evidence the nature of the case will admit of shall always be required . . ."⁴¹

A second reason for preferring the new bundle, once adversarial notions of trial had been accepted, may have been aversion to improper behavior by the State, whether used to convict the innocent or the guilty. Allowing a prosecutor to rely on inferior evidence, if he thought it helped his case more than the best evidence, might be considered bad enough in itself. Allowing affidavits had the further disadvantage of encouraging and rewarding the use of torture in obtaining them. Raleigh had relied on the jury's holding such sentiments when he charged that an important witness out-of-court witness (other than Cobham) had been threatened with torture, and compared the prosecution to the Spanish Inquisition.⁴² Finally, a third reason for preferring the new bundle of defendant opportunities may have been symbolic. As Raleigh put it, arguing in equity for rejection of the type of evidence used against him, "the life of man is of such price and value, that no person, whatever his offense is ought to die, unless he be condemned on the [live] testimony of two or three witnesses."⁴³

Thus, the reasons for supporting the creation of a right of confrontation and a bar on hearsay, like the set of opportunities that they were meant to provide at trial, present us with a bundle among which the rules' creators had no occasion to choose. Even the choices made in developing exceptions to the bar on hearsay do not illuminate their internal preferences, beyond suggesting that reliability may be implicated more often than the other reasons. Early hearsay exceptions, as for proof of dying declarations,⁴⁴ general custom, or business transactions written down in shopbooks,⁴⁵ allow the use of hearsay that seems highly reliable where the "better" evidence of in-court testimony either is unavailable or does not appear to be significantly better. Yet these exceptions do not rebut the perceived importance of requiring honorable conduct by the

41. *Id.* at 368. A recent commentator argues that reliability has only recently been thought a reason for requiring confrontation, which instead serves to ensure the use of adversarial procedures. Randolph Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 578, 585-86 (1988) [hereinafter Jonakait]. However, a central reason for ensuring the use of adversarial procedures, protecting the defendant against errors in evaluating the evidence that is adverse to her (*see id.* at 594-95) seems fairly similar to ensuring the reliability of guilty verdicts.

42. 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 230 n.8 (1938) [hereinafter HOLDSWORTH].

43. JARDINE, *supra* note 31, at 419. This speech could be construed as going to reliability as well as to symbolic justice.

44. Dying declarations were considered reliable because they are made "when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration [of religion] to speak the truth . . ." McCormick, *supra* note 6, at § 281 n.2, quoting Chief Baron Eyre in *Rex v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352 (K.B. 1789).

45. *See* BLACKSTONE, *supra* note 37, at 368-69.

State or symbolic respect for defendants' rights, so much as permit hearsay to be used where the objections are not significantly raised.⁴⁶ And some hearsay exceptions, while arguably consistent with reliability, seem to have been based more on the other two reasons for the rules.⁴⁷

While the hearsay rules cannot be explained intelligently without reference to the policy of reliability — especially given their modern extension to civil trials, where the other two policies have diminished importance — they do not follow logically from reliability alone. In particular, one could argue from the standpoint of reliability that the rules against hearsay are overly exclusionary. Why not admit hearsay, despite all its flaws, in cases where it is the best evidence available? Moreover, even if a prosecutor uses hearsay when it is not the best evidence, why isn't the defendant's power to point this out to the jury (as Raleigh did), inviting it to draw appropriate inferences, remedy enough? Inferences aside, if defendants have the power to call their own witnesses (as Raleigh did not), the parties' incentives in an adversary system seemingly can be counted on to ensure that all valuable witnesses are produced. Thus, why bar the use of affidavits and other hearsay unless reliability is not the only policy?

Two answers are possible to this argument against the hearsay rules being wholly consistent with concern about reliability. First, those who designed the rules may not have trusted juries to draw the appropriate inferences from the use of hearsay evidence.⁴⁸ Thus, they may have viewed exclusion as promoting

46. The shopbook and custom rules presumably almost always arose in civil trials. Dying declarations, to be sure, frequently arose in homicide cases, but they do not involve misconduct by the State (assuming it is not responsible for the declarant's impending death) and their admission presumably was viewed as symbolically appropriate. In treason cases, the revival of the Statute of Edward VI provided assurance that admissible hearsay would not alone support conviction. Confrontation and hearsay aside, they included (1) withholding the indictment until trial, thus hampering Raleigh's preparation of a defense, (2) requiring Raleigh to submit to pre-trial interrogation without a privilege against self-incrimination, (3) denying Raleigh the right, had he wanted it, to a lawyer, (4) the license afforded to Sir Edward Coke to engage in vicious invective and make factual representations going beyond his evidence (along with the judges' more restrained tendency in the same direction), (5) Lord Chief Justice Popham's endorsement of Cobham's accusation as persuasive to him, (6) the springing of surprise evidence at the close of trial (albeit permitted to Raleigh as well as Coke), and (7) non-application of the rule of Edward VI requiring two witnesses for a treason charge (a rule subsequently formalized in England as well as America; See HOLDSWORTH, *supra* note 42, at 207).

47. For example, the exception for statements made by co-conspirators during the course of the conspiracy and in furtherance thereof, while arguably producing reliable evidence, was principally based on the notion that a co-conspirator is one's agent, and that under an adversarial system one cannot complain about the adverse consequences of one's own adoptive acts. *Bourjaily v. United States*, 483 U.S. 171, 190-91 (1987) (Blackmun, J., dissenting).

48. See Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786 (1980) (rationalizing the hearsay rules as a response to expected errors by the jury in evaluating hearsay evidence).

reliability by compensating for the shortcomings of the fact-finder. Second, the hearsay rules may reflect an erroneous choice of means to promote reliability. It appears natural to assume that, if evidence is unreliable -- that is, highly questionable and hard to evaluate, not clearly wrong -- the fact-finder should ignore it. Yet the assumption that questionable evidence should be ignored is incorrect. The better course, if the fact-finder has sufficient skill, is to evaluate the evidence gingerly for what it is worth. Nonetheless, in my experience, law students in Evidence often make the leap from questioning the evidence to demanding its exclusion all the time. The leap can be seen as well in Blackstone, in a passage connecting the hearsay rules to reliability, where he commends England's refusal to admit "dangerous species of [hearsay] evidence,"⁴⁹ but without appearing to recognize that excluding uncertain evidence cannot cure the real uncertainty about which party's version of the facts is correct.

Thus, even if the hearsay rules are incorrect on grounds of reliability alone, this does not suggest an intentional choice to sacrifice it to the other objectives, unless the sacrifice was recognized as such - as it likely was not. The rules easily could be thought of as advancing all of the policies given, not only the policies' vagueness, but the "win-win" world of legal argumentation, where judges and litigants alike tend to describe favored outcomes as wholly good, not as regrettably sacrificing one set of important values to advance another.⁵⁰

The undifferentiated mix of policies supporting the hearsay rules, and thus the closely related Confrontation Clause,⁵¹ is all the more significant in that the policies powerfully influenced not just the decision to have hearsay rules, but their internal structure. The hearsay exceptions plainly show a willingness to dispense with the requirement of in-court testimony in circumstances where the need for it, based on the policies, seems relatively slight and necessity or convenience argue strongly for admission. Given the hearsay exceptions and the reasons for their adoption, along with their undoubted permissibility under the Confrontation Clause (at least where the exceptions are historically supported), the following statement by Justice Scalia, denying that the Clause's policies

49. BLACKSTONE, *supra* note 37, at 368-69.

50. See generally GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* (1978).

51. In repeating the truism that the hearsay rules and the Confrontation Clause are closely related, I do not mean to suggest that they must be identical in scope. The relationship between the two has received much attention in the literature; see, e.g., William H. Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process--A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Louis M. Natali, *Green, Dutton, and Chambers: Three Cases in Search of a Theory*, 7 RUT.-CAM. L. J. 43 (1975); Frank T. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185 (1979); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434 (1966). I address the relationship briefly in the next section.

influence its application, is incorrect:

[Denying confrontation where its purposes, such as reliability, can be assured on alternative grounds] abstracts from the right to its purposes and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees procedures that were thought to assure reliable evidence Whatever else it may mean in addition, the defendant's constitutional right to be "confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says . . .⁵²

While Scalia is wrong that the rules do not permit abstracting from the rights usually granted to their purposes (given how the purposes affect the structure of the hearsay exceptions), and wrong that confrontation is mandatory in all cases, an atom of truth can be gleaned from what he says. The rules clearly reflect very strong views that the in-court procedures embraced within confrontation usually are both necessary and sufficient to guarantee reliability, and should be followed in the great majority of cases. The following section discusses more fully the modern constitutional implications of the Confrontation Clause's origin as a response to cases such as the trial of Raleigh.

III. EVALUATING SUPREME COURT DOCTRINE IN LIGHT OF THE COMMON LAW BACKGROUND

The common law background to adoption of the Confrontation Clause, derived from trials such as that of Raleigh and the common law response thereto, has limited, yet some, value for a historically rooted constitutional interpretation of the Clause. On the one hand, it provides a clear framework, consisting of: (1) a bundle of procedures that confrontation embraces: the accuser must make her charges in public, under oath, while free of coercion, in view of the defendant and jury, and subject to cross-examination;⁵³ (2) a bundle of reasons for these procedures: to ensure the reliability of guilty verdicts, prevent improper behavior by the State, and show symbolic respect for defendants; and (3) a willingness to deny the procedures in limited circumstances where the reasons seem less compelling than usual and there are countervailing

52. *Maryland v. Craig*, 110 S. Ct. 3157, 3171 (1990) (emphasis in original). As I discuss in the next section, Justice Scalia erroneously believes that what the Confrontation Clause explicitly says is that defendants have the "right to meet face to face all those who appear and give evidence at trial." *Id.*

53. The Confrontation Clause also guarantees the right to be present at one's trial. See, e.g., Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 569 (1978). I have ignored this right because it was not at issue in the *Raleigh* case and has remained largely uncontested thereafter. For the discussion on *Raleigh*, see *supra* notes 31-34 and accompanying text.

arguments of convenience or necessity. On the other hand, the application of this framework is significantly under-determined.⁵⁴

While both Supreme Court Justices and academic commentators disagree about the answers, they have evinced -- with the solitary exception of Justice Scalia -- surprisingly broad consensus about the questions. Everyone but Scalia seems to agree that the Confrontation Clause might mean, subject to closer examination, three principal things: (1) that procedures relating to in-court witnesses cannot be excessively limited, (2) that certain hearsay statements cannot be used as evidence if the declarant is available but not called by the prosecution as a witness, and (3) that certain hearsay statements cannot be used as evidence, even if the declarant is unavailable, unless they meet minimum standards of reliability. Not everyone agrees that the Confrontation Clause does mean all three of these things, but the three issues have framed - and I think appropriately - both the academic dialogue and Supreme Court doctrine. Thus, I will discuss them in turn, from the standpoint of what the common law background may tell us, and then consider Justice Scalia's alternative analysis.

A. Limits on Procedures Relating to In-Court Witnesses

1. Historical Overview

The Confrontation Clause embodies a vision of criminal trials in which not only do witnesses appear in court to testify against the defendant, but their appearances have certain familiar characteristics. Prosecution witnesses testify in public, under oath, subject to cross-examination, before a judge, and face-to-face with both the defendant and the jury. Since all of these aspects were assumed, valued, and deliberate parts of the common law trial process, the common law background suggests a strong presumption that all must generally be provided.

What little we know about the political process that led to the Confrontation Clause supports this view. The Clause, along with the rest of the Sixth Amendment and the Bill of Rights generally, emerged from demands voiced during the debate over ratifying the Constitution. The demand at issue here was that the familiar common law mode of trial be guaranteed. As one critic of the unamended Constitution put it:

54. To be sure, one could take the position that the hearsay exceptions existing at the time of the Clause's adoption in 1791, and no others, are permissible under it -- assuming that practice in 1791 can be reconstructed. Yet this not only would be distressingly rigid as policy, but is far from obviously correct as constitutional interpretation. Even if one is a strict "originalist," how does one rebut the argument that the Framers intended the Clause to incorporate into the Constitution an evolving common law standard?

The mode of trial is altogether indetermined--whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told. . . . [C]ongress [is] possessed of powers enabling them to institute judicatories, little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of christendom: I mean that diabolical institution, the Inquisition.⁵⁵

The Framers responded to such criticism by promising to enact a bill of rights that would include a guarantee of the right to common law trial. The Sixth Amendment then was drafted with language putting the point relatively broadly and vaguely. It referred to a right of "confrontation" - as distinct from merely mentioning, say, a right of "cross-examination,"⁵⁶ or, like some existing state bills of rights, a right for the defendant "to meet the witnesses against him face to face."⁵⁷

This presumably conscious drafting choice, along with the breadth of the intention to preserve English common law trial procedures, contradict Justice Scalia's position that only eye contact between the defendant and the accusing witness is within the literal and direct scope of the Confrontation Clause. Wigmore's view of the Clause as referring solely to cross-examination⁵⁸ similarly is weakened by the historical evidence, as prior commentators have noted.⁵⁹ A better view than either would focus on the entire bundle of confrontation rights and assume that all were meant to be provided in the usual case.

The early history of the Clause does not reveal any clear exceptions permitting particular parts of the bundle -- such as, say, eye contact or cross-

55. Mr. Abraham Holmes of Plymouth, speaking at the Massachusetts Convention, *quoted* in POLLITT, *supra* note 28, at 399. Similarly, Patrick Henry, during the Virginia ratification debates, complained that "[C]ongress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany--of torturing, to extort a confession of the crime." *See id.*

56. *See* Larkin, *supra* note 28, at 70.

57. *See id.* at 76 (quoting preexisting Massachusetts and New Hampshire bills of rights). It is plausible that these bills of rights were meant to have exactly as broad a meaning as the Confrontation Clause, but the use of the vaguer term "confrontation" helps to make this intent clear.

58. *See generally*, WIGMORE, *supra* note 2.

59. *See, e.g.*, *California v. Green*, 399 U.S. 149, at 178-79 (1970) (Harlan, J., concurring); Baker, *supra* note 51, at 534-36; Larkin, *supra* note 28, at 69-70. *But cf.* Read, *supra* note 51, at 4-8 for a more sympathetic view. Wigmore may have realized that his view was historically suspect and supported it on grounds of current policy. As paraphrased by Larkin, *supra* note 28, at 69 n.9, he concedes that "in the earlier and more emotional periods, actual confrontation was supposed, 'more often than it now is,' to be able to unstring the nerves of a false witness."

examination -- to be waived when a witness testifies at the defendant's trial.⁶⁰ Yet the hearsay exceptions, by allowing testimony from out-of-court declarants, in effect permitted all to be dispensed with in appropriate cases. If as a group the bundle of confrontation rights need not always be provided, albeit that it cannot be dispensed with lightly, it is hard to see why there should be an absolute rule that, when some of the rights are granted, all must be.⁶¹ The approach of the common law plainly was to permit some flexibility. Moreover, the lack of historical precedent for picking and choosing among the items in the bundle is not dispositive, if continued evolution of the rules is permissible (as with hearsay exceptions) or the grounds relied upon for doing so have only recently become important. Thus, it should not be unthinkable to dispense with an item within the bundle of rights, but doing so should require an extremely good reason -- one good enough to support a new hearsay exception.

The Supreme Court has considered the arguable abridgment of rights within the confrontation bundle in three contexts: (1) where child sex abuse witnesses were shielded from eye contact with the defendant during their testimony, (2) where cross-examination was limited by the accusing witness's evidentiary privilege, and (3) where cross-examination concerning a statement made before trial by a witness called to testify at trial arguably was impeded by the witness's claimed forgetfulness.⁶² In addressing these issues, I believe that the Court generally has stayed within historically plausible parameters, whether or not one

60. It has long been agreed, however, although I do not know how far back the antecedents go, that a defendant who disrupts her trial may be removed from the courtroom and thus lose the opportunity to meet accusing witnesses face-to-face. See, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970); *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1933). It also is conceivable that from an early point there was an accepted conflict between witnesses' testimonial privileges and the right of cross-examination.

61. I have elsewhere described the bizarre consequences of treating the package of confrontation rights, but none of its separate parts, as dispensable. See Shaviro, *supra* note 18, at 394, noting that, if a child witness in a sex abuse case has accused the defendant through reliable hearsay falling within an allowed exception, but the child would be unable to testify at trial unless spared from having the defendant in sight, *Coy v. Iowa*, 487 U.S. 1012 (1988), alongside *United States v. Inadi*, 475 U.S. 387 (1986), suggest that the prosecution can spare the accusing witness from having the defendant in sight, but only if it avoids cross-examination by the defendant and denies the defendant a view of the witness as well. The Supreme Court subsequently held, in *Idaho v. Wright*, 110 S. Ct. 3139 (1990), that a child's hearsay statements to a doctor describing the sex abuse that he or she suffered are not sufficiently reliable to be admitted as hearsay without calling the child to testify. This removed the most likely scenario for the bizarre juxtaposition that I described, but does not weaken my basic point.

62. In addition, in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), three members of the Court endorsed the view that the Confrontation Clause may guarantee a right to pre-trial discovery where necessary to learn the identities of important witnesses. See *id.* at 61 (Blackmun, J., concurring in part and in the judgment), and at 66-72 (Brennan, J., dissenting). *Ritchie* affirmed a state court's invalidation of a conviction partly on Federal constitutional grounds, but principally under due process principles and the right to compulsory process.

agrees with all of its decisions. Yet there are hints of inadequate concern about defendants' confrontation rights. These hints will grow stronger as we move on to the next set of issues.

2. Child Sex Abuse Witness Shielded from Eye Contact with Defendant During Testimony

In *Coy v. Iowa*,⁶³ the Supreme Court reversed a conviction for sexual abuse of children because at trial a screen had been placed between the defendant and the child witnesses, permitting him to see them dimly, but blocking their view of him.⁶⁴ By contrast, in *Maryland v. Craig*,⁶⁵ the Court upheld a conviction in a child sex abuse case despite the use to similar effect of a one-way closed circuit television to record the testimony.⁶⁶ The decisive difference between the cases - made so by Justices O'Connor and White, who provided the swing votes - was that in *Coy* the procedure was automatic upon request of the complaining witness, whereas in *Craig* it required a finding by the trial judge that eye contact would cause the child witness "emotional distress such that the child cannot reasonably communicate."⁶⁷ Justice O'Connor explained in her concurrence in *Coy*, and reiterated in her opinion for the Court in *Craig*, that such case-specific findings of necessity were required to overcome the defendant's important, but not absolute, constitutional right to direct eye contact.

Justice O'Connor steered between the polar positions of Justice Scalia,⁶⁸ that the Confrontation Clause unequivocally bars denying this right when the witness testifies at trial, and of Justice Blackmun that, as Wigmore stated, "[t]here never was at common law any recognized right to an indispensable thing called confrontation as distinct from cross-examination."⁶⁹ From a historical standpoint, given the importance of the entire bundle of confrontation

63. 487 U.S. 1012 (1988).

64. *Id.* at 10144-15. All confrontation rights other than eye contact with the defendant were preserved, and the defendant's lawyer was allowed to step around the screen during cross-examination.

65. 110 S. Ct. 3157 (1990).

66. Under this procedure, the child witness, prosecuting attorney, and defense counsel withdraw to a separate room for the circuit television taping, accompanied only by the operators of the television and, if the defendant does not object, a therapist or other person to calm the child. The defendant and the judge watch the taping and, while it is going on, can communicate electronically with the persons in the taping room. *Id.* at 3161.

67. *Id.*

68. Justice Scalia wrote the opinion of the Court in *Coy v. Iowa*, 487 U.S. 1012 (1988), and the dissent in *Maryland v. Craig*, 110 S. Ct. 3157, 3171 (1990), in each case joined by Justices Brennan, Marshall, and Stevens.

69. *Coy v. Iowa*, 487 U.S. 1012, 1019 n.2 (1988), quoting 5 JOHN WIGMORE, EVIDENCE § 1397 (J. Chadbourne rev. 1974) (emphasis in original).

rights along with the allowance of some flexibility, she was correct in rejecting both of these positions and in treating the burden for justifying the states' procedures as onerous but not insuperable. Indeed, given the variety of purposes that confrontation is meant to serve, she was correct in holding the states' procedures to a high standard even if we assume that the procedures increased reliability (by reducing psychological intimidation of the witnesses). However, whether she found the right balance, or instead should have found the burden met either in both cases or in neither, without regard to case-specific findings by trial judges, is more than the historical record can tell us. The precise weighing of the balance, as opposed to the choice of broad perspective from which to weigh it, is historically indeterminate, and beyond the limited scope of this paper.

3. Cross-Examination Limited by Accuser's Evidentiary Privilege

In *Davis v. Alaska*,⁷⁰ the Supreme Court reversed a conviction for burglary because the trial court had relied on a claim of evidentiary privilege to limit cross-examination of a key prosecution witness.⁷¹ The witness had been on probation as a juvenile delinquent, and the defendant had wanted to bring this out on cross-examination to suggest, as a motive for assisting the police, fear of probation revocation if he failed to cooperate or fell under suspicion himself.⁷² The trial judge had barred this line of questioning under a state law making juvenile criminal proceedings confidential, whereupon during cross-examination, the witness had blandly denied feeling any anxiety about the police questioning.⁷³

The common law background to the Confrontation Clause, while the background obviously does not establish whether the limitation was of sufficient magnitude to justify reversal,⁷⁴ provides significant support for the decision. Surely the right of cross-examination, a vital and perhaps today (as Wigmore says) the most important aspect of confrontation,⁷⁵ is impaired when the defense is barred from suggesting a plausible motive for false testimony. Agreeing with Wigmore that cross-examination is the most important (if not the only) confrontation right -- a view that makes the decision more persuasive,

70. 415 U.S. 308 (1974).

71. *Id.* at 318.

72. *Id.* at 311.

73. *Id.* at 313.

74. Justice White, dissenting, argued that this was "nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination." *Id.* at 321 (White, J., dissenting). The Supreme Court subsequently held that the rule of *Davis v. Alaska* does not automatically lead to reversal even if cross-examination was limited erroneously; rather, the verdict was subject to "harmless error" analysis. *Delaware v. Van Arsdale*, 475 U.S. 673, 683 (1986).

75. WIGMORE, *supra* note 2, at § 13617.

since that right was not wholly denied here and no other confrontation right was affected -- is neither barred nor supported by the common law background.⁷⁶ Consistency with the background, along with the subsequent historical trend of increased reliance on cross-examination, should be enough for all but the most rigid "originalists."

4. Cross-Examination Concerning Statement Made Before Trial Impeded by Witness's Forgetfulness at Trial

In *California v. Green*⁷⁷ and *United States v. Owens*,⁷⁸ the Supreme Court upheld convictions based on pre-trial statements by accusers who testified at the trials and the court rejected arguments that cross-examination was constitutionally inadequate because impeded by the accusers' claiming forgetfulness about the subjects of the statements.⁷⁹ In *Green*, Justice Harlan, concurring, suggested that the mere opportunity to cross-examine at trial was constitutionally adequate, even if the claimed amnesia reduced its effectiveness.⁸⁰ The Court, however, held more narrowly only that cross-examination at trial about a prior statement can be constitutionally adequate.⁸¹ In *Owens*, the Court squarely adopted Justice Harlan's position.⁸²

The two cases had significant factual differences that the Court in *Owens* did not address. In *Green*, the witness had accused the defendant, first in a statement to police and then at a preliminary hearing where he was extensively cross-examined by the defendant's counsel. He then professed amnesia at trial on a ground that itself was inconsistent with his prior testimony: that due to drug use while the original events were occurring, he could not distinguish fact from fantasy or remember either thereafter.⁸³

In *Owens*, the witness had been savagely assaulted, causing permanent brain damage and severe, progressive memory impairment. He initially named a third party as the assailant, and identified the defendant only a month later, while meeting with an FBI agent who visited him in the hospital. By the time of trial,

76. A historicist also might find significant the lack of strong historical antecedents for the juvenile criminal proceedings privilege that was at issue in *Davis*. The case might have been more difficult if a historically well-rooted privilege, such as the attorney-client privilege, had been involved.

77. 399 U.S. 149 (1970).

78. 484 U.S. 554 (1988).

79. *United States v. Owens*, 484 U.S. at 563; *California v. Green*, 399 U.S. at 164.

80. *California v. Green*, 399 U.S. at 188 (Harlan, J., concurring).

81. The Court held that the case was not ripe for deciding whether the mere opportunity to cross-examine is adequate and, if not, whether it had been adequate here. *Id.* at 168-70.

82. *United States v. Owens*, 484 U.S. at 559.

83. *California v. Green*, 399 U.S. 149, 152 (1970).

the witness had wholly forgotten who assaulted him, but thought he remembered making the identification during the FBI agent's visit, and feeling certain at the time that it was correct. He had no memory of any hospital visitors during his stay other than the agent on this one occasion, although he had received numerous visitors, both official and personal, including his wife on a daily basis. He also did not remember whether anyone had suggested to him that the defendant was responsible. His medical condition made him highly susceptible to suggestion.

Given these facts, the cases differed in two critical respects. First, the prior accusatory statements made in open court at the preliminary hearing in *Green* (if not those made to a police officer) were far more reliable than those in *Owens*, which were entirely derived from a private meeting with a law enforcement agent. Second, the claim of forgetfulness and its testing under cross-examination provided a stronger basis for evaluating the testimony in *Green*. In *Owens*, the witness who made the identification arguably was too different from the one appearing at trial to be impeached by the latter's show of confusion, since he had suffered, in the interim, nineteen more months of progressive memory loss.

These characteristics make *Owens* an extremely troubling case. It is almost as if, in the trial of Raleigh, the Crown, instead of merely using Lord Cobham's affidavit, had brought him into court, but under circumstances in which he remembered nothing but the act of signing it.⁸⁴ Surely there is a very real question, ignored by the Court due to its embrace of Harlan's standard, of whether the cross-examination was able to serve its historically intended purposes of testing the reliability of the accusation and preventing improper behavior by the State.⁸⁵

While the facts of *Owens* suggest difficulties with the position that the mere opportunity to cross-examine is enough without regard to its potential effectiveness, one should not be too quick to reach the usual opposing position, that prior statements cannot be used unless the witness at trial adopts or at least remembers them. As the Court noted in *Green*, it simply is not possible, desirable though it might be, for the jury "somehow [to] be whisked magically back in time to witness a grueling cross-examination of the declarant as he first gives his statement."⁸⁶ Moreover, despite the reduced value of cross-

84. See *supra* notes 31-35 and accompanying text.

85. To my mind, the fact the witness's memory was so extraordinarily and conveniently selective, from the state's perspective, supports a disturbing inference of government misconduct, at least to the extent of coaching the witness with the knowledge that he was medically highly suggestible and would not even remember being coached.

86. *California v. Green*, 399 U.S. 149, 160 (1970).

examination when it is conducted later and the witness sidesteps it by not endorsing the prior statement,⁸⁷ it surely affords the jury some basis to evaluate the testimony -- even in *Owens*, where some information might have been obtained from the jury's view of the witness, notwithstanding his progressive memory loss.

I am more certain that *Owens* looks like an unfair conviction than that the problem lay principally in the inevitable inadequacy of cross-examination. Despite the difficulty in impeaching the person who made the identification, I can readily imagine a devastating closing argument by defense counsel pointing out the weaknesses in the prosecution's case. Thus, the reduced value of the confrontation that was afforded might not have been critical. I might even hazard a guess, although without any personal knowledge, that a major reason for the conviction was simply jury bias: the natural desire to punish someone for the horrible crime and its devastating consequences for the victim.

Thus, while as a Justice I would have been tempted to strike down the conviction in *Owens*, I might not have done so under the Confrontation Clause. I might instead have held that the conviction was based on evidence so unreliable, and so redolent of possible prosecutorial misconduct, as to be inadmissible under the Due Process Clause of the Fifth Amendment.⁸⁸ Or I might have held, depending on the rest of the trial record, that the evidence in the case was inadequate as a matter of law to support the conviction.⁸⁹

The reflexive thinking that I engaged in when I first read *Owens* -- leaping immediately from doubting the verdict's justice to blaming it on the admission of suspect, but not wholly worthless, evidence⁹⁰ -- is characteristic of the Anglo-American common-law trial tradition. Again, it is reflected in hearsay rules that often exclude evidence with some probative value even if the better form of the evidence is unavailable. Yet, from the standpoint of verdict accuracy, the reflex (embodied to some extent in the Confrontation Clause) to exclude evidence simply because it might be inaccurate is mistaken, at least if we sufficiently trust juries as fact-finders. And if we lack such trust, the trial system's problems may be too serious to be addressed adequately by the rules of evidence. Bad fact-finders are likely to reach bad verdicts with or without

87. See *Ruhala v. Roby*, 150 N.W.2d 146 (Mich. 1967), for a spirited, if not totally convincing, argument for the proposition that prior statements are most effectively discredited when the witness endorses them at trial and is subjected to *withering cross-examination* than when she disavows them at trial.

88. See, e.g., *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Stovall v. Denno*, 388 U.S. 293 (1967).

89. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979).

90. See Shaviro, *supra* note 18, at 393-95.

the help of suspect evidence.

B. Prerequisite of Declarant Unavailability for the Use of Hearsay Evidence

A second major strand in Supreme Court and scholarly consideration of the Confrontation Clause goes to the issue of hearsay declarants' availability to testify at trial. One can view the Clause as creating a rule of preference for live testimony, and thus as requiring the prosecution to produce at trial all available witnesses whose statements it wishes to use. The Clause, under this interpretation, differs from the Sixth Amendment guarantee to the defendant of "compulsory process for obtaining witnesses in his favor," in that it applies to adverse witnesses and the prosecution's case, and is not so much a requirement of production as a penalty for non-production: exclusion of the hearsay evidence. Under the unavailability rule, Cobham's affidavit would have been inadmissible at Raleigh's trial because he was "in the house hard by and may soon be brought hither."⁹¹ Yet the affidavits would not have been barred, at least under this aspect of the Confrontation Clause, had Cobham died of natural causes. Nor would Dyer's testimony about the presumably unavailable Portuguese gentleman have been barred.

Justice Harlan, in his concurrence in *Green*,⁹² argued that the Confrontation Clause mandates a strict unavailability rule, without exception, but nothing more.⁹³ Although he explicitly recanted this view within less than a year,⁹⁴ it has proven enduringly popular with commentators, at least as describing one aspect of the Confrontation Clause.⁹⁵ His reason for recanting it - that it would unduly burden trials by requiring prosecutors to produce all hearsay declarants even when this was "difficult, unavailing, or pointless"⁹⁶ - has led others to suggest refinements rather than to reject the unavailability rule altogether.

In recanting, Justice Harlan had in mind hearsay evidence such as business records, learned treatises, and trade reports, involving declarants who might be difficult to produce and of almost no use to the defendant. The solution that others have suggested is simply to limit the circumstances in which the unavailability rule applies. Peter Westen, for example, suggests applying it only

91. JARDINE, *supra* note 31, at 427.

92. *California v. Green*, 399 U.S. 149, 174 (1970).

93. *Id.*

94. *Dutton v. Evans*, 400 U.S. 74, 94-96 (1970) (Harlan, J., concurring).

95. See, e.g., Baker, *supra* note 51, at 541; Graham, *supra* note 4, at 190-94; Westen, *supra* note 51, at 1189-90; Irving Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32, 41-42 (1973).

96. *Dutton*, 400 U.S. at 96 (Harlan, J., concurring).

where "the prosecution can reasonably expect the defendant to wish to cross-examine [the declarant] at that time."⁹⁷ Michael Graham suggests applying it only where the out-of-court statement is "accusatory," meaning that the declarant intended to accuse the defendant or was aware of a reasonable possibility that the prosecution would use her statement as inculpatory evidence.⁹⁸ Laird Kirkpatrick argues that whether the unavailability rule applies should depend on the statement's centrality to the case, its reliability, its susceptibility to testing through cross-examination, and on the adequacy of means of challenging it other than through cross-examination.⁹⁹

From a historical standpoint, the unavailability rule is highly persuasive - leaving aside for now the question of whether, as Justice Harlan argued in *Green*, it is the only limitation placed by the Confrontation Clause on the use of hearsay evidence. Raleigh's position that Cobham should have been produced won out historically, and helped give rise to hearsay rules that generally excluded evidence of out-of-court statements if the declarant did not testify at trial, but that generally permitted witnesses to be questioned at trial about their prior statements.¹⁰⁰ Yet the commentators' view that the unavailability rule should not apply in all cases also seems historically powerful, given early hearsay exceptions such as the shopbook rule that did not require showing the declarant's unavailability. The historical record does not, however, provide a basis for selecting a specific test for waiving the unavailability rule, such as those of Westen, Graham, or Kirkpatrick. Thus, the decision regarding what specific test to apply must be made on other grounds that are beyond this paper's limited scope.

The Supreme Court follows the unavailability rule "[i]n the usual case."¹⁰¹ The question of how to define the exceptional case, where the rule does not apply, has largely been left unanswered. In *United States v. Inadi*,¹⁰² however, the Court held that the rule did not apply to at least one category of admissible hearsay: statements made by the defendant's co-conspirators in furtherance of the conspiracy and while it was in progress.¹⁰³ The Court reasoned that, while an in-court appearance, subject to cross-examination, ordinarily produces better evidence than a hearsay statement, the relative merits are reversed for co-conspirator statements. Conspirators have more reason to

97. Westen, *supra* note 51, at 1206-07 (footnote omitted).

98. Graham, *supra* note 4, at 193-94.

99. Kirkpatrick, *supra* note 25, at 682.

100. Whether the prior statements were admissible as substantive evidence was a closer question. See Advisory Committee's Note on FED. R. EVID. 801(d)(1), 56 F.R.D. 183, 293.

101. *Ohio v. Roberts*, 448 U.S. 56, 65 (1980).

102. 475 U.S. 387 (1986).

103. *Id.* at 395.

be candid, and less to be guarded, when they are conspiring among themselves than when testifying at trial. Thus, the latter evidence "seldom will reproduce a significant portion of the evidentiary value" of the former.¹⁰⁴

I find this plausible, although not beyond question, as an assessment of the relative merits of the two types of statements. As the Court noted in *Inadi*, a conspirator's incentives change drastically, and very likely for the worse so far as truthfulness is concerned, once the conspiracy collapses and criminal charges are being brought.¹⁰⁵ In *Inadi* itself, the defendant may have felt no great need for the declarant's testimony, and may have viewed his confrontation rights merely as a means of causing difficulties for the prosecution (which wanted to use as evidence a legally authorized wiretap) once the witness, who had duly been scheduled, claimed car trouble and failed to appear.

Yet co-conspirators' statements may be considerably less reliable than the Supreme Court seemed to assume. The saying that "there is no honor among thieves," while perhaps overstated, surely contains some truth. Conspirators may be misinformed or may intentionally mislead each other. Raleigh noted this problem when he argued that the plotters must have been using his name without authorization in order to lend countenance to the conspiracy.

Without cross-examination, it may be difficult to explore and expose at trial the unreliability of co-conspirator statements. Thus, there are arguments against their being more reliable than in-court testimony, and even if on balance these arguments are incorrect, they have a certain historical pedigree. The Anglo-American legal tradition strongly reflects the views that live testimony is always more reliable, even if not always required, and that, even where witnesses are dishonest, cross-examination, in Wigmore's phrase, is "the greatest legal engine ever invented for the discovery of truth."¹⁰⁶

Although not clearly wrong as a matter of policy in holding that the available witness did not need to be produced, *Inadi* suggests to me a certain impatience by the Supreme Court in evaluating defendants' confrontation claims -- a view of defendants in this area as trying to obstruct the course of justice with needless procedural roadblocks, rather than to test the truth of the prosecution's case. Why take the time to be originalist or even loosely

104. *Id.* at 394-95.

105. *Id.* at 395.

106. WIGMORE, *supra* note 2, at § 1367. It is not necessarily sufficient to note, as the Supreme Court did in *United States v. Inadi*, 475 U.S. 387, 399-400 (1986), that the defense can call available witnesses whose testimony it wants the jury to hear. Calling a somewhat hostile witness as part of one's case, to counter the very hostile testimony introduced by the prosecution as hearsay, may be tactically extremely inferior to requiring the prosecution to produce both simultaneously.

traditionalist when the interests of effective law enforcement are at stake? A Court more concerned about defendants' legitimate concerns about sharp tactics by the prosecution might still have upheld the conviction, but on grounds showing greater respect for live testimony and cross-examination, and relying more on the circumstances showing limited need for confrontation in this case.¹⁰⁷ For example, in keeping with Peter Westen's suggestion, the Court could have conditioned the admission of the hearsay testimony, without production of the available declarant, on whether the defendant should reasonably have been expected, under the particular circumstances of the case, to want immediate cross-examination. Such a rule would empower trial courts to distinguish between needless procedural roadblocks and rights of legitimate value to the defense.

This suggestion of impatience becomes stronger when we turn to another issue raised by the unavailability test: the question of when a witness qualifies as unavailable. A good illustration is *Ohio v. Roberts*,¹⁰⁸ in which the Court upheld a conviction based on testimony at a pretrial hearing, where the witness had not appeared at trial.¹⁰⁹ One of the central issues in the case was whether the prosecution had tried hard enough to find her. Its efforts consisted principally of delivering five subpoenas in her name to her parents' residence, including three after the authorities learned that she was no longer living there.¹¹⁰ While it was true that her parents did not know where she was, the Court conceded that there were numerous steps the prosecution could have taken in attempting to locate her, but did not.¹¹¹ For example, it failed to contact a social worker who it knew had been in contact with the witness sometime after her parents last saw her.¹¹²

Airily noting that "[o]ne, in hindsight, may always think of other things"¹¹³ that could have been done, the Court concluded that the prosecution had done enough to show good faith. The Court failed to ask whether the prosecution might have done more to find the witness had the testimony at the pre-trial hearing not been so favorable to its case. Yet the problem of varying effort to search for hard-to-find witnesses, depending on the prosecution's degree of satisfaction with the preexisting hearsay evidence, is both subtler than

107. Among the various proposed test described above, Michael Graham's (conditioning the availability requirement on accusatory intent) almost certainly would support the result in *Inadi*, assuming that the declarant did not know he was being wiretapped. The outcome under other tests is unclear. See generally, Graham, *supra* note 4.

108. 448 U.S. 56 (1980).

109. *Id.* at 77.

110. *Id.* at 79 (Brennan, J., dissenting).

111. *Ohio v. Roberts* 448 U.S. 56, 75 (1980).

112. *Id.* at 75.

113. *Id.*

outright bad faith and potentially quite significant. It deserved consideration, whether or not it justified deciding *Roberts* the other way.

C. Requiring Reliability as a Prerequisite for the Use of Hearsay Even if the Declarant Is Unavailable

The third major strand in Supreme Court and scholarly consideration of the Confrontation Clause goes to the issue of whether hearsay evidence, in order to be admitted even if the declarant is unavailable, must meet some minimum standard of reliability, above the bare requirements applying to all evidence under the Due Process Clause of the Fifth Amendment. Applying such a standard to the trial of Raleigh, it might follow, for example, that Cobham's affidavit ought not to have been admitted, given the circumstances under which it was obtained, even if he had died before trial of natural causes. It also might follow that Dyer's testimony about the Portuguese gentleman ought not to have been admitted. Interpreting the Confrontation Clause to establish a reliability standard for out-of-court statements, even if the declarant is unavailable, would move in the direction of constitutionalizing some form of the hearsay rules and limiting the allowable breadth of hearsay exceptions, although solely for the government in criminal trials.

Wigmore vigorously denied that the Confrontation Clause implied a reliability standard, largely because, being "fanatically interested in hearsay reform and opposed to the notion of a special doctrine of criminal evidence,"¹¹⁴ he feared inflexible constitutionalization of the hearsay rules.¹¹⁵ Justice Harlan agreed with Wigmore, arguing that the Confrontation Clause "is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence."¹¹⁶ One can reduce the force of these arguments by treating the Confrontation Clause merely as a floor for constitutionally permissible hearsay rules, establishing

114. Graham, *supra* note 4, at 104 n.24.

115. As William Baker has noted, the basis for Wigmore's position is well conveyed by his statement that "so bold are nowadays the attempts to wrest the constitution in aid of crime and so complaisant are some courts in listening to fantastic and unfounded objections to evidence, that the permissibility of such changes [in the hearsay rules] should not be left in the slightest doubt." Baker, *supra* note 50, at 535, quoting WIGMORE, *supra* note 2, at § 1397.

116. Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring). In *California v. Green*, Justice Harlan had criticized Wigmore for suggesting that judges could in effect "read [the Confrontation Clause] out of existence by creating new and unlimited exceptions." *Green*, 399 U.S. at 179 (Harlan, J., concurring). In *Green*, Harlan had disagreed with Wigmore only about dispensing with the requirement of unavailability, not about the constitutionality of using hearsay where the declarant was unavailable. *Id.*

minimum standards of reliability¹¹⁷ but mandating no specific set of exceptions and allowing broad variation and evolution. Yet Peter Westen criticizes even this limited constitutionalization of a reliability standard for the use of hearsay. Noting the general due process bar on the use of unreliable evidence, he asks advocates of a more demanding threshold for hearsay to

explain why hearsay evidence is categorically different from other kinds of prosecutorial evidence. Hearsay, after all, is not the only kind of evidence that can be challenged for lack of trustworthiness. The same can occur with real evidence, eyewitness identification, and other kinds of testimonial evidence. Yet no one contends that the due process standard is inadequate for those kinds of evidence. . . .¹¹⁸

One can go beyond this to argue, not just for treating all evidence the same, but for making the uniform standard, like the due process bar as described by Westen, a "minimal" one that bars "only the most tendentious and inherently dubious items of evidence."¹¹⁹ The argument relies on the adversary process to bring weaknesses in the evidence to the jury's attention, and on the jury to weigh the weaknesses appropriately.

Such an argument may be powerful on its own terms, but has less force from a historical perspective. The Confrontation Clause and the hearsay rules reflect a strong conviction that witnesses' statements are a special and unusually unreliable evidence - potentially suffering from the classic flaws of insincerity, ambiguity, faulty perception, or erroneous memory¹²⁰ - unless tested in court through cross-examination, jury observation of demeanor, and the like. The Constitution contains the Confrontation Clause, in addition to the Due Process Clause, for the same reason that the modern Federal Rules of Evidence exclude hearsay not within a specific exception, in addition to excluding evidence that is insufficiently probative.¹²¹ While a view of hearsay as less reliable than, say, eyewitness identifications that are repeated in court may be wrong,¹²² this is our contemporary understanding, not the one prevailing when the Sixth

117. Given the historical reasons for the Confrontation Clause and the hearsay rules, the minimum standard could take account not only of reliability, but of deterrence of government misconduct and symbolic concerns. See *supra* notes 38-42 and accompanying text.

118. Westen, *supra* note 51, at 1202 (footnote omitted).

119. *Id.* at 1190.

120. See, e.g., Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

121. See FED. R. OF EVID. 403 (excluding evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay"); and 802 (excluding hearsay except as provided by the hearsay exceptions).

122. On the under-appreciated inaccuracy of eyewitness identifications, see, e.g., ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (1987).

Amendment was adopted.

I therefore conclude that the best historical interpretation of the Confrontation Clause would read it as requiring a showing of reliability, beyond that necessary for evidence under the Due Process Clause, even if the witness is unavailable. This is not to say that Westen's constitutional position is flatly incorrect. Since it is plausible as policy and not explicitly ruled out by either the text or the history of the Sixth Amendment, one is perfectly justified in advocating it if one is not a strict "originalist," and views both policy and history as relevant to interpreting ambiguous provisions in the Constitution.¹²³

The Supreme Court has agreed that the Confrontation Clause requires that hearsay evidence which is used against a criminal defendant bear sufficient "indicia of reliability," going beyond the minimal due process requirements, even if the declarant is unavailable.¹²⁴ In *Roberts*, the Court stated that, while this sometimes might require a case-specific inquiry, "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."¹²⁵ The Court seemed not quite to believe itself, however, as it engaged in a case-specific inquiry despite the apparent applicability of one such exception.¹²⁶ More recently, however, the Court has taken the statement in *Roberts* at face value. In *Bourjaily v. United States*,¹²⁷ the Court expressly declined to consider whether the particular co-conspirator statements admitted against the defendant bore sufficient indicia of reliability, on the ground that co-conspirator statements are a firmly rooted hearsay exception with a "long tradition of being outside the compass of the general hearsay exclusion."¹²⁸

Those who favor a high threshold of reliability under the Confrontation Clause have criticized the Court's "firmly rooted" rule on two grounds. First, evidence fitting under many of the "firmly rooted" exceptions may not in fact be reliable.¹²⁹ Co-conspirator statements, for example, plainly may be

123. Cf. William F. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (arguing that history and current policy are both relevant to statutory interpretation).

124. See *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

125. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

126. See *id.* at 70-72. The evidence in *Roberts*, testimony at a pretrial hearing, arguably met the terms of current Federal Rules of Evidence 804(b)(1), which allows the admission of "[t]estimony given as a witness at another hearing of the same or a different proceeding, . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The Court described this hearsay exception as firmly rooted. *Id.* at 66 n.8.

127. 483 U.S. 171 (1987).

128. *Id.* at 183.

129. See Goldman, *supra* note 25, at 16-46.

tendentious,¹³⁰ and the historical reason for the exception has more to do with notions of agency and estoppel than reliability.¹³¹ Similarly, dying declarations, although apparently adopted based on the belief that they are reliable,¹³² in fact may not be,¹³³ especially in an era where reduced religious fears of punishment in an afterlife may weaken one of the principal motives for truthfulness.¹³⁴ Second, they argue that the Supreme Court has been disingenuous in its application of the "firmly rooted" rule. Thus, in *Bourjaily*, the Court simultaneously expanded the exception's breadth -- easing the standards for the government's required prior showing that the defendant was engaged in a conspiracy -- and relied on the exception's being firmly rooted in history.¹³⁵

The first of these two criticisms, while plainly correct - surely many of the hearsay exceptions fail to guarantee reliability and may not even have emerged primarily on that ground - would appear to be irrelevant if one is engaged purely in reconstructing the most plausible historical meaning of the Confrontation Clause. A hearsay exception's historical roots, if they reach back to the eighteenth century, obviously testify to the assumption at the time that confrontation could appropriately be dispensed with. The argument against the "firmly rooted" rule therefore must be one of current policy rather than history. The second criticism, that the Supreme Court simultaneously broadens the existing hearsay exceptions and purports to rely on their ancient roots, is considerably more telling historically, and suggests once again a possible impatience with even historically supportable claims of defendant confrontation rights.

D. Justice Scalia's Interpretation of the Confrontation Clause

Despite disagreement over details, there is surprising consensus over the broad picture of what the Confrontation Clause means. It envisions a set of procedures for in-court witnesses, perhaps most importantly cross-examination, but not limited thereto. It requires that witnesses whose statements are used as evidence against the defendant be called by the State to testify at trial if they are available, but subject to some set of reasonable exceptions. Finally (and more

130. See *supra* note 103 and accompanying text.

131. See *Bourjaily v. United States*, 483 U.S. 171, 188-190 (1987) (Blackmun, J., dissenting); Goldman, *supra* note 25, at 39-41.

132. See MCCORMICK, *supra* note 6, at § 281 n.2.

133. See Goldman, *supra* note 25, at 24-26.

134. See FED. R. EVID. 804(b)(2), advisory committee notes. It may not, however, be true, other than for academics and other members of the intelligentsia, that religious belief in this country has declined over the last two centuries. See GARY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* (1990).

135. See *Bourjaily v. United States* 483 U.S. 171, 199-202 (1987) (Blackmun, J., dissenting).

controversially), it requires that hearsay evidence used without confronting the declarant at trial meet minimum standards of reliability.

In disagreement with this framework of analysis, one person stands alone: Justice Scalia.¹³⁶ While apparently willing to accept most Supreme Court precedents in the area, on the ground that they state rights implied by or collateral to confrontation,¹³⁷ he argues that confrontation itself, and thus the explicit, irreducible meaning of the Clause, extends to only one thing: eye contact between the defendant and accusing witnesses while they testify in court.¹³⁸

Justice Scalia derives his unique view principally from three sources. First is the ostensible plain meaning of the word "confrontation" itself, which he thinks denotes a face-to-face encounter between the defendant and the accusing witness "simply as a matter of English."¹³⁹ He ignores the point that "confrontation" also, as a matter of English, denotes a hostile encounter and thus suggests that adversarial interaction (such as cross-examination?) is similarly at the heart of the Clause. Second, he argues that his interpretation follows "[s]imply as a matter of Latin as well, since the word 'confront' ultimately derives from the prefix 'con-' (from 'contra' meaning 'against' or 'opposed') and the noun 'frons' (forehead)."¹⁴⁰ Why this is relevant to the word's meaning in eighteenth century or current legal usage remains unspecified. Third, he traces the right to a face-to-face encounter to the beginnings of Western legal culture, as evidenced by the following sources: the words of the Roman Governor Festus,¹⁴¹ a speech by Shakespeare's Richard

136. Justice Scalia's opinions in *Coy v. Iowa*, 487 U.S. 1012 (1988), and *Maryland v. Craig*, 110 S. Ct. 3157 (1990), stating his view, were joined by Justices Brennan, Marshall, and Stevens. (Justices White and O'Connor also joined Justice Scalia's opinion in *Coy*, but filed a concurring opinion that stated a different view and then followed that opinion to reach a different conclusion than Scalia's in *Craig*.) Other Confrontation Clause opinions by Justices Brennan, Marshall, and Stevens make it clear, however, that even if they agree with Justice Scalia's central point about the importance of eye contact between the defendant and the accusing witnesses, they take a far broader view of the Confrontation Clause in other respects. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 77-82 (1980) (Brennan, J., joined by Marshall, J., and Stevens, J., dissenting).

137. See *Craig*, 110 S. Ct. at 3172-74 (Scalia, J., dissenting).

138. *Id.* at 3171-75.

139. *Coy*, 487 U.S. 1012, 1016 (1980) (quotation marks and brackets omitted). The above phrase is quoted from Justice Harlan's opinion in *California v. Green*, 399 U.S. 149, 175 (1971), which describes the Confrontation Clause as conferring "at least a right to meet face to face all those who appear and give evidence at the trial." *Coy*, 487 U.S. at 1016, quoting *California v. Green*, 399 U.S. 149, 175 (Harlan, J., concurring). Justice Harlan, however, argued in *Green* that the production of available witnesses was at the heart of the Clause, and in *Dutton* that it principally conferred a right of cross-examination. See *id.* at notes 149-52.

140. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1980).

141. *Id.* at 1015.

II,¹⁴² and the childhood memories of Dwight Eisenhower.¹⁴³ Yet he fails to consider the more specific roots of the Confrontation Clause in eighteenth century English common law.¹⁴⁴

There remains for Justice Scalia the problem of whether all declarants whose statements are used against the defendant must make eye contact with her while they provide their evidence, in which case no hearsay evidence would be admissible. This, he says, depends on whether the term "witnesses" in the Confrontation Clause refers to all persons who know or see anything about the facts of the case or instead only to the witnesses appearing at trial.¹⁴⁵ He then continues:

The former meaning (one "who knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses against him." The phrase obviously refers to those who give testimony against the defendant at trial.¹⁴⁶

It is difficult to imagine a more complete and unconvincing non sequitur. Concededly, the words "against him" establish that the "witnesses" covered by the Sixth Amendment are only a subset of all persons having knowledge about the defendant's case. On what ground, however, does Justice Scalia conclude that the subset consists only of those persons appearing at the trial? Why cannot the term "witnesses against him" refer to all persons having knowledge about the case and whose statements reporting such knowledge the prosecution uses as evidence against the defendant? Under that meaning, hearsay declarants would be included. Looking at the words "witnesses against him" in isolation from a "plain meaning" perspective, that interpretation appears at least as plausible as the one that Justice Scalia so rapidly concludes is "obvious."

I have already suggested that Justice Scalia's view is contradicted by the history of the Sixth Amendment and the drafters' decision to refer to confrontation rather than (like some existing state bills of rights) to a meeting

142. *Id.* at 1016.

143. *Id.* at 1017. All three of these quotations were apparently derived from the scholarly literature. See *Graham*, *supra* note 4, at 107 n.42 (Richard II); POLLITT, *supra* note 28, at 381 (Eisenhower) and 384 (Festus). Justice Scalia spared us an anecdote from Pollitt, *supra* note 28, at 384, involving the Roman Emperor Trajan.

144. From a methodological standpoint, one can only wonder what Justice Scalia who condemns reliance on isolated "snippet[s]" of legislative history (*Blanchard v. Bergeron*, 109 S. Ct. 939, 947 (1988)) would make of this motley selection of supporting authorities from the history of Western culture.

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

146. *Id.* at 3173-74.

"face to face."¹⁴⁷ It is worth noting as well how oddly his view would apply to the Raleigh trial. Under it, the Confrontation Clause would have no direct bearing on the trial. It would not bar Cobham's evidence, because he did not appear at the trial as a witness. Nor, for the same reason, would it bar the evidence of the Portuguese gentleman. The Confrontation Clause, Justice Scalia would have us believe, has little to do with trial by affidavit as practiced in Tudor and Stuart England. Rather, with remarkable foresight, it was drafted two centuries ago to deal, directly and literally, with almost no cases other than *Coy v. Iowa* and *Maryland v. Craig*, the 1980s child sex abuse cases in which the state attempted to shield the child witness from eye contact with the defendant through the use of closed circuit television or a screen.

Justice Scalia's approach seems not only wrong, but poorly thought through. It extracts one right from a larger bundle and simply assumes that right to stand alone at the heart of the Confrontation Clause. Justice Scalia displays little interest in careful textual analysis, less knowledge about the history most relevant to interpreting the language, and least of all the modesty to wonder why everyone else's views over the last century have been so different from his own. This shoddy performance is all the more disappointing given that Justice Scalia's position about the procedures in *Coy* and *Craig* is plausible, on grounds of both history and policy,¹⁴⁸ and given the admirable conviction he evidently holds that he is staunchly defending an important right "against the tide of prevailing current opinion."¹⁴⁹

The Supreme Court majority, by contrast, has more or less remained within the boundaries of a plausible interpretation of the Confrontation Clause. For sound reasons of history, it continues to view the Clause as excluding some evidence that arguably should get in, from the standpoint of reliability alone, if one trusts juries, with the assistance of defense counsel, to recognize the defects of hearsay evidence. In subtle ways, however, more alarming as evidence of a broader methodology than for themselves, the Court has tilted towards prosecutors in confrontation cases, at times ignoring legitimate defense concerns or applying legal standards inconsistently. For the future, one can only wonder how well the Confrontation Clause will weather being interpreted by those who, in their sympathies, seem less the heirs of Sir Walter Raleigh than of the judges who denied him confrontation lest the jury be "inveigled."¹⁵⁰

147. See *supra* notes 118-19 and accompanying text.

148. I would decide *Coy* and *Craig* for the government, but uneasily, given not only the history but the possibility of unfair prejudice to the defendant.

149. *Maryland v. Craig*, 110 S. Ct. 3157, 3171 (1990) (Scalia, J., dissenting).

150. JARDINE, *supra* note 31, at 427.