

THE COST OF AB 193: CONSTITUTIONAL GUARANTEES SACRIFICED FOR INEFFECTIVE MEANS

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INTRODUCTION

“[I]t’s the wave of the future,” stated Washoe County District Attorney Christopher Hicks.¹ He was referring to Nevada Assembly Bill 193 (“AB 193”), passed during the 2015 legislative session. The bill allows admission of hearsay evidence in preliminary hearings and before grand juries for cases involving (1) sexual abuse against a child under sixteen, (2) child abuse of a minor under sixteen, and (3) domestic violence that results in substantial bodily harm.² Thirty-six other states have passed similar bills.³ Additionally, although rare, hearsay evidence is permissible in federal court.⁴ Advocates for domestic violence survivors support this bill because abuse survivors are typically reluctant to testify against their abusers.⁵ By allowing hearsay evidence, AB 193 would enable others, such as police officers or district attorneys, to describe events that occurred and repeat words that were said, sparing the victim from having to testify.⁶

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¹ Terri Russell, *Hearsay Rules Would Change Under AB193*, KOLO8 NEWS NOW (Apr. 2, 2015, 8:14 PM), <http://www.kolotv.com/home/headlines/Hearsay-Rules-Change-Under-AB193-298536091.html> [<https://perma.cc/98S9-JHS5>].

² A.B. 193, 78th Gen. Assemb., Reg. Sess. (Nev. 2015) (codified at NEV. REV. STAT. §§ 171.196(6), 172.135(2) (2015)).

³ See *Hearing on A.B. 193 Before the Nev. Assemb. Judiciary Comm.*, 2015 Leg., 78th Sess. 20 (Nev. 2015) (testimony of Steven Wolfson, Clark County District Attorney) (Mar. 13, 2015).

⁴ FED. R. CRIM. P. 5.1 advisory committee’s notes to 1972 amendment. Particularly, the Advisory Committee Notes to the 1972 addition make clear “that a finding of probable cause may be based on ‘hearsay evidence in whole or in part.’” *Id.*

⁵ Editorial, *Domestic Violence Bill Doesn’t Serve Justice*, L.V. REV.-J. (Apr. 30, 2015, 7:44 AM), <http://www.reviewjournal.com/opinion/editorial-domestic-violence-bill-doesn-t-serve-justice> [<https://perma.cc/W7LR-8XTN>].

⁶ Russell, *supra* note 1.

The abuse survivor's reluctance to testify is a significant bar to the successful prosecution of domestic violence. Numerous factors cause this reluctance: cultural or familial pressure, worry about loss of financial support from the abuser, fear of losing custody of children, and an ongoing or renewed romantic relationship with the abuser.⁷ Apart from these reasons, AB 193 focuses on the survivor's fear of facing their abuser in a court proceeding. Facing their abuser again, even in a court setting, often traumatizes victims, causing them to relive the abuse.⁸ Simultaneously, seeing the survivor relive the fear of the abuse can re-empower the abuser, fueling the abuser's drive for more power and control, and put the abuse survivor at a higher risk of murder.⁹

Despite the bill's passage with large majorities in both houses of the legislature, there was significant opposition.¹⁰ "The right to confrontation is a bedrock principle of the criminal justice system," wrote Alameda County Public Defender Brendon D. Woods.¹¹ In his letter opposing the bill, Mr. Woods noted that AB 193 significantly erodes the accused's constitutional right to confrontation.¹² The Sixth Amendment to the United States Constitution reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹³ Recent Supreme Court jurisprudence has strengthened the defendant's position *vis-à-vis* the Confrontation Clause, making it harder to include hearsay statements into evidence.¹⁴ Bills like AB 193 have been an immediate response by many states to help prosecute domestic violence abusers.¹⁵ Unfortunately, this legislation is the wrong response. It will do little to help survivors of abuse, and what little good it does will be at the expense of the rights of the accused.

While the goals of AB 193 are laudable, the bill focuses on the wrong problem, falls short of true effectiveness, and infringes upon the constitutional rights of the accused. This note attempts to chart a path that both vindicates victims' rights and maintains judicial fairness for the accused. But first, to know where

⁷ Michelle Byers, Note, *What Are the Odds: Applying the Doctrine of Chances to Domestic Violence Prosecutions in Massachusetts*, 46 NEW ENG. L. REV. 551, 557 (2012).

⁸ See Lindsay Hoopes, Note, *The Right to a Fair Trial and the Confrontation Clause: Overruling Crawford to Rebalance the U.S. Criminal Justice Equilibrium*, 32 HASTINGS INT'L & COMP. L. REV. 305, 313 (2009).

⁹ See, e.g., Aviva Orenstein, *Sex, Threats, and Absent Victims: The Lessons of Regina v. Beddingfield for Modern Confrontation and Domestic Violence Cases*, 79 FORDHAM L. REV. 115, 145 (2010).

¹⁰ See, e.g., Letter from Brendon D. Woods, Alameda Cty. Pub. Def. (Mar. 11, 2015), https://www.leg.state.nv.us/App/NELIS/REL/78th2015/ExhibitDocument/OpenExhibitDocument?exhibitId=13054&fileDownloadName=Opposition%20Letter_Brendon%20Woods%20Public%20Defender%20Alameda%20County.pdf [<https://perma.cc/C53B-LHCQ>].

¹¹ *Id.*

¹² *Id.*

¹³ U.S. CONST. amend. VI.

¹⁴ See generally Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865 (2012).

¹⁵ *Hearing on A.B. 193 Before the Nev. Assemb. Judiciary Comm.*, *supra* note 3.

that path leads, it is well to know where the path began. Part I will present a brief overview of the origins of hearsay and confrontation, and a discussion of their doctrinal development in pre-revolution America. Particular emphasis is placed on how the constitutional right of confrontation relates to the other rights contained in the Sixth Amendment. Part II will trace the Supreme Court's treatment of hearsay as it relates to confrontation. This review of cases will show the development of working rules used by the Court today, and explain how these rules vary from hearsay's and confrontation's historical roots. Finally, Part III will review recent cases under the most recent Supreme Court rules on hearsay and confrontation, and outline some troubling trends from those cases. This final Part will also explain how AB 193 falls short of its intended purpose by describing how the bill's shortcomings create a significant cost that outweighs any benefit. The Conclusion provides suggestions for a better solution.

I. ORIGINS OF HEARSAY AND THE CONFRONTATION CLAUSE

A. Hearsay

Black's Law Dictionary defines hearsay as "testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness."¹⁶ Under the Federal Rules of Evidence, hearsay is generally not admissible, unless an exception applies.¹⁷ Common exceptions to the hearsay rule revolve around the physical and mental state of the declarant, the availability of the declarant, and the declarant's credibility.¹⁸ The Nevada rule against hearsay mirrors closely the federal rule.¹⁹ But the rules against hearsay have not always been what they are today.

Hearsay's common law origins followed developments in witness testimony.²⁰ In the early 1400s, witness testimony before a jury was practically unrecognizable from what it is today. A typical witness was a pre-appointed individual ("transaction-witnesses"), who often did not testify live in court.²¹ Additionally, such witnesses were not the only source of information on which the jury based its final determination. Rather, litigating parties had a right to personally inform the jury, either before trial or after they were empaneled.²² Further, nothing prevented a juror from making any extra-judicial inquiry, including interviewing witnesses who were not going to testify at trial.²³ As Sir John Fortescue, Chief Justice of the King's Bench of England, commented in 1450, "If

¹⁶ *Hearsay*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁷ FED. R. EVID. 802.

¹⁸ FED. R. EVID. 803(3), 804, 806.

¹⁹ NEV. REV. STAT. §§ 51.065, 51.069, 51.105, 51.315 (2015).

²⁰ See John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 438 (1904).

²¹ *Id.* at 440.

²² *Id.*

²³ *Id.* at 440–41.

the jurors come to a man [outside of court] . . . to have knowledge of the truth of the matter . . . it is justifiable.”²⁴ In short, witnesses were paid professionals, parties were permitted ex-parte contact with jurors, and jurors had permission to consult any source of information.

These practices changed over the next one-hundred years as trial by jury grew in practice and prominence. Independent jury investigation diminished, creating a large dependency on live, in-court testimony.²⁵ By the mid-1500s, the increased dependence on live, in-court testimony generated questions and discussion about the “sufficiency in quantity and quality” of witnesses.²⁶ Here is when hearsay was first seriously questioned.

Initial hearsay concerns were more a question of quantity than of quality.²⁷ It was generally accepted that having only one sole witness, who based his entire testimony on hearsay, was insufficient evidence.²⁸ The harder question: Must testimony from second or third witnesses derive from personal knowledge, or could their testimony be based on hearsay as well?²⁹ At first, as long as the hearsay testimony corroborated the personal knowledge testimony, it was admissible.³⁰ However, this reliance on corroboration led to some of the most infamous abuses of hearsay.

Sir Walter Raleigh was a poet, soldier, politician, and explorer.³¹ He was instrumental in establishing early American colonies, and today is widely remembered for his extravagant tales of searching for El Dorado in South America.³² Shortly after the ascension of James I to the English monarchy, Raleigh was accused of conspiring against the new king.³³ On trial for treason, with his life in the balance, the strongest evidence presented against Raleigh was a signed confession of Baron Cobham, who admitted his own guilt while also naming fellow conspirators.³⁴ Raleigh objected, arguing, “[L]et Cobham be here, let him speak it. Call my accuser before my face.”³⁵ Lord Chief Justice Popham denied

²⁴ *Id.* at 440 (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 128 (Boston, Little, Brown & Co. 1898)).

²⁵ *Id.* at 441.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See id.* at 442.

²⁹ *See id.* at 442–43.

³⁰ *Id.* at 443.

³¹ *See* Agnes M.C. Latham, *Sir Walter Raleigh*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/biography/Walter-Raleigh-English-explorer> [https://perma.cc/4YVD-B2B7] (last updated Dec. 11, 2015).

³² *Id.*

³³ *Id.*

³⁴ *Crawford v. Washington*, 541 U.S. 36, 44 (2004).

³⁵ *Id.* (quoting *The Trial of Sir Walter Raleigh*, in 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON 16 (1809)).

this request, simply replying, when “so many circumstances agree[] and confirm[] the accusation . . . the accuser is not to be produced.”³⁶ In other words, corroboration trumped confrontation.

Other prominent abuses occurred during this time as well. The English monarch established the Court of the Star Chamber to alleviate the case load of both civil and equity courts.³⁷ To facilitate public trials, the court’s frequent practice was to examine witnesses in secret.³⁸ It was not long, however, before these secret proceedings began to be used as a political weapon—threatening and harassing those out of favor with the crown.³⁹ The ex-parte, anonymous testimony obtained by the Star Chamber was then used to “trap the accused into a confession.”⁴⁰

These abuses did not go unnoticed. By the mid-1600s, mounting concern developed into working hearsay rules, which functioned under two scenarios: (1) whether the statement was a general statement (made out of court), or (2) whether it was made in court under oath.⁴¹ Concerns regarding statements made out of court mounted because they offered “the other side hath no opportunity of a cross-examination.”⁴² Questions of validity and reliability (e.g., corroboration) were becoming secondary to the concern of confrontation. But this was a slow process.⁴³ Sufficient corroboration of personal knowledge testimony through hearsay testimony still frequently overcame objections to confrontation.⁴⁴ Statements under oath were similarly concerned with and justified by sufficient corroboration.⁴⁵

But, evolving concurrently with hearsay rules was another feature that is common in today’s law practice—assistance of counsel. Principally, counsel was at first only required for a defendant in capital and felony cases.⁴⁶ This changed during the eighteenth century, as assistance of counsel became available for even petty crimes and misdemeanors.⁴⁷ During this transition, the growing and frequent use of counsel was instrumental in converting the judicial process into the

³⁶ Wigmore, *supra* note 20, at 443 (citing 1 DAVID JARDINE, CRIMINAL TRIALS 427 (1875)).

³⁷ *Court of Star Chamber*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/Court-of-Star-Chamber> [https://perma.cc/N2F5-ETK7] (last updated Oct. 24, 2003).

³⁸ Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 738 (1913).

³⁹ See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 570–71 (1992).

⁴⁰ *Id.* at 570.

⁴¹ Wigmore, *supra* note 20, at 448.

⁴² *Id.* at 448 (referencing 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 431 (1716)).

⁴³ See *id.* at 453–54.

⁴⁴ See *id.* at 446–47.

⁴⁵ *Id.* at 448.

⁴⁶ See, e.g., Patrick S. Metzger, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 168–69 (2012).

⁴⁷ *Id.* at 168.

adversarial system.⁴⁸ With the growing establishment of the adversarial system, the right to cross-examine became a more permanent part of judicial proceedings, and a bedrock principle of justice.⁴⁹

Corroboration and cross-examination, therefore, formed the core historical concerns regarding hearsay. It was in this historical setting that Blackstone published his famous commentaries. Before Blackstone, corroboration had been a numerical question—inquiring how many hearsay witnesses plus personal-knowledge witnesses equaled admissible evidence.⁵⁰ Blackstone, however, focused instead on reliability exceptions.⁵¹ Many of these exceptions described by Blackstone are recognized today, including excited utterances, dying declarations, and self-inculpatory statements, to name just a few.⁵²

Regarding cross-examination, Blackstone notes that “[a]ny one giving evidence may state what he has *seen* . . . but he may not state what he has heard *said* . . . [unless there be] the opportunity of contradicting them.”⁵³ In other words, hearsay of any kind required cross-examination, unless it fell in one of the exceptions noted above. More intriguing than this hard stance on hearsay is that it is discussed not in a chapter on evidence, but in reference to juries.⁵⁴ Blackstone praises the use of juries as “the principal safeguard of people’s liberties” because “open examination of a witness in *viva voce* . . . is much more conducive to the clearing up of truth.”⁵⁵

By tying so closely together a jury trial, cross-examination, and the adversarial process, his conclusion that discovering the truth through confronting adverse witnesses “can never be had upon any other method of trial” is made without justification; it is simply axiomatic.⁵⁶ Blackstone practically elevates confrontation into a natural right. As this note will show, this focal switch on hearsay from corroboration to reliability, coupled with the growing acceptance of the adversarial process, had a significant impact on the interpretation of hearsay and the Confrontation Clause for the Founding Fathers.

⁴⁸ *Id.* at 199 n.272 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

⁴⁹ *See id.* at 208–09.

⁵⁰ Wigmore, *supra* note 20, at 442.

⁵¹ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 796 (Banks & Brothers 1877) (noting the preference to not admit discourse evidence, “but the man himself must be produced.” Additionally, when courts do admit hearsay evidence, “such evidence will not be received of any particular facts” due to the inherent unreliability. Exceptions for written records and dying declarations are then later discussed).

⁵² *See* FED. R. EVID. 803, 804.

⁵³ JOHN E. EARDLEY-WILMOT, AN ABRIDGMENT OF BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 312 (3d ed. 1855).

⁵⁴ *See* Berger, *supra* note 39, at 583.

⁵⁵ *Id.* at 583–84 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *345).

⁵⁶ *Id.* at 583 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *345).

B. Right to Confrontation

Blackstone's treatment of hearsay had a particular impact on the American colonies. In fact, it was under the influence of this treatment that the Framers drafted the Confrontation Clause. The scholarly literature, however, is still in debate about the specific origins of the Confrontation Clause.⁵⁷ Early colonial records are largely silent regarding this right, and other common sources used to ascertain the Framers' perspective (e.g., Federalist papers, Notes on the Constitutional Convention) also yield little to no information.⁵⁸ Because of this murkiness, the literature is divided largely into two academic camps regarding the origin of the Confrontation Clause: (1) either it arose as a result of the political abuse suffered in the English court system (e.g., Raleigh, Star Chamber), or (2) it was an institutionalization of colonial criminal procedure.⁵⁹

Certainly, Raleigh's trial and the Star Chamber were not far removed in time and place from colonial life.⁶⁰ But more present than these past abuses were recent judicial usurpations, such as the Stamp Act and other custom laws. These acted as fresh, daily reminders that the harms of Raleigh's trial were real.⁶¹ The Stamp Act was a 1765 parliamentary decree that required an official stamp on all legal documents to effect their validity.⁶² The Stamp Act expanded the role of the vice-admiralty courts, allowing them to proceed without a jury and to examine witnesses in secret.⁶³ As revolutionary fervor built in the colonies, Parliament also decreed that all traitors to the crown should be tried in England, effectively depriving colonists of a jury of their peers and destroying their ability to call witnesses on their behalf.⁶⁴ In post-Glorious Revolution England, these two traits (jury trial and witnesses) became bedrock principles of judicial procedure, guaranteed to all citizens (or at least those in England).⁶⁵ Denial of these rights, cou-

⁵⁷ See, e.g., Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995).

⁵⁸ See *id.*

⁵⁹ See *id.* at 81–82.

⁶⁰ Raleigh was tried in 1603. Wigmore, *supra* note 20, at 443. The Star Chamber was in operation from the fifteenth century through the mid-seventeenth century, until its dissolution in 1641 by the Long Parliament. *Court of Star Chamber*, *supra* note 37.

⁶¹ Berger, *supra* note 39, at 578–79.

⁶² *Stamp Act*, HISTORY.COM, <http://www.history.com/topics/american-revolution/stamp-act> [https://perma.cc/ZE5R-KEKK] (last visited Jan. 27, 2017).

⁶³ See Berger, *supra* note 39, at 579.

⁶⁴ *Id.*

⁶⁵ See *id.* at 577.

pled with the mounting pressure from the Stamp Act and other similar laws, became especially hard on the colonists.⁶⁶ At best, the colonists considered these acts as backward steps; at worst, they were inquisitorial and tyrannical.⁶⁷

Also during this time, colonial law practices began to distinguish themselves from their common law heritage. In particular, the importance of juries and of the right to counsel took hold much faster in the colonies than it had in England.⁶⁸ An ardent fear of monarchical control-inspired actions to ensure fair judicial practices and strong criminal rights.⁶⁹ The rights of free men were afforded to the accused, and only deprived after a determination of guilt.⁷⁰ In order to protect these rights, the colonial trial system quickly developed into the adversarial system, leaning heavily upon a full right to counsel, with a focus on defense by cross-examination.⁷¹

As noted, Blackstone had a particular impact on colonial lawyers, who devoured his *Commentaries*, taking to heart his praise of juries, and the inherent tie between jury trial and live cross-examination.⁷² Indeed, George Mason's draft of the Confrontation Clause for the 1776 Virginia Bill of Rights read as if it came straight from Blackstone.⁷³ Virginia was the first state to incorporate a Confrontation Clause in its legislation, becoming a model for at least seven other states, and eventually for the United States Constitution.⁷⁴

The location of the Confrontation Clause in the Sixth Amendment also looks back to Blackstone. The right to confrontation is included with the rights to jury trial, calling of witnesses, and assistance of counsel.⁷⁵ All of these rights, taken as a bundle, support the arguments of either academic camp regarding the origin of the Confrontation Clause. These rights, together, act as a powerful restraint

⁶⁶ Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1115 (1994) (noting that by the 1760s "Americans attached a unique constitutional importance to jury trial" in light of "increasingly violent colonial political dissent.").

⁶⁷ See Jonakait, *supra* note 57, at 86 (noting the dominance of judges over trials, particularly over the jury).

⁶⁸ In the roughly 150-year span from the first American colonies in the early seventeenth century to the revolutionary era in the mid-eighteenth century, colonial law accepted the legal precedents that took hundreds of years to develop under English common law. William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 393-94 (1968). Regarding the importance of juries, see note accompanying Moglen, *supra* note 66. Regarding the importance of right to counsel, see Jonakait, *supra* note 57, at 92-96 (noting that while the right to counsel in England expanded greatly in the 1730's, significant expansion of the right in American colonies began as early as 1660, showing that "Americans were willing to fashion their own criminal procedure to be more protective of the accused than the common law or English practice was.").

⁶⁹ Jonakait, *supra* note 57, at 114.

⁷⁰ See *id.*

⁷¹ *Id.* at 116.

⁷² See Berger, *supra* note 39, at 581 n.102, 581-83.

⁷³ See *id.* at 584-85.

⁷⁴ *Id.*

⁷⁵ U.S. CONST. amend. VI.

against excessive and oppressive governmental power, and they form the core of the then-in-practice colonial criminal procedure. As such, it is impossible to create an original understanding of the Confrontation Clause without considering it in conjunction with the other Sixth Amendment rights. Just as hearsay in its origin became inextricably combined with the notions of corroboration and cross-examination, so, too, did the American constitutional right to confrontation, as it became inextricably bound to notions of jury trial, cross-examination, and assistance of counsel.

II. COURT TREATMENT OF HEARSAY AND THE CONFRONTATION CLAUSE

A. *The Early Cases (Natural Right)*

Unfortunately, there is little early court interpretation of hearsay and confrontation. The two notions share similar origins, focus on similar concerns, and therefore have close historical ties. But it is misleading to think that confrontation always concerns hearsay, or that hearsay always requires confrontation. The two developed independently and have distinct aims.

The most prominent early exposition occurred in the 1807 trial of Aaron Burr. Burr, after his failed nomination to the vice-presidency, and the subsequent duel with Alexander Hamilton, fled west.⁷⁶ There, he found supporters who offered him funds, land, and young men willing to follow him.⁷⁷ But to what end? Burr's intentions were uncertain; an expedition against the Spanish into Mexico was as plausible as a conspiracy against the United States.⁷⁸ Fearing the latter, General Wilkinson, a former confidant of Burr, became worried of further threats against the still-fledgling nation, and informed President Jefferson of Burr's militia.⁷⁹ Labeling Burr a traitor, Jefferson issued a warrant for his arrest.⁸⁰

Burr's trial ended in acquittal,⁸¹ but more important than the holding were the words of Chief Justice John Marshall regarding hearsay and confrontation. During Burr's trial, the prosecution sought to present an out-of-court statement from an absent witness as a declaration by a co-conspirator.⁸² Chief Justice Marshall, however, struck the statement on confrontation grounds.⁸³ He pondered why the Confrontation Clause was a constitutional provision at all if mere verbal

⁷⁶ CHARLES F. HOBSON, FED. JUDICIAL CTR., *THE AARON BURR TREASON TRIAL* 1–2 (2006).

⁷⁷ *Id.* at 2.

⁷⁸ *See id.* at 2–3.

⁷⁹ *Id.* at 3.

⁸⁰ *See* Donald F. Paine, *Proof of Treason: The Trial of Aaron Burr*, TENN. B.J., July 2003, at 24.

⁸¹ *Aaron Burr Arrested for Treason*, HISTORY.COM, <http://www.history.com/this-day-in-history/aaron-burr-arrested-for-treason> [<https://perma.cc/VRQ4-SPEC>] (last visited Jan. 27, 2017).

⁸² *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14694).

⁸³ *Id.*

declarations made in absentia could be availing in court.⁸⁴ Perhaps a little dramatically, the Chief Justice finished that train of thought by concluding that if it were so, then all of “life, liberty and property, might be more endangered.”⁸⁵

While this dramatic flourish at least suggests the importance of confrontation to Marshall, unfortunately his opinion gives no further justification as to why this was inadmissible hearsay and why the Confrontation Clause comes out on top. At a minimum, the bare takeaway here is an early judicial disdain for ex-parte testimony, and a preference for confrontation by cross-examination.

The few state court decisions that followed Burr’s trial agreed with Marshall. A North Carolina court denied admittance of an absent witness’s deposition regarding what an alleged horse thief had done with the stolen animal.⁸⁶ The North Carolina court stated, “[F]ounded on natural justice, [] no man shall be prejudiced by evidence which he had not the liberty to cross examine.”⁸⁷ Like the Marshall opinion in the Burr trial, this holding lacks specific and detailed justification. Nowhere in the opinion does it state that confrontation is based on the unreliability of hearsay, or on a need to safeguard any procedural practice that existed in early America. Instead, the Confrontation Clause, “founded on natural justice,” is treated like a fundamental right.⁸⁸

Similarly, an appeal before a Tennessee court went so far as to deny testimony received in the lower court because the witness had died and was therefore unavailable for cross-examination.⁸⁹ Prior testimony of a deceased witness was an exception noted by Blackstone.⁹⁰ However, this Tennessee court noted, though “frequent deaths may take place . . . it would be dangerous to liberty to admit such evidence.”⁹¹ Again, the opinion lacks further reasoning; it simply asserts that confrontation is required.

These and other early cases share the colonial-era concern that confrontation allows for effective advocacy of the accused.⁹² The fear of another King George inspired early Americans to hold tight to their constitutional rights, especially those rights that restrained governmental power, such as those found in the Sixth

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *State v. Webb*, 2 N.C. (1 Hayw.) 103, 103–04 (1794).

⁸⁷ *Id.* at 104.

⁸⁸ *Id.*

⁸⁹ *State v. Atkins*, 1 Tenn. (1 Overt.) 229, 229 (1807).

⁹⁰ BLACKSTONE, *supra* note 51.

⁹¹ *Atkins*, 1 Tenn. (1 Overt.) at 229.

⁹² *See Jonakait*, *supra* note 57, at 124.

Amendment.⁹³ Effective defendant advocacy was one way to limit government overreach and to retain power in the people.⁹⁴

Any of a number of existing legal or historical explanations suggest the source for judicial interpretation of the Confrontation Clause: fear of a return to monarchical control, an adherence to existing criminal procedure, a disdain for ex-parte testimony, a sincere belief that confrontation is a natural or fundamental right. Any or all—or perhaps even none—of these reasons account for the historical source for judicial interpretation of the Confrontation Clause.

B. Working Towards a Rule (State Deference)

It may be likely that these early cases, so close in time to the ratification of the Bill of Rights, were somehow just more in touch with the Framers' intent, that further explanation was therefore unnecessary. Regardless, court decisions regarding hearsay and confrontation read this way for close to ninety years.⁹⁵ When the court addressed this issue again, the justices discovered a new interpretation that led confrontation into new territories.

In the 1895 case *Mattox v. United States*, the United States Supreme Court upheld a murder conviction, stating that a deceased's prior testimony was not hearsay, and that such an exception had existed long before the Constitution.⁹⁶ While this holding is similar to those in previous cases, the dissent in *Mattox* began to ask questions. In dissent, Justice Shiras was convinced that sufficient facts showed the dead witness was not reliable.⁹⁷ Recognizing that the prior testimony of a dead witness was a traditional common law exception to hearsay, Justice Shiras noted that this was not a universal rule and that the facts justified a departure from that rule.⁹⁸

Raised by this dissent was the question left unanswered by this and the prior court decisions: What is the justification for confrontation? Is it simply the incorporation of the common law? If not, then what other purpose did the Framers have in mind? Unfortunately, it would be many years before the Court would again take up this line of questioning and attempt an answer.

⁹³ *Id.* at 100 n.110. "Power was feared in the eighteenth century, whether it was governmental power, royal power, aristocratic power, or 'mobocracy.' The very existence of power, rather than its abuse, raised concern. All authority was dangerous, but not all power was illegitimate. Only authority checked by procedural rules was 'lawful.'" *Id.* (quoting JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 50 (1986)).

⁹⁴ *Id.* at 112 (noting that "the driving force behind the Bill of Rights," including the Sixth Amendment's protections, was "to protect against federal encroachments").

⁹⁵ See *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

⁹⁶ See *id.* at 238, 240–44.

⁹⁷ See *id.* at 251 (Shiras, J., dissenting) (noting that the defendant offered two witnesses to show that prior testimony of a deceased witness, whose testimony was crucial for the conviction, "was given under duress, and was untrue in essential particulars").

⁹⁸ *Id.* at 252, 258–59.

The first attempt to answer these questions came in the 1970 case of *Dutton v. Evans*.⁹⁹ Defendant Evans, along with a conspirator, Williams, was tried and convicted of murder.¹⁰⁰ Crucial evidence for Evans's conviction came from a man named Shaw, who had been incarcerated with Williams.¹⁰¹ Shaw testified to statements Williams made when they were incarcerated together.¹⁰² The statements inculpated Evans.¹⁰³ Traditional common law allowed a hearsay exception for co-conspirator statements if they were made during the conspiracy.¹⁰⁴ Here, the trial court permitted the hearsay under a state statutory exception, which allowed any declaration by any of the conspirators at any time to be admitted, as long as the conspiracy had been proven.¹⁰⁵ Evans argued that that state statute did not conform to federal court exceptions and therefore was a violation of his right to confrontation.¹⁰⁶

The case divided the court. A plurality held that the state statutory expansion of hearsay exceptions was not a violation of confrontation, but a permissible exercise of the state's rulemaking power respecting the law of evidence.¹⁰⁷ This holding is intriguing for several reasons.

First, it makes clear that the common law is not the guide to interpreting the Confrontation Clause. Justice Stewart, writing for the plurality, stated, "[T]he Confrontation Clause is . . . [not] a codification of the rules of hearsay and their exceptions as they existed historically at common law."¹⁰⁸ Second, there is neither reference to the disdain of ex-parte communications nor appeal to a natural right as shown in earlier cases.¹⁰⁹ In his concurrence, Justice Harlan noted, "[T]he historical understanding of the clause furnishes no solid guide to adjudication."¹¹⁰ Finally, procedural history indicates that the lower courts in this case emphasized the rights of the accused, but here, the Court's opinion focused on deference to states in drafting their hearsay laws. Again, Justice Stewart explained, "The issue before us is . . . whether a defendant's constitutional right 'to be confronted with the witnesses against him' is necessarily inconsistent with a State's decision to change its hearsay rules."¹¹¹

Prior to this holding, not all hearsay required confrontation, and "the limits of this hearsay exception have simply been defined [not by common law, but] by the Court in the exercise of its rule-making power in the area of the federal law

⁹⁹ See generally *Dutton v. Evans*, 400 U.S. 74 (1970) (plurality opinion).

¹⁰⁰ *Id.* at 76.

¹⁰¹ *Id.* at 77.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 81.

¹⁰⁵ *Id.* at 78 (citing GA. CODE ANN. § 38-306 (1954)).

¹⁰⁶ *Id.* at 80.

¹⁰⁷ *Id.* at 83.

¹⁰⁸ *Id.* at 81 (quoting *California v. Green*, 399 U.S. 149, 156 (1970)).

¹⁰⁹ See generally *id.*

¹¹⁰ *Id.* at 95 (Harlan, J., concurring).

¹¹¹ *Id.* at 81 (quoting *Green*, 399 U.S. at 155) (plurality opinion).

of evidence.”¹¹² But, the *Evans* decision was only a plurality.¹¹³ Ten years later, a majority of the Court would develop a working rule on hearsay and confrontation.

C. *The Roberts Rule (Evidentiary Inquiry)*

In *Ohio v. Roberts*, the defendant objected to the use of a witness’s preliminary hearing transcript in lieu of live testimony, claiming that such use violated his right to confrontation.¹¹⁴ The prosecution claimed that the witness could not be found, despite best efforts to locate her.¹¹⁵ Therefore, the unavailability of the witness created an exception to hearsay that allowed the use of prior testimony.¹¹⁶

In finding that the transcript was admissible and not a violation of confrontation, the Supreme Court developed a two-prong test.¹¹⁷ But before the test could be applied, the Court also developed a “necessity requirement,” which obliged the prosecution either to produce the declarant or to prove his unavailability.¹¹⁸ This requirement was intriguing because, despite the *Dutton* court’s insistence that history provided no guide to the understanding of constitutional confrontation, the *Roberts* court cites this necessity requirement as “conform[ing] with the Framers’ preference for face-to-face accusation.”¹¹⁹

After meeting this threshold requirement, the first prong of the test considered whether the hearsay statement fell within a “firmly rooted hearsay exception.”¹²⁰ Despite the *Roberts* court turning to the Framers’ intent in establishing availability, nowhere does the Court turn to history to describe what a “firmly rooted hearsay exception” is. No attempt is given to define this term, nor are any examples given. The Court’s silence, particularly its failure to describe or find the specific historical context for a firmly rooted exception—such as not finding that it relates to common law exceptions—may be taken as a tacit approval of the holding in *Dutton* where it stated that the common law is not the source of the Confrontation Clause.

The second prong of the test similarly lacks a clear definition. If the hearsay does not fall within a prong-one exception, then the statement still might be admissible if it bears a “particularized guarantee[] of trustworthiness.”¹²¹ Footnote

¹¹² *Id.* at 82.

¹¹³ Justice Stewart authored the opinion, joined by Chief Justice Berger, and Justices White and Blackmun. *Id.* at 76. Justice Marshall authored the dissent, joined by Justices Black, Douglas, and Brennan. *Id.* at 100. It was Justice Harlan who wrote the opinion, concurring in result only, that makes this a plurality opinion. *Id.* at 93.

¹¹⁴ *Ohio v. Roberts*, 448 U.S. 56, 59 (1980).

¹¹⁵ *Id.* at 56.

¹¹⁶ *Id.* at 56–57.

¹¹⁷ *Id.* at 66.

¹¹⁸ *Id.* at 65.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 66.

¹²¹ *Id.*

nine of the *Roberts* opinion notes “[t]he complexity of reconciling the Confrontation Clause and the hearsay rules.”¹²² It further notes that scholarly commentary agrees there can be no one bright-line rule to determine if hearsay is admissible.¹²³ Despite this obvious truth, this prong of the *Roberts* test leaves total discretion in assessing reliability in the hands of the justices, with only vague terms as guidance.

D. Moving Away from Roberts (Administrative Ease)

The *Roberts* rule expanded beyond all previous tradition and practice of both hearsay and confrontation. Born of the criminal procedure staples of assistance of counsel and cross-examination, the Confrontation Clause under the *Roberts* test becomes a simple evidentiary inquiry. Natural right of the accused had no place in these modern opinions. Two subsequent cases would demonstrate how far-reaching this test became.

In *United States v. Inadi*, the Court admitted a co-conspirator’s hearsay statement despite the fact that he was available to testify.¹²⁴ Responding to the so-called departure from the *Roberts* necessity rule, the Supreme Court turned the question back on the scoffers, claiming it was a “radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.”¹²⁵ This cavalier response prompted a harsh dissent by Justice Marshall. The fact that the prosecution was not required to make even the slightest effort to produce the declarant flew in the face of the “Framers’ preference for face-to-face accusation,” denoting a clear violation of the Confrontation Clause.¹²⁶ And yet again, another bold holding, here stating that proving unavailability is a radical claim, is made largely without justification.

Shortly after *Inadi*, the Court delivered the final blow. In *White v. Illinois*, the defendant was charged with sexual assault of a minor.¹²⁷ Rather than put the child on the witness stand, the prosecution presented five witnesses in whom the child had confided the abuse, including a family friend, a police officer, and medical personnel.¹²⁸ *White* objected on confrontation grounds, claiming the prosecution needed to prove unavailability *vis-à-vis Roberts*.¹²⁹ The Court held that

¹²² *Id.* at 66 n.9.

¹²³ *See id.* at 67.

¹²⁴ *United States v. Inadi*, 475 U.S. 387 (1986).

¹²⁵ *Id.* at 394.

¹²⁶ *Id.* at 401–02 (Marshall, J., dissenting).

¹²⁷ *White v. Illinois*, 502 U.S. 346, 349 (1992).

¹²⁸ *See id.* at 349–50.

¹²⁹ *Id.* at 351.

the statements fell within a firmly rooted exception to the hearsay rule—a spontaneous declaration and statement made pursuant to medical treatment.¹³⁰ Because the statements fell under such an exception, the necessity clause was, by default, satisfied, with no need to prove unavailability.¹³¹

The Court's outright rejection of the *Roberts* necessity requirement was not surprising, given the holding in *Inadi*. The surprise lay in the fact that the Court, perhaps for the first time, provided a clear justification for doing so. Justice White's opinion pointed not to any historical practice, nor any analysis of constitutional text, nor to any claim of natural right, but to practicality.¹³² The Court explained that an unavailability rule was “[not] likely to produce . . . [meaningful] testimony” and that it would “impose substantial additional burdens on the factfinding process.”¹³³

In short, *Roberts* and its progeny restricted the constitutional right to confrontation based on administrative ease and cost burden considerations. While colonial history and early court cases give little sure guidance on the justification for the Confrontation Clause, the holding in *Roberts* clearly shows that lofty principles such as the rights of the accused have little place in the analysis. Rather, practical concerns, based on nothing but the court's discretion, win the day.

E. *Roberts* Overturned (*Crawford* Rule)

In 2004, defendant Michael Crawford was convicted for assault of Kenneth Lee.¹³⁴ Crawford and his wife Sylvia confronted Lee regarding a previous occasion where Lee allegedly attempted to rape Sylvia.¹³⁵ A fight ensued and Crawford stabbed Lee in the torso.¹³⁶ During police interrogation, Crawford's and Sylvia's accounts of the stabbing differed as to whether Lee was armed and at what point Lee reached for a weapon.¹³⁷ Sylvia recounted that Lee grabbed for a potential weapon after being stabbed, which if true, would destroy Crawford's self-defense claim.¹³⁸

Sylvia did not testify at trial because of a state marital-privilege law that barred spousal testimony without the consent of the other spouse.¹³⁹ Instead, the prosecution presented Sylvia's taped interrogation wherein she stated that Lee was unarmed at the time of the stabbing, and may have grabbed for a weapon only after the stabbing.¹⁴⁰ The lower court convicted Crawford, but the appellate

¹³⁰ *Id.* at 356–57.

¹³¹ *Id.*

¹³² *See id.* at 354–55.

¹³³ *Id.*

¹³⁴ *Crawford v. Washington*, 541 U.S. 36, 38 (2004).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 39.

¹³⁸ *See id.* at 39–41.

¹³⁹ *Id.* at 40.

¹⁴⁰ *Id.* at 40–41.

court reversed.¹⁴¹ The courts reached opposite conclusions on whether the facts showed that Sylvia's testimony demonstrated any particular "guarantees of trustworthiness," as required under the second prong of the *Roberts* test.¹⁴²

In a unanimous opinion by Justice Scalia, the Court found that the *Roberts* test had strayed from historical confrontation principles.¹⁴³ Rather, history showed that the Confrontation Clause had two particular aims: ex-parte testimony and testimonial hearsay.¹⁴⁴ Justice Scalia's appeal to ex-parte testimony is familiar. It recalls Raleigh's trial and abuses by the Star Chamber, and it was perhaps the impetus behind Chief Justice Marshall's opinion in the Aaron Burr treason case.¹⁴⁵ Ex-parte testimony has a clear historical background in regard to confrontation, and it is true that the *Roberts* decision completely strayed from considering this point.

Testimonial hearsay, however, is less familiar. Focusing acutely on the constitutional text, Justice Scalia noted that the Confrontation Clause applies to "witnesses" against the accused.¹⁴⁶ Using an appropriately aged dictionary (from 1828), Justice Scalia defined witness as "those who bear testimony."¹⁴⁷ He then further defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."¹⁴⁸ Therefore, as defined by the Constitution itself, the Confrontation Clause is concerned at its core with testimonial statements.

Unfortunately, the Court opted to leave a comprehensive definition of testimonial hearsay for another day, though some guidance was given.¹⁴⁹ Testimonial statements are more like formal statements made to government officers, and less like casual remarks made to acquaintances.¹⁵⁰ In other words, testimonial statements are those made when the declarant is likely to know that his words can be used in court to determine guilt, and nontestimonial statements are those made just in passing and with no particular purpose. On this, the *Crawford* court agreed with one aspect first considered in *Dutton* and later announced in *Roberts*: not every hearsay statement requires confrontation.¹⁵¹

Crawford did indeed return the Confrontation Clause to its historical principles in many ways. *Roberts* and the subsequent cases became too embroiled in weighing exceptions and laws of evidence, and left too much discretion, based

¹⁴¹ *Id.* at 41.

¹⁴² *Id.*

¹⁴³ *Id.* at 42.

¹⁴⁴ *See id.* at 50–51, 53–54.

¹⁴⁵ *See id.* at 44; *see also id.* at 71 (Rehnquist, J., concurring).

¹⁴⁶ *Id.* at 51 (Scalia, C.J., majority).

¹⁴⁷ *Id.* (internal quotations omitted).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 68.

¹⁵⁰ *Id.* at 51.

¹⁵¹ Alexandra A.E. Shapiro & Noreen A. Kelly-Najah, *Supreme Court Breathes New Life into the Confrontation Clause in Crawford v. Washington*, 19 NO. 1 WHITE-COLLAR CRIME REP. 2, 4 (2004).

on “amorphous notions of reliability,” for the court to reach its conclusion.¹⁵² *Crawford*, alternatively, notes that “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”¹⁵³ In other words, the rule in *Roberts* would ask first: “Is this testimony reliable?” Whereas, the rule in *Crawford* correctly redirects the inquiry to: “Does this deserve confrontation?”

But, the claims of *Crawford*’s holding that, (1) “testimonial hearsay” is historical, and (2) that it is less discretionary than *Roberts*, are both mistaken. The *Crawford* holding is therefore paradoxical; it uses historical means to bring about a historical understanding. Despite the base intuitive sense that Justice Scalia’s textual analysis makes, his claim that the dichotomy of testimonial and nontestimonial hearsay is historical is, at best, a stretch of the imagination, and, at worst, is completely fabricated. Other than the clever dictionary dance Justice Scalia performs, there is no historical record that the Framers viewed things in this light, no court case deals with hearsay in any way similar to this, and nothing in the common law resembles such an understanding.

Claiming that testimonial hearsay is historical is essentially harmless and can therefore be forgiven. But the effect of the testimonial hearsay framework—which subsequent cases have declared as discretionary as the *Roberts* test—is not harmless. *Davis v. Washington* was the first case to expand upon the testimonial hearsay test.¹⁵⁴ The Court’s holding did little more than show how fluid and discretionary testimonial statements are. Two domestic violence cases were consolidated for the Court’s consideration, and the holding was that statements from police interrogations could be both testimonial and nontestimonial.¹⁵⁵ The hinge upon which the out-of-court statement hangs is the primary purpose of the statement—whether it is a call for aid during a threatening situation or during an ongoing emergency, versus a retelling of a past event.¹⁵⁶

Expanding on this, the holding in *Michigan v. Bryant* greatly multiplied the number of factors for consideration in order to determine if a situation is still threatening or an emergency still ongoing.¹⁵⁷ Additionally, *Bryant* also expanded the inquiry of the primary purpose of the statement to include the interrogator as well as the declarant.¹⁵⁸ Seemingly, the *Crawford* test now requires consideration of multiple factors and multiple actors, all with mixed motives and differing viewpoints, within a dynamic context. This multiplicity of factors is beginning to resemble the wide discretion given under the *Roberts* test.

¹⁵² *Crawford*, 541 U.S. at 61 (internal quotations omitted).

¹⁵³ *Id.* at 69.

¹⁵⁴ See generally *Davis v. Washington*, 547 U.S. 813 (2006).

¹⁵⁵ *Id.* at 832.

¹⁵⁶ *Id.* at 830–32.

¹⁵⁷ *Michigan v. Bryant*, 562 U.S. 344, 345–46 (2011).

¹⁵⁸ *Id.* at 367.

F. *Crawford Test in Domestic Violence Cases (Trying to Define “Testimonial”)*

Domestic violence cases since *Crawford* have established at least three consistent trends in determining whether a statement is testimonial or not. In a Minnesota case, police responded to a 911 call where the victim stated, “My boyfriend just beat me up.”¹⁵⁹ When the police began to investigate, the victim first described the most recent incident, and then she began to describe events from earlier that day.¹⁶⁰ The state claimed the statements were considered excited utterances and should be held as nontestimonial.¹⁶¹ In contrast, when Indiana police responded to a domestic disturbance report, the scene was calm and the reluctant victim only recounted the abuse that occurred after repeated prompting from the officer.¹⁶² These statements were considered testimonial because they were given to prove past events rather than to respond to an emergency.¹⁶³ The takeaway is that nontestimonial statements become testimonial the further they move away from the current emergency.

Statements made while an assault is in progress are typically nontestimonial.¹⁶⁴ Statements made to a police officer who arrived ten to fifteen minutes after the 911 call have also been found nontestimonial.¹⁶⁵ Conversely, statements given to police at a domestic violence scene more than two hours after the incident were considered testimonial.¹⁶⁶ The takeaway here is that the greater the time between the incident and the response by authorities, the more likely the statements will be considered as proving past events, having been made with reflection and deliberation, and are, therefore, testimonial.

The person who reports the domestic violence is also a factor in considering whether the statements are testimonial.¹⁶⁷ In California, a neighbor took in the survivor of a recent beating and immediately called the police.¹⁶⁸ Because the survivor did not reach out personally to the police, but they came looking for her, the question was raised whether her interrogation would be considered testimonial.¹⁶⁹ She reluctantly testified, after a long period of being unavailable, which rendered the question moot.¹⁷⁰ The California court, however, seemed open to labeling her statements as testimonial—despite the fact that police responded shortly after the incident, and she spoke only with regard to the current beating—

¹⁵⁹ *State v. Warsame*, 701 N.W.2d 305, 307 (Minn. Ct. App. 2005).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 307–08.

¹⁶² *Davis v. Washington*, 547 U.S. 813, 819–20 (2006).

¹⁶³ *Id.* at 830.

¹⁶⁴ *Marquardt v. State*, 882 A.2d 900, 917–18 (Md. Ct. Spec. App. 2005).

¹⁶⁵ *Vinson v. State*, 221 S.W.3d 256, 264 (Tex. Ct. App. 2006).

¹⁶⁶ *See Davis*, 547 U.S. at 827.

¹⁶⁷ *See People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004).

¹⁶⁸ *People v. Hunter*, No. A104022, 2004 WL 1282842, at *1 (Cal. Ct. App. June 9, 2004).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at *2.

simply because she was not the one who reached out to the authorities.¹⁷¹ Conversely, in another case where the prosecution submitted a survivor's police statement because she refused to testify, the court held the statement as testimonial because she had initiated the police contact.¹⁷² The takeaway is that survivors' statements to police are more likely to be nontestimonial if they initiate police intervention.

These trends are troubling. Often, it is difficult to get a domestic violence survivor to open up about the abuse, but sometimes, once the floodgates open, everything comes pouring out. In the event that a survivor begins to open up to a police officer about a recent incident and then reveals information about past events, it is unfortunate that the current *Crawford* trend will penalize the survivor for this and hold these statements as testimonial. In such cases, statements about current events should be considered nontestimonial while the past events should be considered testimonial. Such bifurcation, however, hinges upon a fine line of whether the police officer is interrogating to offer police assistance for an ongoing emergency, or simply trying to establish the facts of past events.¹⁷³

The lapse of time between an incident and arrival of authorities presents a similar difficulty. It is hard enough for a survivor to make the call for help in the first place. Often the survivor's well-being, or a desire to have the abuser arrested, is not the first concern after an incident of abuse. There is often greater concern for the needs of children or other loved ones. Numerous valid reasons exist to explain why a survivor does not pick up the phone to dial 911 the minute the beating stops, or why a neighbor phones the police instead of the survivor. The primary purpose of police responding to a domestic violence call should always be considered to determine if an emergency is ongoing, whether phoned in by a concerned neighbor or an involved party.

III. THE FUTURE OF CRAWFORD AND DOMESTIC VIOLENCE—NOT IN AB 193

In the larger scheme of domestic violence, the Confrontation Clause does not affect a significant number of cases.¹⁷⁴ A review of cases that raise confrontation issues shows that a majority concern drug charges, larceny allegations, and white-collar crimes.¹⁷⁵ Domestic violence makes up a small percentage of such cases, which begs the question: When the Confrontation Clause seemingly affects so few domestic violence cases, why do states feel the need to enact legislation like AB 193?

¹⁷¹ *Id.*

¹⁷² *Corella*, 18 Cal. Rptr. 3d at 776.

¹⁷³ *See Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹⁷⁴ *See generally* James L. Buchwalter, Annotation, *Construction and Application of the Sixth Amendment Confrontation Clause—Supreme Court Cases*, 83 A.L.R. FED. 2d 385 (2014).

¹⁷⁵ *Id.*

The largest problem with domestic violence is reporting. Estimates are that a little over 50 percent of domestic violence incidents are reported.¹⁷⁶ As noted in the Introduction, numerous reasons may make a victim reluctant to bring forward a domestic violence case: fear of further violence for reporting, worry about loss of economic support, cultural pressure to remain with the abuser, lack of places to go, concern for the safety of children, and feelings of obligation and love for the abuser.¹⁷⁷ Often, just being back in the presence of the abuser is enough to overwhelm and petrify survivors, causing them to relive the abuse.¹⁷⁸ It is this last, narrow concern that AB 193 hopes to address.

But AB 193 will not address this concern. A common judicial trend already allows hearsay in preliminary hearings and grand jury proceedings because confrontation is “basically a trial right.”¹⁷⁹ It is for this reason that Judge Melissa Saragosa, writing on behalf of the justices of the peace for the Eighth Judicial District, stated the court’s neutrality with respect to the passage of AB 193, calling it a policy decision for the legislature to make.¹⁸⁰ While some saw AB 193 as a symbol demonstrating the state’s commitment to holding domestic violence abusers accountable, others worried about moving too fast. Supporters of the bill focused on how AB 193 would combat violent crime, whereas opponents feared this would lead to a vote based on emotion, and wanted more information on how the thirty-six other states implemented their respective bills first.¹⁸¹ But at the end of the day, supporters had nothing to lose in voting for the bill, while those opposed faced the potential political threat of being maligned as misogynistic or tolerant of child abuse.

Moreover, AB 193 does nothing to alleviate a victim’s fear of facing an abuser in court because the bill does not permit hearsay or suspend confrontation in the actual criminal trial. Of the approximately 23,000 felony cases in Clark County last year, only 149 went to trial.¹⁸² That means that 99.35 percent of all criminal cases settle before actually going to trial. Regarding confrontation, a preliminary hearing is overwhelmingly often the only time the accused will have a meaningful opportunity to confront his accusers. If the Confrontation Clause is

¹⁷⁶ Casey Leins, *Sobering Stats for Domestic Violence Awareness Month*, U.S. NEWS (Oct. 9, 2015, 1:01 PM), <http://www.usnews.com/news/blogs/data-mine/2015/10/09/sobering-stats-for-domestic-violence-awareness-month> [https://perma.cc/RC48-FYHY].

¹⁷⁷ Byers, *supra* note 7, at 557.

¹⁷⁸ NAT’L CTR. ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH, *PREPARING FOR COURT PROCEEDINGS WITH SURVIVORS OF DOMESTIC VIOLENCE 1* (2013).

¹⁷⁹ *Barber v. Page*, 390 U.S. 719, 725 (1968).

¹⁸⁰ Letter from Judge Melissa A. Saragosa, Chair of the Legislative Comm. for the Las Vegas Justice Court, to Assemblyman Ira Hansen, Chair of the Nev. Assembly Comm. on Judiciary (Mar. 31, 2015), <https://www.leg.state.nv.us/App/NELIS/REL/78th2015/ExhibitDocument/OpenExhibitDocument?exhibitId=12831&fileDownloadName=AB%20193%20Position%20Paper%20for%20Assembly%20Judiciary%20Committee.pdf> [https://perma.cc/M7TR-HG2X].

¹⁸¹ *See Hearing on A.B. 193 Before the S. Comm. on Judiciary, supra* note 3, at 15 (testimony of Philip Kohn, Clark Cty. Pub. Def.) (May 6, 2015).

¹⁸² *Id.* at 17.

to have anything to do with its historical goals—disdain for ex-parte testimony, concern for excessive judicial overstep, praise for the jury process, and confidence that cross-examination is the key to the adversarial process and is most likely to lead to truth—then confrontation should not just be limited to a trial. Rather, it must be permitted through every stage of the criminal proceeding.

This is especially true because Nevada is one of eighteen states that either prohibit hearsay at preliminary hearings, or only allow it through limited exceptions.¹⁸³ A stringent adherence to trial rules during a probable cause determination ensures a fair hearing for the defendant. To require such stringency in all other aspects of a preliminary hearing, only to carve out a small exception under AB 193, goes against the policy reasons for enforcing the rules of evidence during those early stages.

The current *Crawford* test has at least moved away from the practicality concerns of the *Roberts* test, and does indeed rest more on the historical principle of disdain for ex-parte statements. But the arbitrariness of having to define statements as testimonial or nontestimonial has completely obliterated consideration for the other historical principles, particularly the strong desire for effective criminal rights. Therefore, AB 193 may fit within the letter of the Constitution, but moves far away from its spirit and historical intent.

Further, legislators misunderstand the context of confrontation in a domestic-violence setting. The problem is not the constitutional understanding, but of simply having the courage to stand up and say no to the abuse, and accessing the needed support to safely leave the situation in the first place. AB 193 does nothing to support a survivor in this aspect. Further, AB 193 does nothing to help the underreporting of domestic violence. Supporters of the bill argue that not having to face the abuser during the early criminal proceedings creates an impetus to file a charge, but that notion is shortsighted.¹⁸⁴

Suppose a survivor files a charge, does not appear at the preliminary hearing, and the police report read by the prosecutor is sufficient to find probable cause to go to trial. In this scenario, the defense has no opportunity to question the testimony of the accuser. In other words, the defense is denied the opportunity to test how strong the prosecution's case is. This is a disincentive to settle, meaning more cases will go to trial. And with more cases going to trial, the very problem that AB 193 was intended to prevent occurs: the fear and trauma that confronts the survivor when re-facing the abuser. But in this scenario, with the Sixth Amendment constitutional protections of confrontation of witnesses in a criminal trial in place, the survivor must confront the abuser. There is no escaping it at trial. Therefore, AB 193 is ineffective.

Legislators should focus their attention not on the constitutional definition of confrontation, but on the colloquial, everyday understanding of confrontation

¹⁸³ *Hearing on A.B. 193 Before the Assemb. Comm. on Judiciary*, *supra* note 3, at 24 (testimony of Steve Yeager, Clark Cty. Pub. Def.) (Apr. 3, 2015).

¹⁸⁴ *See id.* at 35 (testimony of Jeremy Bosler, Washoe Cty. Publ. Def.).

in order to foster strength and courage in the survivor to say “no” to the abuse, and to have effective means to escape the abuse safely. The best way to do that is to provide more and better means of support: shelter for survivors and their children, child care facilities to allow the survivor to go to work, meaningful protection orders that ensure the abuser stays away, advocacy programs that support the survivor during the trial phase, and emotional counseling for the survivor to overcome the effects of the abuse.

Additionally, stiffer criminal procedures will do nothing to deter the occurrence of domestic violence. An abuser is unlikely to stop the abuse out of fear that he will not be able to exercise his constitutional right to confront his victim during the pre-trial stages. While counseling for abusers has historically done little to reduce recidivism rates, it is still the most humane course.

CONCLUSION

The right to confrontation has a historical purpose to protect the rights of accused criminals, especially against ex-parte communications, and is tied closely to the other bedrock principles of our modern court system today, namely: the adversarial process, representation of the accused by counsel, and a trial by jury of one’s peers. The Sixth Amendment focuses on criminal rights, and while today there may be little reason to simply appeal to natural right as justification for providing the accused the right to confront their accusers, the historical abuses that arose from not doing so are clear examples why face-to-face confrontation should always be preferred. While trying to alleviate the fears and pressures a domestic violence survivor experiences during court proceedings is laudable, laws like AB 193 do more to whittle away at what the Constitution aims to protect than to help those survivors. AB 193 focuses only on a small branch of the domestic violence tree, and is ineffective against any root cause. Additionally, AB 193, though technically permissible under current confrontation jurisprudence, tramples underfoot the spirit of confrontation.

Legislative attention should focus more on providing means to protect and secure domestic abuse survivors before they enter the court system. Domestic violence may be one of the oldest, most recurrent, and most underreported offenses of all time. This sad history may mean there is little that can be done to prevent it. Efforts should therefore focus on providing means to escape, having places of refuge for both survivor and children, creating resources to help economically, and offering the counseling needed to emotionally overcome the abuse. AB 193 is an ineffective piece of legislation, and it should not be allowed to risk the integrity of an essential constitutional guarantee.