

THE MOLD THAT SHAPES HEARSAY LAW

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ABSTRACT

In response to an article previously published in the *Florida Law Review* by Professor Ben Trachtenberg, I argue that the historical thesis of *Crawford v. Washington* is basically correct: The Confrontation Clause of the Sixth Amendment reflects a principle about how witnesses should give testimony, and it does not create any broader constraint on the use of hearsay. I argue that this is an appropriate limit on the Clause, and that in fact for the most part there is no good reason to exclude nontestimonial hearsay if live testimony by the declarant to the same proposition would be admissible. I further suggest that the prevailing law of evidence is consistent with this approach to a significant degree, because the doctrine is much more receptive to nontestimonial hearsay than to testimonial hearsay. In contrast to Professor Trachtenberg, I am not troubled by the fact that this approach would probably not block admissibility of one of the notable statements in the trial of Walter Raleigh, or by the fact that the approach supports the willingness of some courts to admit evidence of statements made in support of lawful joint ventures. I conclude by offering some suggestions as to how hearsay doctrine might be transformed to reflect the principles advocated in this Essay.

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INTRODUCTION

A decade ago, in *Crawford v. Washington*,¹ the U.S. Supreme Court decided that the Confrontation Clause of the Sixth Amendment does not create a substantive standard of reliability by which the admissibility of hearsay is to be assessed.² Rather, it provides a categorical procedural rule that, with only rather narrow qualifications, bars use of a testimonial statement against an accused, unless the accused has had an opportunity (at trial, if reasonably possible) to be confronted with the witness who made the statement.³

When *Crawford* came down, I thought that the categorical treatment of testimonial statements reflected such an obvious core principle of our criminal justice system that I hoped lower courts and prosecutors would soon come to accept it and the Supreme Court itself would adhere to it steadfastly. I should have known better.

But I really thought I was safe in assuming that those on the defense side would recognize that the impact of *Crawford* has obviously been to fortify the confrontation right. And of course many do. But Professor Ben Trachtenberg, in an article published in this Review,⁴ focuses on the fact that the *Crawford* doctrine narrows the theoretical scope of the Confrontation Clause, so that it applies only to testimonial statements rather than—as under the prior regime—all hearsay statements.⁵ He is troubled by this fact. I am not.

I will make the following main points in this Essay:

1. However much one may quibble about details, the basic historical thesis of *Crawford* is correct: The confrontation right, as stated in the Sixth Amendment and recognized over centuries in the common law system, reflects a principle about how witnesses should give testimony—under oath, face-to-face with the adverse party, and subject to cross-examination. It does not express a rule about the admissibility of hearsay in general.

1. 541 U.S. 36 (2004).

2. *Id.* at 67–69.

3. *Id.*

4. Ben Trachtenberg, *Confronting Coventurers: Conspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 FLA. L. REV. 1669 (2012).

5. *Id.* at 1672–73.

2. It is perfectly appropriate to limit the Confrontation Clause to a rule about testimony, with other doctrines providing for exclusion on other grounds.

3. For the most part, if hearsay is nontestimonial and live testimony of the declarant to the same proposition would be admissible, there is no good reason that justifies exclusion of the hearsay.

4. This approach helps explain many of the exemptions to the hearsay rule, including the exemption for statements by a conspirator of the accused.⁶ It also helps explain a long-term trend in the American judicial system to be more receptive to nontestimonial hearsay. Thus, to a great extent the confrontation principle is the mold that shapes hearsay law. The mold of a bronze statue shapes the statue by setting limits on where the molten metal can go; similarly, the confrontation principle sets limits on the types of statements to which hearsay exemptions might apply.

5. Under this approach, the confrontation right would presumably not block admission of one of the notable statements in the case of Sir Walter Raleigh. But that fact does not undermine the merits of the approach, and neither does the fact that the approach supports the willingness of some courts to admit evidence of statements made in support of “lawful joint ventures.”

6. Black-letter law effectively creates a presumption that hearsay is inadmissible. The law would be improved by reversing that presumption with respect to probative nontestimonial hearsay. That is, courts and rulemakers should treat such hearsay as inadmissible only for good cause, such as the proponent’s superior ability to produce the declarant as a live witness at trial.

I. HISTORY

An originalist like Justice Antonin Scalia, who wrote the majority opinion in *Crawford*, seeks to determine the public meaning of the Confrontation Clause as of the time of its adoption in 1791. I believe that history offers a deeper lesson concerning the meaning of the

6. See FED. R. EVID. 801(d)(2)(E). The Rule uses the term “co-conspirators,” and this is the common parlance. But James Joseph Duane, *Some Thoughts on How the Hearsay Exception for Conspirators’ Statements Should—and Should Not—Be Amended*, 165 F.R.D. 299, 304–12 (1996), argues at some length that we should speak instead of a party’s conspirators. If someone puts so much energy, learning, and rhetoric into such a trivial point he may well be right, and largely for that reason I have made a habit of adhering to Professor Duane’s locution.

confrontation right, for the right reflects a principle that has been central to the common law system, among others, for centuries.⁷

The essential idea of the right is actually very simple: A rational system of adjudication must depend, in large part, on information provided by witnesses. Given this premise, the system must decide the procedure by which the witnesses provide that information—that is, by which they testify. A common requirement is that testimony be given under oath or some similar form of solemnification.⁸ Beyond that, various procedures for giving testimony are possible. For example, one could, as the ancient Athenians did, require that witnesses provide their testimony in writing and under seal.⁹ Or one could require, as the old courts of continental Europe did, that witnesses testify before officials and out of the presence of the parties.¹⁰ But for centuries, one of the great prides of the English was that in their system, as in those of the ancient Hebrews and Romans, witnesses against an accused gave their testimony openly, “face-to-face” with the accused.¹¹ As the system developed further, it also became clear that the accused had a right to subject the witnesses against him to cross-examination.¹² And although the right to be confronted with adverse witnesses was usually provided at trial, a well-developed body of law allowed the prosecution to use prior testimony of the witness if she was unavailable at trial and the accused had had an opportunity to be confronted by her.¹³ Although the English did not honor the right of confrontation without fail, it was a clearly established norm that migrated to America.¹⁴ The new states incorporated it in their constitutions, and it was included in the Sixth Amendment to the U.S. Constitution.¹⁵

This history all seems very clear. Indeed, I do not know of anybody who denies any part of this account. Certainly Professor Trachtenberg does not. And the account I have just given is, in essence, the same as that offered in *Crawford*.¹⁶ So then why is there any historical debate about the confrontation right? The answer, I believe, is hinted at in this

7. The summary presented here draws from the fuller account in Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1201–09 (2002).

8. *Id.* at 1209.

9. WILLIAM STEARNS DAVIS, *A DAY IN OLD ATHENS: A PICTURE OF ATHENIAN LIFE* 137 (1960) (“All pertinent testimony is now written down, and the tablets sealed up by the magistrate.”).

10. Friedman & McCormack, *supra* note 7, at 1202–03 & n.111.

11. *See Crawford v. Washington*, 541 U.S. 36, 43 (2004) (quoting 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 326 (1883)).

12. *See, e.g., King v. Paine* (1696), 87 Eng. Rep. 584 (K.B.) 585; 5 Mod. 163, 165; *Crawford*, 541 U.S. at 45–46.

13. Friedman & McCormack, *supra* note 7, at 1204 n.19.

14. *Id.* at 1204–05, 1206–09; *see also Crawford*, 541 U.S. at 43.

15. Friedman & McCormack, *supra* note 7, at 1206–09.

16. *Crawford*, 541 U.S. at 43–50.

passage written by Professor Trachtenberg:

[H]earsay law remained largely unsettled at the time of ratification, making it difficult to believe that the authors and ratifiers of the Sixth Amendment gave serious thought to the various classes of hearsay identified in modern blackletter evidence law.¹⁷

I agree with Professor Trachtenberg that hearsay law was not well-settled at the time the Confrontation Clause was ratified as part of the Sixth Amendment. Indeed, it had just begun to form.¹⁸ But the conclusion to be drawn from this is not that the authors and ratifiers of the Clause intended to require the exclusion of all hearsay, or of all hearsay not deemed by a court to be reliable. The Confrontation Clause was not an attempt to express a principle of hearsay law at all.¹⁹ Rather, it expressed a well-understood and long-established principle of how witnesses give their testimony.²⁰ One way of demonstrating this is to examine Geoffrey Gilbert's treatise on evidence, initially published in the mid-eighteenth century and often considered the first real treatise on the subject. It includes very little discussion of hearsay. Although Gilbert said that hearsay was "no evidence,"²¹ he did not elaborate on what this meant. For example, he included no definition of hearsay—a matter of considerable complexity under modern law²²—or any suggestion that the rule might be subject to an extensive set of

17. Trachtenberg, *supra* note 4, at 1678.

18. Edmund Burke said in 1794, albeit with considerable exaggeration, that "it was true, something had been written on the Law of Evidence, but very general, very abstract, and comprised in so small a compass, that a parrot that he had known might get them by rote in one half-hour, and repeat them in five minutes." HISTORY OF THE TRIAL OF WARREN HASTINGS, ESQ., 84 (1796) (Feb. 25, 1794 entry). Professor Tom Gallanis has shown that "[u]ntil the 1780s, the courts rarely discussed the hearsay rule." T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 536 (1999). Gallanis argues that there was a burst of activity in the 1780s and that much of the structure of modern hearsay law was in place by 1800. *Id.* Even assuming he is right about the latter assertion—I have some doubts, because I know of no articulation of anything like the modern definition of hearsay before 1800—it does not suggest that those developments underlay the Confrontation Clause, for at least two reasons. First, the confrontation right was expressed in state constitutions before and shortly after 1780; it expressed a principle understood to be very old. See Friedman & McCormack, *supra* note 7, at 1206–11. Second, it is unlikely that such recent developments would have become known in America, and certainly not well enough absorbed to have formed a common basis of understanding of the meaning of proposed constitutional text. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 153–62 (2005).

19. Friedman & McCormack, *supra* note 7, at 1209.

20. *Id.*

21. GEOFFREY GILBERT, THE LAW OF EVIDENCE 107 (1754).

22. See FED. R. EVID. 801(a)–(c) (expressing the basic definition of hearsay).

exemptions.²³ And of course it certainly was not true that there was a general rule in practice barring everything that would come within the modern definition of hearsay; in fact, courts readily admitted a great deal of hearsay.²⁴ Gilbert's brief mention of hearsay was incorporated in a long chapter about witnesses,²⁵ which included the procedure by which they should give their testimony.²⁶ And, in a separate section, he discussed in considerable detail the law governing depositions.²⁷ This sophisticated doctrine determined when a prior testimonial statement of a witness could be admitted at trial because the witness was unavailable. It is strikingly similar in substance to the modern hearsay exception for former testimony.²⁸ But it was not then thought of as an exception to a rule against hearsay; rather, it was an alternative method by which a witness's testimony could be offered *if* the adverse party had a chance to be confronted with the witness and the witness was unavailable.²⁹

What happened then? It appears that, as lawyers played a larger role in criminal trials, they demanded that they be able to cross-examine anybody whose out-of-court statement might be introduced against their clients to prove the truth of what it asserted; they did not restrict the demand to those whose statements were testimonial in nature.³⁰ Indeed, in the first half of the nineteenth century, they pushed the doctrine so far that it included out-of-court conduct that did not assert the statement in question but appeared to reflect the actor's belief in it.³¹ Such a broad rule of exclusion would be untenable if it were unqualified, and

23. *Id.* 801(d) (exempting certain statements from the definition of hearsay), 803, 804, 807 (providing exceptions to the rule against hearsay).

24. Compare Gallanis, *supra* note 18, at 512, 514–15 (“Hearsay, for example, occupies much of the modern law of evidence but in 1755 was accepted [in civil trials] almost without comment. . . . Hearsay went almost as unregulated [in criminal trials] as in civil trials. . . . Some notion thus existed of hearsay as an evidentiary problem, but the rules restricting it had not yet fully developed.”), and John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1189–90 (1996) (noting that “it is hard to believe that the courts of the mid-eighteenth century enforced the hearsay rule,” that “[c]ounsel seem not to have objected to hearsay often,” and that “the courts seem to have received it aplenty,” and surmising “that the question of excluding hearsay and other suspect types of testimony may still have been remitted to judicial discretion, rather than being subject to firm rules of exclusion”), with Trachtenberg, *supra* note 4, at 1702 (saying hearsay was excluded by the common law since the seventeenth century).

25. GILBERT, *supra* note 21, at 86–104.

26. *Id.* at 94–104.

27. *Id.* at 44–51.

28. FED. R. EVID. 804(b)(1).

29. Friedman & McCormack, *supra* note 7, at 1204 n.120.

30. See Gallanis, *supra* note 18, at 545–46.

31. See *Wright v. Doe dem. Tatham* (1838), 7 Eng. Rep. 559 (H.L.); 5 Cl. & F. 670. The reach of the rule as it was applied in *Wright* is suggested by the title of the classic article, Judson F. Falknor, *The “Hear-Say” Rule as a “See-Do” Rule: Evidence of Conduct*, 33 ROCKY MTN. L. REV. 133, 134 (1961).

throughout the rest of the nineteenth and twentieth centuries, the principal movement was a loosening of the hearsay restraint by expanding the exemptions to the exclusionary rule.³² The result was a doctrine of great breadth but of questionable force—one that was marked by a jumble of exemptions supposedly justified by various assertions of cracker-barrel psychology. For example, if people are startled, they almost surely tell the truth, don't they?³³ And a person would not lie to her doctor about her condition, would she?³⁴ The rationales underlying both the basic exclusionary rule and the exemptions were so unpersuasive that they made the doctrine seem of dubious value.³⁵ And that welter of complexity tended to occlude the simple driving principle that lay at the heart of the hearsay rule—that when one gives testimony against a person, especially against a criminal defendant, she should do it in open court if reasonably possible, but in any event, under oath, subject to cross-examination, and face-to-face.

Indeed, even after holding that the Confrontation Clause expresses a fundamental right that the Fourteenth Amendment incorporates against the states,³⁶ the Supreme Court seemed at a loss as to what the confrontation right actually means.³⁷ After fifteen years, in *Ohio v. Roberts*,³⁸ the Court finally adopted a theory of the Clause, based on the perception that it acts as a filter against unreliable evidence.³⁹ *Roberts* virtually constitutionalized the law of hearsay: it provided on the one hand that the offer of any hearsay statement against an accused creates a presumptive confrontation problem, and on the other that the problem could be relieved by bringing the statement within a “firmly rooted hearsay exception.”⁴⁰ Even if a statement did not fit within such an exception, *Roberts* indicated that it might yet avoid the confrontation bar if it was supported by “particularized guarantees of trustworthiness”⁴¹—a doctrine that rather closely resembled the residual

32. Jeffrey L. Fisher, *What Happened—and What Is Happening—to the Confrontation Clause?*, 15 J.L. & POL'Y 587, 595 (2007) (“As the nineteenth century progressed, courts relaxed their attitudes somewhat toward hearsay evidence, to the point where they allowed several exceptions to the rule.”).

33. See FED. R. EVID. 803(2).

34. See *id.* 803(4).

35. See, e.g., Robert M. Hutchins & Donald Slesinger, *Some Observations of the Law of Evidence*, 28 COLUM. L. REV. 432, 437–39 (1928) (discussing criticism of the excited utterance exception).

36. *Id.* at 406.

37. *Ohio v. Roberts*, 448 U.S. 56, 64–65 (1980) (pointing out the Court's struggle to “accommodate the[] competing interests” of the Confrontation Clause).

38. *Id.* at 56.

39. *Id.* at 65–66, 72.

40. *Id.* at 66.

41. *Id.*

exception to the rule against hearsay.⁴² It took nearly a quarter century more before the Court in *Crawford* rediscovered the essential nature of the confrontation right.

II. TEXT AND STRUCTURE

It might help to look at the text of the Confrontation Clause in the context of the entire Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].⁴³

This certainly seems to be a set of rules about criminal *procedure*. And the Clause on which we are focusing seems to say quite clearly that the accused has a right to insist that those who testify against him be brought in his presence; it also seems obvious that included implicitly is at least the right to insist that those witnesses *give their testimony* in his presence (not just that the accused be able to see them at *some* time, though not necessarily when they testify). Furthermore, note that the Clause, like the rest of the Amendment, speaks in simple, categorical terms. A court does not have to weigh in the particular case whether the accused has a right to a public trial, or to the assistance of counsel; the text expressly says that “the accused shall enjoy” these rights “[i]n all criminal prosecutions.” There may be ambiguity about what any of these rights mean, of course. How fast is speedy enough? What measures must be taken to determine if a jury is impartial? But the text clearly says that the rights, whatever their bounds, must be honored in every criminal case. For the Confrontation Clause, that means that a court must determine who “the witnesses against” the accused are, and then allow the accused “to be confronted with” them, whatever that means. The court is not free to say that in the particular case the right is not worth protecting.

Given that the Clause insists on a prescribed procedure for testimony, it cannot be evaded by presenting evidence in court of testimony not satisfying that procedure. Suppose, for example, that, as in *Crawford*, a witness describes a crime to a police officer in the station house, knowing full well that the officer is gathering evidence

42. See FED. R. EVID. 807(1).

43. U.S. CONST. amend. VI.

for a criminal prosecution.⁴⁴ Suppose further that, not for any reason attributable to conduct of the accused, the witness does not attend trial and that the prosecution attempts instead to introduce evidence of her statement—perhaps the police officer’s own testimony recounting the out-of-court witness’s statement, or perhaps some recorded form of the out-of-court statement, such as an affidavit in which the witness makes the statement or an audio or videotape of her making it. Plainly, such an evasion cannot be allowed, because doing so would effectively create a system in which a witness could testify out of court, without confrontation. And so the procedural requirement of the Confrontation Clause is necessarily enforced by means of an evidentiary rule of exclusion.

But as the history indicates and the text confirms, the Confrontation Clause does *not* impose a *substantive* limit on evidence.⁴⁵ That is, it does not prescribe that a piece of evidence is inadmissible because there is some defect in the evidence itself, as opposed to the procedure by which it was created, leading it to be insufficiently probative or excessively prejudicial.⁴⁶

It is therefore striking to me that Professor Trachtenberg speaks of the pre-*Crawford* Confrontation Clause as having “saved us” from admission of a class of evidence that he thinks should be excluded, and of the post-*Crawford* Clause as not doing so.⁴⁷ The only thing the Confrontation Clause is supposed to “save” us from is a system in which witnesses testify without adhering to proper procedures. If the Constitution imposes substantive constraints on evidence, they must be found elsewhere. There should be nothing startling about the idea that the Confrontation Clause has a limited scope.

Moreover, I believe that this limitation actually increases the effectiveness of the Clause. To be clear, I do not believe that the aim of scholars should be to try to develop a construction of the Clause that maximizes the evidence it excludes. Rather, as I have put the point repeatedly in amicus briefs before the Supreme Court, I believe our aim should be—or at least mine is—“to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime.”⁴⁸ But it is still a fair question whether *Crawford*, by narrowing the scope of the Clause but prescribing a categorical right within that scope, has on

44. *Crawford v. Washington*, 541 U.S. 36, 53 n.4 (2004).

45. *Id.* at 61; *supra* Part I.

46. *Crawford*, 541 U.S. at 61.

47. *See* Trachtenberg, *supra* note 4, at 1700–03.

48. *See, e.g.*, Brief for Richard D. Friedman as Amicus Curiae Supporting Petitioner at 2, *Williams v. Illinois*, 132 S. Ct. 2221 (2013) (No. 10-8505).

net benefitted criminal defendants. From Professor Trachtenberg's focus on one class of statements that, he asserts, would have been excluded under *Roberts* but not under *Crawford*, it appears that he regards the answer as doubtful.⁴⁹ I do not. Although I am not happy about some post-*Crawford* decisions that, in my view, have taken an unduly narrow view of the confrontation right,⁵⁰ I think there is no doubt that the Clause has more force after *Crawford* than it did before. And, though the proposition is less subject to proof, I believe that force is attributable in part to the limitation in scope.

The facts of *Crawford* suggest the first of these propositions: Sylvia Crawford made a formal, audiotaped statement to the police in the station house describing a knife fight that had occurred earlier that day.⁵¹ Everyone in the room knew at the time that the police were taking the statement for possible use in preparation of a criminal prosecution.⁵² And yet the trial court admitted the statement, and the Washington Supreme Court held that doing so did not violate the Confrontation Clause.⁵³ Justice Scalia's opinion for the majority in *Crawford* reviewed some of the common types of testimonial statements that courts frequently admitted during the *Roberts* regime, such as statements at plea allocutions and accomplice confessions implicating the accused.⁵⁴ There is no doubt now that the Confrontation Clause bars use of such statements absent an opportunity for confrontation.

Consider also *Hammon v. Indiana*.⁵⁵ There, while a police officer held Hershel Hammon at bay, his wife, sitting in their living room with another officer, accused him of having assaulted her earlier that evening.⁵⁶ She made an oral statement to the officer and immediately thereafter signed an affidavit to the same effect. At trial, before

49. Trachtenberg, *supra* note 4, at 1695–96.

50. In *Davis v. Washington*, 547 U.S. 813 (2010), I thought the Court should have established that a statement to a known police officer accusing another of a crime is per se testimonial. Instead, the Court held that a statement made primarily to resolve an ongoing emergency is not testimonial. *Id.* at 828. In *Michigan v. Bryant*, 131 S. Ct. 1143, 1150, 1167 (2011), the Court applied the emergency doctrine to hold a statement accusing the defendant of a shooting nontestimonial even though it was made half an hour after the shooting and several blocks away. In *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012), a fractured Court held that a lab report of a DNA test performed on material taken from a vaginal swab of a rape victim was not testimonial.

51. 541 U.S. at 38–39.

52. *See id.* at 53 n.4.

53. *Id.* at 38, 41.

54. *Id.* at 63–65.

55. 547 U.S. 813 (2010). This case was decided together with *Davis v. Washington*. I represented Hammon in the Supreme Court.

56. *Id.* at 819–20.

Crawford came down, the court held *both* statements admissible.⁵⁷ When Hammon's counsel objected to admission of the affidavit, the prosecution responded that it was made under oath.⁵⁸ "That doesn't give us the opportunity to cross examine [the] person who allegedly drafted it," replied defense counsel. "Makes me mad." The trial court advised counsel with withering scorn, "You might want to refresh your memory regarding the hearsay rules," and then held that the affidavit satisfied the hearsay exception for present sense impressions and thus did not pose a confrontation problem.⁵⁹ After *Crawford*, the state conceded that admission of the affidavit was error⁶⁰—and eight Justices of the U.S. Supreme Court held, as *Crawford* should have put beyond doubt, that admission of the officer's testimony of the oral statement was also a confrontation violation.⁶¹

Finally, note the dramatic transformation concerning forensic lab reports. Before *Crawford*, many jurisdictions routinely admitted them without any live testimony by the persons who prepared them.⁶² The Confrontation Clause posed no obstacle. But now, as a result of a "rather straightforward application" of *Crawford*'s holding in *Melendez-Diaz v. Massachusetts*,⁶³ that has changed. If the prosecution wishes to introduce a lab report purporting to show, for example, that a given material was cocaine or that the accused had an elevated blood alcohol level, then absent a stipulation (which the accused is often willing to make), the prosecution must ordinarily provide the author of the report as a live witness.⁶⁴

The categorical nature of the confrontation right as articulated in *Crawford* clearly has contributed to its increased vigor: If a statement is testimonial, and there has been no opportunity for confrontation, then it is clear, with only narrow qualifications, that there has been a violation of the right.⁶⁵ There is wiggle room, of course, in determining what types of statements are testimonial,⁶⁶ but there is considerably less of it

57. *Id.* at 820.

58. *Id.*

59. Joint Appendix to Petition for Writ of Certiorari, *Hammon v. Indiana*, 132 S. Ct. 2221 (2012) (No. 05-5705.), 2005 WL 3617526, at *19–20.

60. *Id.* at *106.

61. *Davis*, 547 U.S. at 815, 834 (companion case).

62. See, e.g., Valerie J. Silverman, *Testing the Testimonial Doctrine: The Impact of Melendez-Diaz v. Massachusetts on State-Level Criminal Prosecutions and Procedure*, 91 B.U. L. REV. 789, 790–91 (2011) (describing the change in procedure for lab report admission in Massachusetts and Virginia).

63. 557 U.S. 305, 312 (2009).

64. *Id.* at 311, 328.

65. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). One qualification is that the accused may have forfeited the right. The Court has also left open the possibility that there is a separate dying-declaration exception to the right. *Id.* at 56 n.6.

66. The Court in *Crawford* intentionally avoided defining "testimonial." *Id.* at 68.

than there was under *Roberts* in determining that a statement was reliable. In part the difference is attributable to the facts that a statement could be deemed reliable under *Roberts* because of case-specific factors, but to a large extent the appellate courts resolve as a general matter the question of whether a given type of statement is testimonial.

One could, of course, imagine a doctrine that combined *Crawford* and *Roberts*, providing that a statement may not be admissible for its truth against an accused if *either* (a) it is testimonial and the accused has not had an opportunity to be confronted with the person who made the statement, *or* (b) it is deemed unreliable by the court. But there would be no logic holding together such an artificially constructed doctrine. The simple, fundamental principle that underlies the Confrontation Clause as articulated in *Crawford*—that a witness against an accused should testify in the presence of the accused, subject to cross-examination—would again be obscured. And over time, I believe, a type of entropy would set in. Given the back-up of a fuzzy reliability test, courts would be tempted to minimize the scope and importance of the relatively hard-edged testimonial test, and ultimately we would be left with something very much like the *Roberts* test once again. To be sure, this prediction is speculative, but I believe it reflects the way of the world. In any given case, the loss of evidentiary value that may be created by insisting on the confrontation right is usually more salient than the long-term harm of diminishing the right. And so there would be a tendency to weaken the right, little by little.

III. THE ADMISSIBILITY OF NONTTESTIMONIAL STATEMENTS

I will proceed now on the assumption that, as *Crawford* suggested and subsequent cases make clear, the Confrontation Clause simply does not apply to nontestimonial statements.⁶⁷ Operating on the same assumption—about which he is less happy than I am—Professor Trachtenberg contends that the Due Process Clauses of the Fifth and Fourteenth Amendments should act as “constitutional backstops” to require the exclusion of nontestimonial hearsay that is offered against an accused and that a court deems unreliable.⁶⁸ I am dubious. I will not go so far as to deny the possibility that some nontestimonial evidence might be so potentially prejudicial and have so little probative value that it ought to be rendered constitutionally inadmissible. But as a general matter, I think there is no need for a constitutional bar on nontestimonial hearsay. Indeed, I will go further: For the most part, if live testimony of the declarant to a given proposition would be admissible, then usually evidentiary law, as well as constitutional law, should be receptive to

67. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Davis v. Washington*, 547 U.S. 813, 823–25 (2006).

68. *See* Trachtenberg, *supra* note 4, at 1702.

evidence that the declarant made a nontestimonial assertion of that proposition out of court. Note that by confining this claim to nontestimonial assertions, I am putting aside cases in which admission of the hearsay evidence would amount to allowing witnesses to testify out of court.

A. *Reliability*

When a statement is not testimonial, why should hearsay *not* be admitted? Professor Trachtenberg worries, as others have, about the admissibility of unreliable evidence.⁶⁹ I find the concern perplexing. For one thing, like most of those who use the term, Professor Trachtenberg makes no attempt to define reliability. So I offer my own definition, one that I believe captures the sense of the term as used in ordinary parlance: Evidence is reliable proof of a given proposition if and only if, given the evidence, it is highly improbable that the proposition is false.

Note that this is a very demanding standard. So one problem is that very few items of evidence meet it; on some contested issues, none at all will do so. Apart from that, our conception of a trial is not that the court winnows out all unreliable evidence, allowing the jurors to hear only evidence that appears to point them in the right direction. If it were, there would be really nothing left to try, because the outcome would be predetermined. Indeed, the epitome of acceptable evidence—live testimony of eyewitnesses—is notoriously unreliable.⁷⁰ The essence of a trial is to present the trier of fact with a range of evidence, which may point in both directions and much of which might be extremely unreliable, and leave it to the trier to do the best it can to weigh the evidence on both sides and reach a conclusion. A trial is a test, and we should not shrink from the facts that trials deal with imperfect inputs and that they may have uncertain outcomes.

B. *The Probative–Prejudicial Balance*

Perhaps a response to the argument I have just made is that I am simply quibbling with terminology, and that the true question is whether the evidence is more probative than prejudicial. Reliability is a sufficient but not necessary condition for that test to be satisfied. But there is no basis for concluding that hearsay in general tends to be more prejudicial than probative. On the contrary, if live testimony of the declarant to a given proposition would be more probative than

69. *See id.* at 1702–03.

70. *See, e.g.,* United States v. Wade, 388 U.S. 218, 228–29 (1968); *Understand the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness_Misidentification.php (“Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly 75% of convictions overturned through DNA testing.”).

prejudicial, then, in most cases, secondary evidence that the declarant has asserted the proposition would be more probative than prejudicial as well.⁷¹ True, the secondary evidence deprives the trier of fact of some of the tools it might find useful in assessing the truthfulness of the declarant, but that in itself does not warrant exclusion. To justify excluding the evidence on this basis, we would have to conclude not only that the trier of fact is unable to take this factor into account and discount the weight it places on the evidence accordingly; we would also have to conclude that the defect is so great, and the trier's inability so pronounced, that the trier's probable overvaluation of the evidence, if it is presented to them, is greater in significance than the loss of probative value if the evidence is excluded. But so far as I am aware, there is no empirical evidence that jurors tend to overvalue hearsay to this degree, or indeed at all. In fact, empirical evidence suggests that jurors *undervalue* hearsay, and there has certainly been no demonstration that the use of hearsay, rather than of no evidence at all from the declarant, impairs the search for truth.⁷²

It appears, then, that in most cases in which a live witness's testimony of a given proposition would be more probative than prejudicial, the same conclusion can be drawn about hearsay evidence tending to prove that the same person made a nontestimonial out-of-court assertion of the proposition. That is not the end of the story, though.

C. Best-Evidence Considerations

It is possible that the hearsay should be excluded, even though it is more probative than prejudicial, on best-evidence grounds. That is, in some circumstances it may be that exclusion of this hearsay will induce the proponent, or others similarly situated, to present better evidence than the hearsay—presumably, the live testimony of the declarant at

71. See Richard D. Friedman, *Dealing with Evidentiary Deficiency*, 18 CARDOZO L. REV. 1961, 1976 (1997).

72. Much of the literature is reviewed in Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149 (2003). Professor Park concludes that "it is difficult to draw broad, general inferences from the empirical literature about the impact of hearsay evidence." *Id.* at 1167. As he points out, the question of impact, whether hearsay "is strong medicine," is not the important one for determining legal impact; that issue, rather, is "whether hearsay evidence helps or hurts the quest for accurate verdicts," and an experiment will not help determine that unless the investigator knows "the ground truth." *Id.* According to Park, "[t]here have been two hearsay experiments in which the experimenters started with a real incident, knew the ground truth, and sought to examine whether jurors could use hearsay reliably in reaching accurate verdicts." *Id.* Although Park acknowledges that "it is hard to draw too much from them because neither experiment involved cross-examination," he points out that "[t]hey both reached results that should provide comfort to those who favor wider admission of hearsay." *Id.* at 1168.

trial, or at least at a deposition.⁷³

1. The Unavailable Declarant

At least in the usual case, exclusion can be warranted on best-evidence grounds only if the declarant is available, or would have been available had the proponent acted with reasonable diligence. If, for example, the declarant died shortly after making the statement, the proponent was not responsible for the death, and the proponent could not reasonably have anticipated a later evidentiary need for the statement, then the proponent should not be held to account for failure to produce the declarant as a live witness at trial or deposition.⁷⁴ Similarly, if the declarant is a person whose identity the proponent could not reasonably be expected to know, it would make no sense to exclude the hearsay on best-evidence grounds.⁷⁵

2. The Available Declarant

Even if the declarant is available, I think the law should usually be hesitant to exclude nontestimonial hearsay to induce the proponent to produce live testimony. The situation is rather subtle and complex; here I present only a very brief summary of an argument I have made elsewhere.⁷⁶

Bear in mind three propositions that are true by hypothesis: (1) the hearsay is not testimonial in nature; (2) it is more probative than prejudicial; and (3) the proponent is satisfied to rely on the hearsay rather than go to the trouble and expense of producing the declarant. Also, given that the proponent could produce the declarant as a live witness, then presumably the opponent also could do so, if he cared enough about examining her. That, it appears to me, should ordinarily be enough to satisfy constitutional concerns.⁷⁷

But my analysis goes further. In most cases, even if the declarant is available, I do not believe that, as a matter of policy, best-evidence considerations call for outright exclusion of the evidence. Given that the

73. It is also possible that exclusion of the hearsay will induce the proponent to present live or deposition testimony, to the same proposition, given by another witness who is more easily available than the hearsay declarant. For simplicity's sake, I will put aside this relatively unusual case.

74. See generally Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 282 (1988).

75. Cf. *id.* at 248 n.105 (noting that what today is often called the "best-evidence rule" does not apply if the evidence is unavailable through no fault of the proponent).

76. Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 764–82 (1992).

77. It would not be if the hearsay were testimonial and offered against an accused. Putting the burden on the accused to call a prosecution witness to the stand is not allowed. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

hearsay evidence the proponent wishes to introduce is more probative than prejudicial, and that the opponent could produce the declarant as a live witness, the hearsay ought to be admissible unless there is good reason for excluding it. What good reason might there be?

One reason might be that the opponent would have a sound basis for being reluctant to call the declarant as his own witness solely for the chance of cross-examination.⁷⁸ Most significantly, such a move is risky because it will appear perplexing if the cross is not highly productive. Sometimes this problem is a significant one, and sometimes not—it may be that the opponent would have little interest in seeing the declarant testify as a live and perhaps very persuasive witness.⁷⁹ But in any event, I believe that adopting a simple procedural feature will address this problem and often lead to better results: If the opponent of the hearsay timely produces the declarant, ready and able to testify, then the proponent should usually be required to choose whether to present the live testimony of the declarant as part of his case or forgo use of the evidence.⁸⁰

Another factor weighing in favor of excluding the hearsay may be that the proponent is substantially better able than the opponent to produce the declarant as a live witness. But even if so, I do not believe that exclusion is usually warranted. The chance that the opponent would have chosen to produce the declarant, even if his costs of doing so were as low as the proponent's, might be so small that admitting the hearsay is still appropriate. For example, if the proponent has an advantage only in some part of the tasks necessary to make the declarant a witness (identifying the declarant, locating her, securing her presence, and ensuring her willingness to testify), it might make sense to impose on him only the burden of performing those tasks, and on the opponent the burden of performing the others. It might also make sense to give the opponent the option of demanding that the proponent produce the declarant, but at the opponent's expense.⁸¹

I acknowledge, nevertheless, that the situation in which the proponent is substantially better able than the opponent to produce the declarant is the one in which exclusion of hearsay is best justified, notwithstanding that the evidence is more probative than prejudicial. Perhaps in some rather extreme circumstances, if the opponent is a criminal defendant, the difficulty is serious enough that the failure of the prosecutor to produce the declarant should be considered a due

78. Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883, 892–93 (1991).

79. See Friedman, *supra* note 76, at 748–49.

80. I have elaborated on the reasons for adopting this procedure in Friedman, *supra* note 78, at 892–98.

81. See Friedman, *supra* note 76, at 767–75.

process violation.⁸² But bear in mind that by hypothesis, the out-of-court statement is not testimonial in nature. It was therefore—if a sound conception of “testimonial” is used—not made in contemplation of prosecution.⁸³ The statement is probative evidence that the prosecution is satisfied to use. What then would justify a ruling that the evidence is constitutionally inadmissible on the ground that the prosecution could have presented better evidence—specifically, live testimony by the declarant? I believe the defendant ought to have to prove at least both that (1) production of the declarant would be relatively easy and low-cost for the prosecution and difficult or impossible for the defense, and (2) live testimony (including cross-examination) would likely be substantially better for the truth-determination process than would introduction of the out-of-court statement. Perhaps such a due process doctrine is justifiable, and perhaps in some cases the accused could make the showing. But this is not a matter of the accused being deprived of the right to be confronted with the witnesses against him.

IV. THE CONFORMITY OF HEARSAY LAW TO THE CONFRONTATION PRINCIPLE

Focusing primarily on evidence offered against an accused, I have argued that there is usually good reason to exclude hearsay when it is testimonial in nature and the opposing party has not had an adequate opportunity for cross-examination, and that there is usually not very good reason to exclude the evidence otherwise.⁸⁴ This Part argues that, to a considerable and perhaps surprising extent, prevailing doctrine, as stated in the Federal Rules of Evidence, reflects this dichotomy. The correlation is not perfect, to be sure, and over time as the confrontation principle became obscured, it loosened up in some settings. But for the most part, hearsay law replicates—in all settings, not just the one in which a prosecutor offers evidence—the doctrine of the Confrontation Clause as enunciated in *Crawford*. If (a) a statement is testimonial, (b) the statement is offered for its truth, and (c) the declarant does not testify at trial, then the statement will be excluded unless *either* (c) (1) the declarant is unavailable *and* (2) the party-opponent has had an adequate opportunity for cross-examination, *or* (d) the opponent has forfeited the objection.⁸⁵ In circumstances in which these principles do not require exclusion, hearsay law tends to be receptive to the evidence.

I want to focus primarily on the degree to which hearsay law and the

82. *See id.* at 726 n.10.

83. *See Melendez-Diaz v. Massachusetts*, 597 U.S. 305, 311 (2009) (holding that certificates of lab reports were testimonial on the basis that authors were aware of their intended evidentiary use).

84. *See supra* Parts II–III.

85. *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004).

Confrontation Clause draw a similar line between testimonial and nontestimonial statements. But I will help clear the stage by first demonstrating several other commonalities, each of which reflects a limitation on both the Clause and on the rule against hearsay:

1. *If a party makes or adopts a statement and it is then offered against him, there is no problem under either the Confrontation Clause or hearsay law.* As has often been said, an accused has no right to confront himself.⁸⁶ Federal Rules of Evidence 801(d)(2)(A) and (B) exempt from the hearsay rule statements made or adopted by the party-opponent.⁸⁷

2. *If the statement in question is not offered for the truth of a proposition that it asserts, then neither confrontation doctrine nor the rule against hearsay applies.* *Crawford* makes this explicit.⁸⁸ And so does Federal Rule of Evidence 801(c)(2).⁸⁹

3. *If the declarant testifies at trial, that eliminates the confrontation problem (under current doctrine) and may eliminate the hearsay problem.* Again, *Crawford* is explicit: “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”⁹⁰ I think that is an unfortunate statement,⁹¹ but it reflects the current state of confrontation doctrine. As for the hearsay rule, significant exemptions apply if the declarant testifies at trial—for certain inconsistent statements,⁹² certain consistent statements,⁹³ statements of identification,⁹⁴ and records made while a matter was fresh in the

86. See, e.g., *United States v. Wood*, 39 U.S. (14 Pet.) 430, 443 (1840) (“[A] man’s own acts, conduct, and declarations, when voluntary, are always admissible in evidence against him.”); Peter Nicolas, *But What If the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, 2010 BYU L. REV. 1149, 1190 n.172 (2010) (explaining how the Confrontation Clause problem is eliminated for the prosecutor when the accused adopts testimony as his own, because he clearly cannot confront himself).

87. A statement is not hearsay if “[t]he statement is offered against an opposing party and . . . was made by the party in an individual or representative capacity” or “is one the party manifested that it adopted or believed to be true.” FED. R. EVID. 801(d)(2)(A)–(B).

88. *Crawford*, 541 U.S. at 60 (endorsing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

89. To fall within the definition of hearsay, a statement must be one that “a party offers in evidence to prove the truth of the matter asserted in the statement.” FED. R. EVID. 801(c)(2).

90. 541 U.S. at 60 n.9.

91. See, e.g., Richard D. Friedman, *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*, 1995 SUP. CT. REV. 277, 289–92.

92. FED. R. EVID. 801(d)(1)(A).

93. *Id.* 801(d)(1)(B).

94. *Id.* 801(d)(1)(C).

witness's memory.⁹⁵

4. *Neither the Confrontation Clause nor the rule against hearsay will block admission of a testimonial statement made out of court if the witness is unavailable to testify at trial and the party opponent has had an adequate opportunity for cross-examination.* Once again, *Crawford* is explicit on this point, which reflects long-standing practice.⁹⁶ And Federal Rule of Evidence 804(b)(1) establishes the same point with respect to hearsay law.⁹⁷

5. *Both the confrontation right and an objection to the hearsay rule may be forfeited by at least some wrongful conduct that renders the declarant unavailable to testify at trial.* Federal Rule of Evidence 804(b)(6) establishes the forfeiture doctrine as part of hearsay law. *Crawford* recognized the existence of the doctrine as part of the law governing the Confrontation Clause.⁹⁸ The Supreme Court addressed the scope of the doctrine, for purposes of the Clause, in *Giles v. California*.⁹⁹ In my view, *Giles* gave the doctrine an unduly narrow ambit, as does Rule 804(b)(6).¹⁰⁰ Properly conceived, I believe that forfeiture doctrine would explain the results achieved by the dying declaration exception to the rule against hearsay.¹⁰¹ Given the limitations on the doctrine established by *Giles*, the Court will probably have to engraft onto the law of the Confrontation Clause an exception for dying declarations akin to the one in Rule 804(b)(2).¹⁰² That, I believe, is very unfortunate, but it need not detain us here. For now, the point is that once again the law of hearsay resembles the law of confrontation as established in *Crawford*.

Now let us focus on the divide between testimonial and nontestimonial statements.

6. *If a statement is offered against an accused and none of the*

95. *Id.* 803(5).

96. 541 U.S. 36, 68 (2004) (“Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”); *see also id.* at 53–54, 59.

97. This rule now appears, of course, as an exception to the hearsay rule. In older days, the rule was conceived as an alternative way in which testimony might be presented. *See, e.g.*, RICHARD D. FRIEDMAN, *THE ELEMENTS OF EVIDENCE* 336–37 (3d ed. 2004).

98. 541 U.S. at 62.

99. 554 U.S. 353, 365–66 (2008).

100. *See, e.g.*, Richard D. Friedman, *Giles v. California: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733, 743–44 (2009).

101. *See* FED. R. EVID. 804(b)(2).

102. The Court allowed for this possibility in *Crawford*. *See* 541 U.S. at 56 n.6.

constraints on the reach of the Confrontation Clause stated above apply, then admission of the statement violates the Clause if the statement is testimonial, but not otherwise. If none of the constraints stated above on the reach of the rule against hearsay applies, admission of the statement will probably violate the rule if the statement is testimonial and will probably not violate the rule if the statement is not testimonial. Four propositions are embedded in this assertion—under each of two doctrines, the Confrontation Clause and hearsay law, a restrictive proposition concerning testimonial statements and a permissive proposition concerning nontestimonial statements. The two propositions involving confrontation doctrine are now elementary. Suppose that (1) a statement by a person other than the accused is offered against the accused to prove the truth of what it asserts, (2) the person who made the statement does not testify at trial, (3) either that person could reasonably have been made a witness at trial or the accused has not had an opportunity for cross-examination, and (4) the accused has not forfeited the confrontation right. (For these purposes, I will treat the possibility that the statement falls within a dying declaration exception as a species of forfeiture.) If the statement is testimonial, its admission against the accused violates the confrontation right—that is the essence of *Crawford*.¹⁰³ And if the statement is nontestimonial, its admission does not violate the right. That, as I have noted above, has been made clear in subsequent cases.¹⁰⁴

Now consider the hearsay side of the near equation, and first the restrictive aspect. Assume (1) the statement is offered for its truth against a party and it was not made or adopted by that party, (2) the declarant does not testify at trial, (3) either the declarant could reasonably have been made a witness at trial or the party opponent has not had an adequate opportunity for cross-examination, and (4) the party opponent has not forfeited the hearsay objection. (Again I treat the dying declaration exception as an aspect of forfeiture doctrine.) Assume further that the statement is testimonial in nature—which for our purposes means that it was made in circumstances that would lead a reasonable person in the position of the declarant to believe that the statement would likely be used as proof in an identifiable litigation.¹⁰⁵

103. *Id.* at 68–69.

104. *Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Davis v. Washington*, 547 U.S. 813, 823–26 (2006); *see also supra* Part III.

105. By the reference to identifiable litigation, I mean to indicate that the declarant was aware, at the time of the statement, of a dispute involving a given incident or perhaps given parties or a given relationship that either was, or plausibly would be, in litigation. For example, if a person makes a statement to the police about what happened in an auto accident, that would be testimonial, even if she did not identify the people involved. If she made a statement bearing on a litigable dispute with another person, that would be testimonial if offered in litigation concerning a later, similar dispute between the same persons. But a statement that, say, records a

Given these assumptions, the statement would probably be inadmissible under the rule against hearsay.

To see this, note first that because the statement is offered for the truth of what it asserts, it falls within the basic definition of hearsay in Federal Rules of Evidence 801(a) through (c), and so is presumptively excluded by Rule 802. And by assumption the exemptions most likely to apply to testimonial statements—those for prior statements made by a witness who testifies at trial, for former testimony by a declarant who is unavailable to testify at trial, and for cases of forfeiture and dying declarations—do not apply. Look over the list of the other exemptions. You will notice that virtually all of them—for family records,¹⁰⁶ statements in ancient documents,¹⁰⁷ market reports,¹⁰⁸ statements in learned treatises,¹⁰⁹ and so forth—apply completely or nearly so to statements that are *not* made in contemplation of identifiable litigation.

To be sure, the line is not perfect. Over the last couple of centuries, courts and rulemakers have stretched some of the exemptions to reach some testimonial statements. I will consider three primary examples.

First is the family of exceptions for spontaneous declarations,¹¹⁰ which emerged in the nineteenth century.¹¹¹ Earlier courts had been careful to admit such statements only if they could be considered part of the *res gestae*, or the story being told, and even in the late nineteenth century, courts were sometimes rigorous about not letting this doctrine be used to admit statements that really were reports on events.¹¹² Even as the doctrine developed into a recognizable exception to the hearsay rule, it was supposed to be limited to statements made so spontaneously as to preclude the possibility of conscious reflection.¹¹³ But by the end of the twentieth century, many courts were using these exemptions to allow in statements that had been made a considerable time after the event in question and quite clearly in contemplation of litigation¹¹⁴—a

routine transaction would not ordinarily be testimonial. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) (noting that business and public records usually are not testimonial within the meaning of Confrontation Clause doctrine because they are “created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial,” but holding that the lab analyst’s statements involved in that case, even if they might be characterized as business or official records, were “prepared specifically” for use at accused’s trial, and so were “testimony against” him).

106. FED. R. EVID. 803(13).

107. *Id.* 803(16).

108. *Id.* 803(17).

109. *Id.* 803(18).

110. *Id.* 803(1)–(3).

111. *See, e.g., Gallanis, supra* note 18, at 516–18.

112. *See Friedman & McCormack, supra* note 7, at 1213–16.

113. FED. R. EVID. 803(1)–(2) advisory committee’s note.

114. *Friedman & McCormack, supra* note 7, at 1200–01.

practice that *Hammon v. Indiana* curbed to some extent.¹¹⁵

Second is the group of exceptions¹¹⁶ that includes most notably those for records of regularly conducted activities¹¹⁷ and for public records.¹¹⁸ Almost by definition, most of these are nontestimonial—they are made as a matter of ordinary routine and not in contemplation of litigation.¹¹⁹ That was very clearly so with respect to the traditional “shopbook rule” from which the exception for records of routinely kept records emerged.¹²⁰ But in the modern day, there are some categories of statements, most notably forensic laboratory reports, that are made routinely *and* in contemplation of litigation. Some courts recognized that these exceptions were not meant to justify admission of reports made for prosecutorial use;¹²¹ others did not.¹²² Once again it required a Confrontation Clause decision by the Supreme Court—in this case, *Melendez-Diaz v. Massachusetts*—to ensure that the hearsay exceptions were not used to justify the admission of out-of-court testimonial statements.¹²³

Finally, consider the hearsay exception for declarations against interest.¹²⁴ Traditionally, the rule did not apply to statements tending to expose the declarant to criminal liability.¹²⁵ On the assumption that the exception should be shaped in an attempt to guarantee the admissibility of reliable evidence, such a limitation makes very little sense.¹²⁶ The limitation is much more sensible, however, if one recognizes that a high proportion of statements that tend to expose the declarant to criminal liability are testimonial. The drafters of the Federal Rules, focusing on reliability, did away with the limitation. They did, however, indicate

115. *Davis v. Washington*, 547 U.S. 813, 820–21, 829–32, 834 (2006) (companion case) (determining that Amy Hammon’s oral statement, accusing her husband of assault and made to a police officer while she was protected and he was held at bay, was testimonial).

116. FED. R. EVID. 803(6)–(10).

117. *Id.* 803(6).

118. *Id.* 803(8).

119. That is not necessarily true about some public records, but notice that such records that are made in contemplation of prosecution and offered against an accused almost certainly fall afoul of the qualifications in Federal Rules of Evidence 803(8)(A)(ii) and (iii).

120. *Developments in Maryland Law, 1991–92*, 52 MD. L. REV. 530, 709 n.179 (1993) (“The authorities are consistent in finding that the present day business records exception is an outgrowth of the common-law ‘shopbook rule.’”).

121. *See, e.g., United States v. Oates*, 560 F.2d 45, 72 (2d Cir. 1977) (“[I]t was the clear intention of Congress to make evaluative and law enforcement reports absolutely inadmissible against defendants in criminal cases.”).

122. *See, e.g., State v. Merritt*, 591 S.W.2d 107, 112–14 (Mo. Ct. App. 1979); *United States v. Evans*, 45 C.M.R. 353, 355–56 (1972).

123. 557 U.S. 305, 311 (2010); *see also supra* note 105.

124. FED. R. EVID. 804(b)(3).

125. *See, e.g., Donnelly v. United States*, 228 U.S. 243, 273 (1913).

126. This was a point made effectively by Justice Holmes, joined by Justices Lurton and Hughes, dissenting in the *Donnelly* case. *Id.* at 278 (Holmes, J., dissenting).

one significant qualification: “[A] statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest.”¹²⁷ In some cases that may be true, but in some cases it is almost certainly false—depending on how serious an admission of culpability the declarant has made. But such a statement is almost certainly testimonial. Nevertheless, courts in the decades after adoption of the Federal Rules of Evidence did not uniformly exclude statements made to the authorities by absent declarants who inculpated themselves as well as another. One decision tolerating admissibility of such a statement was reversed on Confrontation Clause grounds in *Crawford v. Washington*.¹²⁸

In each of these three settings, then, an older conception of hearsay law would not have allowed admissibility of testimonial hearsay. By the beginning of this century, in the absence of a coherent theory of the confrontation right, the resistance to allowing testimonial statements had softened sufficiently that in these contexts courts often let them slip by.¹²⁹ *Crawford* and its progeny effectively plugged these holes with respect to prosecution evidence.

I am not, therefore, contending that hearsay law does a perfect job of policing against the admission of testimonial statements—far from it. I am saying that *for the most part*, the enumerated exemptions to the hearsay rule apply to nontestimonial statements, and that this was especially so in older days, before courts and rulemakers, losing track of the need to prevent a system by which witnesses could effectively testify without coming to trial, loosened up considerably on hearsay that appeared likely to be accurate.¹³⁰

127. FED. R. EVID. 804(b)(3) advisory committee’s note.

128. 541 U.S. 36, 38–39, 68–69 (2004).

129. There were other examples as well, including the willingness of some courts in the decades before *Crawford* to allow admission of flagrantly testimonial statements made in formal settings, such as grand jury proceedings, often using the residual exception (now set forth in Federal Rule of Evidence 807) as a way around the hearsay rule. *See, e.g., United States v. Papajohn*, 212 F.3d 1112, 1118–20 (8th Cir. 2000), *abrogated by Crawford*, 541 U.S. 36.

130. By referring to “enumerated exceptions,” I mean to set apart the residual exception, Federal Rule of Evidence 807. As I have just noted, that exception was sometimes applied before *Crawford* to testimonial statements. *Supra* note 129. But the history of the exception proves the broader point. Creation of the exception (then in two separate provisions, Rules 803(24) and 804(b)(5)) was controversial; the House of Representatives deleted it from the draft of the Rules submitted by the Supreme Court. In restoring a narrower form of the exception, the Senate Judiciary Committee wrote:

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b).

Now let us consider the permissive aspect of the assertion I have made about hearsay—that is, that if a statement is *not* testimonial, hearsay law will very likely tolerate its admissibility. I cannot demonstrate this proposition to a certainty or anywhere near, at least not in the space available here. But the proposition is not one that scholars would find surprising.¹³¹ And its truth is suggested by the profusion of exemptions that apply to nontestimonial hearsay, some purportedly supported by very dubious grounds of reliability,¹³² and the invitation extended by the residual exception¹³³ to admit, on case-specific grounds, hearsay not falling within the recognized exemptions.

Let us consider in this light the exemption for conspirator statements,¹³⁴ which lies near the heart of Professor Trachtenberg's argument. I agree with much of what he says in this context: The traditional rationales offered for the exemption are very weak.¹³⁵ The proposition that one conspirator is an agent of the other(s) presumably justified inclusion of this exemption in Rule 801(d)(2), along with other variants of what have traditionally been called party admissions—but even the Advisory Committee that drafted the rule asserted that “the agency theory of conspiracy is at best a fiction.”¹³⁶ The argument that statements by a conspirator have significance in themselves, not merely as reports but as part of the conspiracy in operation, sometimes has

S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7066. Active use of the residual exception to admit testimonial evidence was therefore a development of the late twentieth century.

131. See David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 2 & n.3; Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 799–800 (1992) (“[I]t is only a marginal overstatement to say that today, at least in civil cases, the hearsay rule applies in any robust fashion only to available nonparty witnesses within the subpoena power of the court. And it does not apply to them very rigorously. . . . The hearsay rule is, in short, no longer a rule of exclusion; it is instead a rule of admission that is doing its subversive work under the cover of darkness.” (footnote omitted)).

132. See, e.g., Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 651 (1992) (“[T]he ‘reliability’ rationale of the exception for spontaneous declarations has been more the result of tradition than of fact, and has been soundly criticized by commentators—a fact ignored by the Supreme Court.”); *id.* at 651 n.110 (“If judged from the standpoint of the reliability of the representations on the basis of perception, the law relating to the admission of spontaneous exclamations is amazing. If the observer speaks before he thinks, the evidence is admissible; if he thinks before he speaks, it is excluded.” (quoting Mason Ladd, *The Hearsay We Admit*, 5 OKLA. L. REV. 271, 286 (1952))).

133. See FED. R. EVID. 807.

134. See *id.* 801(d)(2)(E). As noted above, *supra* note 6, I am referring to “conspirators” rather than to “co-conspirators” in deference to Professor Duane, the leading scholar (albeit by default) on that choice.

135. See Trachtenberg, *supra* note 4, at 1686–88.

136. FED. R. EVID. 801(d)(2)(E) advisory committee's note.

force; a prosecutor does, indeed, often have to show how conspiracies operate, and often they operate in large part through the statements of their members. But often the principal reason for which the proponent offers the statement is to prove the truth of what the conspirator said.¹³⁷ And the idea that conspirators' statements tend to be especially reliable is, as Professor Trachtenberg suggests, nonsense.¹³⁸ As a class, I do not believe that they are any more reliable than was the statement, discussed below, of the Portuguese gentleman in *Raleigh*.

But where does that leave us? Professor Trachtenberg argues that conspirators' statements are admissible on grounds of necessity—convicting conspirators is an important social aim, and because conspirators make conviction difficult by acting secretly, it is necessary to bend principle and admit evidence that would otherwise be unacceptable.¹³⁹ Frankly, I find the suggestion startling. If the exclusion of a given form of evidence really does reflect a fundamental principle, it would be disturbing to allow it in nonetheless to facilitate conviction of a given type of crime. Such a doctrine, I think, would be very hard to confine, with respect to either the crimes it might address (especially because conspiracy is far from the most serious, or the most difficult to prove, of all crimes), or the rights of an accused that we would be willing to abridge. Indeed, it would seem to apply equally to evidence of other out-of-court statements tending to prove that the accused was a member of the conspiracy, whether the declarant was a member of the conspiracy or not.¹⁴⁰

I have an alternative explanation for the exemption. In accordance with the arguments I have made in this Essay, assume that if live testimony by a person to a proposition would be admissible, then evidence that the person made a nontestimonial assertion of that proposition should probably be admitted as well. Then the exemption

137. Trachtenberg, *supra* note 4, at 1689 (citing *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979)).

138. *Id.* at 1687–88.

139. *Id.* at 1689.

140. Thus, it appears to me that this rationale would apply equally in two cases in which Professor Trachtenberg argues vigorously that the evidence should be excluded. *Id.* at 1696–99, 1709–13. In *United States v. El-Mezain*, 664 F.3d 467, 554–55 (5th Cir. 2011), discussed below in Section V.B, the defendants were accused of participating in a conspiracy, which was proved in part by statements made before the confederates' activities were illegal. And in the *Raleigh* case, discussed in Section V.A, the statements at issue asserted that Raleigh was part of a conspiracy to kill the king. In *Raleigh*, neither statement would satisfy the exemption because one was made by a nonconspirator (the Portuguese gentleman) and the other, Cobham's confession to the authorities (which was clearly testimonial), clearly did not support the conspiracy. But any of these statements, it appears, would satisfy the necessity rationale advanced by Professor Trachtenberg; the calculus under that rationale does not appear to be affected by the fact that, at the time of the statement, the person making it was not a member of the charged conspiracy speaking in furtherance of it.

for conspirator statements marks out a segment of the border between nontestimonial statements, which presumably should be admitted, and testimonial ones, which presumably should be excluded. On the one hand, if a statement is genuinely made during the course of and in furtherance of a conspiracy, then virtually by definition it is not testimonial—in making the statement, the declarant was trying to advance the aims of the conspiracy, and presumably she would not have made the statement if she believed there was a substantial probability that it would instead become evidence used to destroy the conspiracy and punish its members. Thus, the confrontation principle does not pose an obstacle to admission, and the exemption ensures that neither does the rule against hearsay. On the other hand, if a conspirator tells a known police officer about the activities of the conspiracy, that statement presumably is inimical to the interests of the conspiracy and so should not fall within the exemption.¹⁴¹ It is also almost certainly testimonial in nature. Thus, the two doctrines yield the same result in this context as well: the confrontation right demands exclusion and the exemption does not remove the hearsay bar.

Again, I am not suggesting that hearsay doctrine perfectly reflects the confrontation principle; given that the principle was obscured for so long, that could hardly be true. I do believe that much of hearsay doctrine represents a groping in the dark for an underlying value. That value is not that unreliable evidence ought to be excluded. It is, rather, that a witness should testify in the presence of an adverse party, subject to cross-examination.

V. TWO APPLICATIONS

I argue in this Essay for a rather strong dichotomy. On the one hand, the law should insist on preserving the right of a criminal defendant to demand that witnesses against him testify face-to-face and are subject to cross-examination. On the other hand, the law should take a far more receptive attitude than it does now towards nontestimonial hearsay. Arguing against such receptivity, Professor Trachtenberg invokes the case of Sir Walter Raleigh.¹⁴² And at the heart of his Essay lies his objection to the willingness of some courts to admit statements on a “lawful joint venture” theory. This Part addresses both these matters.

A. *The Raleigh Case*

141. I realize that some nontestimonial statements made by a conspirator might be relevant to the case and yet fall outside the formal bounds of the exemption—for example, “idle chatter” and statements made after the conspiracy has achieved its principal aim or been abandoned. But courts are resourceful in finding that these statements served the purpose of the conspiracy—by recruiting members and customers, for example—and that the conspiracy was still in force at the time of the statement.

142. Trachtenberg, *supra* note 4, at 1709–11.

One of the statements used to convict Raleigh would probably now be considered nontestimonial. Professor Trachtenberg seems to assume that any theory that allows presentation of hearsay of the type used against Raleigh must be seriously deficient. I will take the issue head-on: I acknowledge that under my approach, the confrontation right would probably not exclude evidence of the statement—but I do not regard this as troublesome.

As Professor Trachtenberg points out, the Raleigh case involved two significant statements that would now be considered hearsay. One of these—and the one that I believe is primarily responsible for the infamy of the case—was the confession of Raleigh’s principal accuser, Lord Cobham, who, as Raleigh said, was “alive, and in the house.”¹⁴³ In the parlance of *Crawford*, the statement was clearly testimonial, and Raleigh made vigorous, persistent, and repeated complaints against his prosecutors’ failure to bring Cobham “face-to-face” against him at trial.¹⁴⁴ He emphasized that this failure violated the basic precepts of a fair English trial. “If there be but a trial of five marks at Common Law,” he argued, “a witness must be deposed. Good my lords, let my Accuser come face to face, and be deposed.”¹⁴⁵ And it was clear that his objection, though ultimately of no avail to him, registered with his listeners.¹⁴⁶ Apart from emphasizing the validity of confessions, neither the Commissioners trying the case nor Attorney General Coke challenged Raleigh’s contention that the norm in an ordinary, non-treason case would have been to bring the accusing witnesses face-to-face. Cobham’s statement, in short, was a testimonial accusation, and by a witness who was readily available—and the dispute over it indicates that, even at the time, allowing it to be used without producing Cobham appeared to be a violation of fundamental principles.

In contrast, consider the second hearsay statement, the one Professor Trachtenberg emphasizes.¹⁴⁷ One Dyer, a pilot, testified that in Lisbon he had the following encounter with a gentleman:

[E]nquiring what countryman I was, I said, an Englishman.
Whereupon he asked me, if the king was crowned? And I

143. 2 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 19 (1809); *see also id.* at 23.

144. *Id.* at 15, 18, 19, 23.

145. *Id.* at 19.

146. Lord Chief Justice Popham contended that “[w]here no circumstances do concur to make a matter probable, then an accuser may be heard; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced.” 1 DAVID JARDINE, CRIMINAL TRIALS 427 (1835). In the end he and the prosecutors were driven to fall back on arguments of state security, which essentially presuppose the guilt of the prisoner. For example, Judge Popham referred to communications between Raleigh and Cobham before the trial, with the innuendo that Raleigh may have bribed Cobham to change his testimony. 2 COBBETT’S, *supra* note 143, at 20.

147. Trachtenberg, *supra* note 4, at 1709–10.

answered, No, but that I hoped he should be so shortly. Nay, saith he, he shall never be crowned; for Don Raleigh and Don Cobham will cut his throat ere that day come.¹⁴⁸

Raleigh challenged the usefulness of the evidence, to be sure, but for its lack of probative value rather than for any fundamental violation of procedure. “This is the saying of some wild Jesuit or beggarly Priest,” he said, “but what proof is it against me?”¹⁴⁹ The chief prosecutor, Attorney General Coke, responded: “It must per force arise out of some preceding intelligence, and shows that your treason had wings.”¹⁵⁰ In other words, Coke contended that the evidence had circumstantial value because the Portuguese gentleman could not be thought to have come up with the story of Raleigh’s involvement unless there were some basis—“some preceding intelligence”—for the statement. And in reply, Raleigh offered an alternative explanation, making a short speech to the effect that it was not surprising that Cobham’s treason in aid of Spain had become known in Lisbon, and that his own name was presumably thrown in to add weight to the conspiracy.¹⁵¹ But he did not press the matter. He did not argue, for example, that efforts should be made to produce, or even identify, the Portuguese gentleman. Nor did he argue that because of the failure of the prosecution to make such efforts, or simply because of the absence of the Portuguese gentleman—which meant that his statement was unsworn, that the triers had no opportunity to evaluate his demeanor, and that Raleigh had no opportunity for cross-examination—the statement should not be presented.

In short, Raleigh’s reaction to the statement of the Portuguese gentleman was not based on the assertion that his right to be brought face-to-face with an adverse witness had been violated. And a comparison of his treatment of that statement with that of Cobham’s suggests that it is the latter, and not the former, that is responsible for the infamy that the prosecution of Raleigh has suffered for centuries.

But suppose that a case like this arose today. What should happen, given the limitation of the confrontation right to testimonial statements? Let’s put aside the possibility that the statement should be considered testimonial, though the matter is not completely free from doubt.¹⁵² And

148. 2 COBBETT’S, *supra* note 143, at 25.

149. 1 JARDINE, *supra* note 146, at 436.

150. *Id.*

151. 2 COBBETT’S, *supra* note 143, at 25.

152. If the statement was made with the anticipation that it would in fact be passed on and used in a prosecution, then it should be considered testimonial. It could be that the statement was a surreptitious attempt to plant evidence that would be used to help prosecute Raleigh. So far as I know, however, there is no evidence that this was true of the Portuguese gentleman’s statement. Also, one could argue that when a person makes a statement accusing another of a crime, and does so beyond a closed circle of people whom he can trust not to pass the information on to the authorities, the statement is necessarily testimonial, because there is a

I will put aside also the possibility that the statement ought to be admitted on grounds similar to those enunciated by Coke—not to prove the truth of what it asserts but as circumstantial evidence that the conspiracy was afoot. Let's assume instead that the prosecutor takes the bull by the horns and offers the statement to prove that Raleigh was in fact part of a conspiracy to murder the king. By hypothesis, the Confrontation Clause does not require exclusion. For several reasons, I am not troubled by this.

First is a matter of principle: The Portuguese gentleman, by hypothesis, simply was not acting as a witness against Raleigh. Allowing evidence of what he said, whatever problems it might pose, does not contribute to a system by which witnesses can testify against criminal defendants without coming face-to-face and being subjected to cross-examination.

Second, there is no particular reason to suppose that a jury would fail to recognize the factors that diminish the probative value of the evidence. And there is no basis for concluding that the jury's overvaluation of the evidence would be so great that its prejudicial impact would be greater than its probative value. If this is correct, then the evidence advances the truth-determination process. And of course if a court regards it as incorrect, the court would presumably exclude the evidence on that basis.¹⁵³

Third, other nonconstitutional doctrines also might call for the evidence to be excluded. In particular, it appears that there was no showing that the Portuguese gentleman spoke from personal knowledge.¹⁵⁴ (Most American courts would probably regard it as inadmissible hearsay, though under the analysis presented here—given that the statement is nontestimonial and that the prosecutor was presumably in no better a position than the accused to produce the declarant—an optimal system would not reach this result.)

Fourth, I believe that, to the extent admissibility of the Portuguese gentleman's statement appears frightening, it is because of the thought that a conviction could be based on it alone. But in fact, if there is no other substantial evidence of Raleigh's guilt, the court should conclude that there is insufficient evidence to support a verdict, and grant the defense a motion to dismiss the charge as a matter of law. A jury could not reasonably conclude that Raleigh's guilt was proven beyond a reasonable doubt by Dyer's testimony that an unidentified declarant

substantial probability that it will indeed be passed on. I might find such a rule rather attractive, but I do not believe the Supreme Court is likely to adopt it in the foreseeable future.

153. See FED. R. EVID. 403.

154. See *id.* 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *id.* 803 advisory committee's note (stating that a hearsay "declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge" in Rule 602).

made a statement asserting, without elaboration, that Raleigh was conspiring to kill the king. In a sufficiently egregious case, failure to grant judgment as a matter of law could be considered constitutional error. If, on the other hand, we assume that there is sufficient evidence to support a verdict of guilt, and the Portuguese gentleman was recounting in idle conversation an event that he had personally observed—say, that Raleigh and Cobham had entered a tavern together—it does not seem so horrifying to allow that to be added to the mix of evidence that the jury may consider.

Finally, suppose we alter the facts slightly in another way, and there is enough evidence to support a finding that the Portuguese gentleman was a member of the conspiracy at the time he made the statement, and that making it advanced the purposes of the conspiracy, perhaps by helping to recruit members. Then the statement would fit within the hearsay exemption for conspirators' statements and would satisfy the Confrontation Clause under pre-*Crawford* law. But, as Professor Trachtenberg's article indicates, the statement is not substantially more reliable given the assumption that it fits within the exemption than it is absent the assumption.¹⁵⁵

In short, perhaps the Portuguese gentleman's statement should not be admitted, and it certainly ought not support a verdict on its own. But it does not appear to pose a problem under the Confrontation Clause.

B. *Lawful Joint Ventures*

Under the "lawful joint venture" theory, as ably described by Professor Trachtenberg, some courts have been willing to admit against a party a statement made in support of a joint undertaking of which that party was a member, without proof that the venture was illegal.¹⁵⁶ Professor Trachtenberg argues that such statements have no particular guarantees of reliability.¹⁵⁷ I agree. But this is not to say that such hearsay is not useful evidence. In fact, it may well be extremely useful.

Consider *United States v. El-Mezain*,¹⁵⁸ the case on which Professor Trachtenberg particularly focuses.¹⁵⁹ In that case, a prosecution for funneling money to Hamas, which the United States and many other nations regard as a terrorist organization, the prosecution introduced a trove of documents discovered in the homes of two unindicted conspirators.¹⁶⁰ As described by the U.S. Court of Appeals for the Fifth

155. Trachtenberg, *supra* note 4, at 1685–89.

156. Trachtenberg, *supra* note 4, at 1669.

157. *Id.*

158. 664 F.3d 467 (5th Cir. 2011).

159. Trachtenberg, *supra* note 4, at 1697–700. He also discusses *United States v. Gewin*, 471 F.3d 197 (D.C. Cir. 2006), which I address *infra* note 165.

160. *El-Mezain*, 664 F.3d at 484, 494.

Circuit, these documents “included annual reports, meeting agendas and minutes, financial records, work papers, and telephone directories that documented the activities of the Palestine Committee [a supervisory organization for many of the acts charged] and demonstrated the defendants’ participation with the Committee.”¹⁶¹ The documents were extensive and detailed, and provided clear support for the proposition that the defendants were working at that time to raise money for Hamas. At the time, Hamas had not yet been classified as a terrorist organization, so the activities reported were not illegal, but clearly they were relevant to the defendants’ later activities.¹⁶²

With a proper foundation, these documents, or at least most of them, presumably could have been admitted as routinely kept records. But the prosecution did not lay that foundation.¹⁶³ Nor could it bring the documents within the bounds of the conspirator exemption as traditionally understood, because, at that point, the venture described was legal.¹⁶⁴ But under Fifth Circuit law,¹⁶⁵ a statement can qualify under the conspirator exemption, established for the federal courts in Rule 801(d)(2)(E), even though it was “made in furtherance of a lawful joint undertaking.”¹⁶⁶

I will not quarrel with Professor Trachtenberg’s view that this doctrine extends the Rule beyond its intended meaning.¹⁶⁷ That, of course, illustrates the tendency of courts, as I have noted above, to find a way to loosen the bounds of hearsay law. And in this case, the result itself—putting aside legal-process concerns created by distortion of the current Rule—strikes me as perfectly sound. The documents were clearly nontestimonial. They were certainly not written in anticipation that they would be used as evidence in a prosecution, or indeed in any other kind of case. Rather, at least on their face, they appear to be recordings of an ongoing operation intended to assist and promote its activities. They appear to have been written by one or more persons in a position to know the truth and without any incentive to mislead a reader

161. *Id.* at 501.

162. *Id.*

163. *Id.* at 498–501.

164. *Id.* at 501–03.

165. The Fifth Circuit is not alone in taking this view. Professor Trachtenberg also discusses *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006), in which the District of Columbia Circuit noted that this was the long-established law of the Circuit. But in that case, the key statement, in Professor Trachtenberg’s rendition, was in effect, “I’ll tell the CEO,” offered to prove that the speaker did in fact tell the CEO. Trachtenberg, *supra* note 4, at 1690. Under the traditional *Hillmon* doctrine, which was clearly intended to be incorporated by Federal Rule Evidence 803(3), that evidence is admissible as a statement of a then-existing state of mind. *See Mut. Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 295 (1892).

166. *El-Mezain*, 664 F.3d at 502.

167. *See* Trachtenberg, *supra* note 4, at 1689–92. I also do not mean to engage in a debate over the merits of the prosecution.

in any way material to their later use in litigation. They were highly probative; even if one believes that the documents were not particularly reliable, that does not mean they lacked substantial probative value. On the contrary, I believe that most reasonable jurors would regard the documents as having altered substantially the probability in favor of the truth of the propositions asserted in the documents.

In short, though it may stretch standard doctrine to exempt statements of this sort from the rule against hearsay, this is a result that—whether by stretching the rule as it stands or by changing it—ought to be reached. Perhaps in succeeding generations, admission of documents like this will not appear to be such a stretch. In the next Part, I will offer a few thoughts on how the law might look in those generations.

VI. A GLANCE AHEAD

I believe that the transformation of confrontation doctrine wrought by *Crawford* has given us a great opportunity to reframe hearsay law, for two reasons. First, *Crawford* has helped us focus on the fact that the principal reason why some hearsay ought to be excluded is that to admit it would essentially allow a witness to testify without confronting the adverse party or being subjected to cross-examination. When the adverse party is a criminal defendant, that problem of course renders the evidence constitutionally invalid. But even when another litigant is the adverse party, the fact that the hearsay is testimonial in nature is at least an important consideration; we expect witnesses to provide evidence for trial by testifying at trial, not by, say, signing an affidavit.

Second, hearsay law has been called on to implement the confrontation principle. As the analysis in Part IV suggests, it has done so in a clumsy and very imperfect way—by a broad presumptive exclusion of all hearsay and then by carving out from that definition a long set of exemptions that, for the most part, do not cover testimonial hearsay. Now that the confrontation right has been separately articulated and protected for criminal defendants—which also makes it more likely as well that the confrontation principle will be protected in other settings—hearsay law can be relaxed in other settings where the hearsay is nontestimonial.

This Part sketches an outline of how hearsay law may be shaped in years to come. I do not attempt to be comprehensive here. For simplicity, I assume that at the time the hearsay issue is raised, the declarant has neither appeared at trial nor been subjected to cross-examination in a deposition or other proceeding,¹⁶⁸ and that neither

168. Whether the opportunity to take a witness's deposition for discovery purposes amounts to an opportunity for cross-examination for purposes of the Confrontation Clause is a sharply contested issue. Compare, e.g., *State v. Lopez*, 974 So. 2d 340 (Fla. 2008) (holding in the negative), with *Berkman v. State*, 976 N.E.2d 68 (Ind. App. 2012), *transfer denied*, 984

party has engaged in wrongful conduct that might render her unavailable. And I also assume that the court adopts a procedural feature suggested above—that if the opponent of the hearsay timely produces the declarant, ready and able to testify, then the proponent should usually be put to the choice of presenting the live testimony of the declarant as part of his case or forgo use of the evidence.¹⁶⁹

In general, I believe the admissibility of hearsay, given the assumptions stated above, should depend on the answers to four questions: Is the hearsay testimonial? Is the hearsay more probative than prejudicial? Is the proponent substantially better able than the opponent to produce the declarant? Has the proponent given substantial notice of intent to offer the hearsay? I now suggest briefly the bearing each of these should have on the result.¹⁷⁰

Is the statement testimonial? Under the assumptions stated, if the out-of-court statement is testimonial and it is offered against an accused, then admitting it violates the Confrontation Clause. If it is offered against another party, the Clause does not apply, but the broader confrontation principle—that witnesses testify in the presence of the adverse party and are subject to cross-examination—still does, though probably it should not apply with equal force.¹⁷¹

N.E.2d 221 (Ind. 2012), *cert. denied*, 134 S. Ct. 155 (2013). I filed the unsuccessful petition for certiorari in *Berkman*, No. 12-10691; it explains reasons why I believe the answer should be negative, and the opportunity to take a deposition for discovery purposes should not be considered the equivalent, for purposes of the Confrontation Clause, of the opportunity for cross-examination at a deposition taken by the prosecution to preserve the testimony of a witness who will not assuredly appear at trial. Perhaps the considerations are different when the confrontation right is not at stake, particularly in a civil case; perhaps then the opportunity to take a deposition for discovery purposes should be deemed to be an opportunity for cross-examination for purposes of the rule against hearsay. That strikes me as a complex issue on which my thinking is unsettled and I do not now wish to state any opinion whatever. For purposes of the discussion in this Article, then, the assumption that the opponent has not had an opportunity for cross-examination in a deposition means that *either* (a) the opponent had no opportunity for a deposition at all, which is true most of the time in most criminal justice systems in the United States and could happen even in civil litigation, as with a late-appearing witness, or (b) the opponent had an opportunity to question the witness at a deposition, but the opportunity is not deemed to be one for cross-examination. Similarly, I am assuming that *either* the opponent had no opportunity to question the witness at another proceeding (such as a probable cause hearing) or that such an opportunity should not be deemed to be one for cross-examination.

169. I have elaborated on the reasons for adopting this procedure. See Friedman, *supra* note 78, at 892–98.

170. I will not attempt here to set out a detailed algorithm for how a court should arrive at results. I still adhere, though, to most of the views set forth in a previous article, *Game-Theoretic*. See Friedman, *supra* note 76.

171. For example, when the party opponent is not an accused, perhaps a somewhat narrower conception of what is “testimonial” should apply. And perhaps the exclusionary rule should not be quite as categorical as when the opponent is the accused. Thus, courts should probably be willing in certain cases to allow witnesses to testify from remote locations by electronic means, even though the party opponent is not present in the same room. *Cf.* Order of the Supreme Court, 207 F.R.D. 89, 94 (2002) (statement of Scalia, J.) (stating, with reference to the Confrontation Clause: “Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”). Perhaps also limited and well-defined categories of testimonial statements—such as certifications of the authenticity

Is the evidence more prejudicial than probative? If the answer to this question is affirmative, then ordinarily the hearsay should simply be inadmissible.¹⁷² If, however, the answer is negative and the statement is nontestimonial, that should create a presumption in favor of admissibility. And, as I have indicated above, if live testimony of the declarant to a given proposition would be more probative than prejudicial, then usually the hearsay statement will be as well.

Is the proponent substantially better able than the opponent to produce the declarant? If the answer is negative, then that will weigh heavily in favor of admission. If the answer is affirmative, the court might consider whether it should give the opponent the option of demanding that the proponent produce the declarant, at the opponent's expense, as a condition of introducing the evidence. Or, if the proponent's advantage is only an informational one—for example, he knows the identity and location of the declarant—the court might consider making admissibility of the statement contingent on the proponent's passing that information along to the opponent.

Has the proponent given substantial notice of intent to offer the hearsay? The importance of notice, I believe, is not to prevent surprise but rather to give the opponent an opportunity, if he so chooses, to produce the declarant as a live witness. I am not suggesting that there be an absolute notice rule; in some cases, it may be apparent that, even given ample notice, the opponent would have no interest in producing the declarant. But in some cases, delay of notice ought to shift the burden, or at least the cost, of producing the declarant to the proponent.

My main reason for offering this brief sketch of how hearsay law may be shaped in the future is to make a more general point: Unlike Professor Trachtenberg, I believe the confrontation principle—the basic concept that a witness should testify face-to-face with the adverse party and be subject to cross-examination—has a central place in our adjudicative system. This principle not only explains the Confrontation Clause but lies at the heart of what is worth preserving in the rule against hearsay. Once the principle is separately articulated and protected, the complex oddities of hearsay law become disposable. We need not worry about doctrinal boundaries of the type that Professor Trachtenberg defends, between conspiracies and lawful joint ventures. We can instead deal with nontestimonial hearsay in a flexible, pragmatic manner, in the way that most evidentiary decisions are made. We can join almost all the rest of the world in doing so without a dogmatic structure of hearsay law, and yet remain faithful to our fundamental principles governing how witnesses testify.

of documents—ought to be admissible, on grounds of efficiency, even without any opportunity for cross-examination.

172. One can imagine a situation, though, in which the opponent is better able than the proponent to produce the declarant, and admission of the hearsay would induce the opponent to produce the declarant as a live witness. See Friedman, *supra* note 78, at 899.