2021

Confrontation in the Age of Plea Bargaining [comments]

William Ortman

ESSAY

CONFRONTATION IN THE AGE OF PLEA BARGAINING

*William Ortman**

A defendant's right to confront the witnesses against him is a cornerstone of our adversarial system of criminal justice. Or is it? Under current law, defendants can invoke their confrontation right only by going to trial. But trials account for about five percent of criminal convictions. That means that the overwhelming majority of defendants convicted in the United States never get to exercise their constitutional right to confront the government's witnesses.

This Essay argues that the Supreme Court should align its Confrontation Clause jurisprudence with the reality of contemporary criminal justice. The Sixth Amendment grants a criminal defendant the right "to be confronted with the witnesses against him." The problem is that the Court reads this text as if it said "the witnesses against him at trial." Nothing compels the Court's trial-centric gloss on what it means to be a witness. To the contrary, the Confrontation Clause's text and purposes point towards recognizing that those whose "testimony" the government relies on in plea bargaining are "witnesses" too. This Essay therefore proposes a procedural device through which defendants could exercise their right to confront (i.e., cross-examine) that class of witnesses—the "Sixth Amendment deposition." By conducting Sixth Amendment depositions, defendants would learn the strengths and weaknesses of the government's evidence, enabling them to negotiate fairer and more reliable plea bargains. Sixth Amendment depositions would deliver to our "system of pleas" what confrontation at trial brought to an earlier version of American criminal justice—adjudication enhanced by adversarial testing of the government's case.

---

* Assistant Professor of Law, Wayne State University. For comments and conversations on earlier drafts or the ideas developed herein, many thanks to Sarah Abramowicz, Al Alschuler, Miriam Baer, Darryl Brown, Kingsley Browne, Kirsten Carlson, Jenny Carroll, Ed Cheng, Dan Epps, Carissa Hessick, Chris Lund, Ion Meyn, Brian Murray, Justin Murray, Sanjukta Paul, Seth Stoughton, Jenia Turner, Jon Weinberg, Steve Winter, and participants in a panel on criminal procedure at Crimfest 2019. Thanks as well to Florida attorneys Bill Barner, Michelle Lambo, Matthew Meyers, and Benjamin Wurtzel for explaining criminal deposition practice in their state to me. For helping me ponder the mysteries of the Confrontation Clause, thanks to my Evidence students at Wayne Law. Special thanks to one of them, Paul Matouka, for superb research assistance.

INTRODUCTION 452
I. A TALE OF TWO CLAUSES 456
A. The Marginal Confrontation Clause 456
B. Confrontation's Neighbor 465
II. UPDATING CONFRONTATION 470
A. Confrontation as a Substantive Right 470
B. Witnesses Against: The Conventional Account 476
C. Witnesses Against: Updated Account 479
III. SIXTH AMENDMENT DEPOSITIONS 485
A. Confrontation by Deposition 485
B. Enforcing Sixth Amendment Depositions 492
C. Objections 495
1. Resource Considerations 496
2. Confidential Informants and Vulnerable Witnesses 499
3. Confrontation as Unbundled Bargaining Chip 503
CONCLUSION 505

INTRODUCTION

In *Crawford v. Washington*, the Supreme Court grandly declared that the Confrontation Clause of the Sixth Amendment "commands" that the government's case against a criminal defendant be tested in the "crucible of cross-examination."[1] To enforce that edict, the Court held that prosecutors may not use uncrossed "testimonial hearsay" in criminal trials.[2] This holding is widely viewed as seismic. *Crawford* "revolutionized this area of the law," a leading scholar noted recently.[3] As another put it, "*Crawford* is among the most important constitutional cases in modern times."[4]

This Essay argues that the conventional understanding of *Crawford* as "revolutionary" misses the forest for the trees. *Crawford* might have transformed Confrontation Clause jurisprudence, but it left the confrontation

1. 541 U.S. 36, 61 (2004).

2. Id. at 61–62.

3. Michael S. Pardo, Confrontation After Scalia and Kennedy, 70 Ala. L. Rev. 757, 763 (2019) ("*Crawford* revolutionized this area of law by effectively severing the ties between the Confrontation Clause's requirements and modern hearsay law."); see also Andrew C. Fine, Refining *Crawford*: The Confrontation Clause After *Davis v. Washington* and *Hammon v. Indiana*, 105 Mich. L. Rev. First Impressions 11, 11 (2006) ("[I]n *Crawford v. Washington*, the Supreme Court had worked a revolutionary transformation of Confrontation Clause analysis . . . ."); Brandon L. Garrett, Constitutional Law and the Law of Evidence, 101 Cornell L. Rev. 57, 69 (2015) ("The Supreme Court's recent Confrontation Clause jurisprudence over the past few decades has been nothing short of a revolution.").

4. Gary Lawson, Confronting *Crawford*: Justice Scalia, the Judicial Method, and the Adjudicative Limits of Originalism, 84 U. Chi. L. Rev. 2265, 2266 (2017).

right itself mostly dormant. That's because the confrontation right the Court articulated in *Crawford* is one that defendants can claim only at *trial*, and our criminal legal system has remarkably few of those. Criminal convictions today come overwhelmingly from guilty pleas, not guilty verdicts.[5] In a system of pleas,[6] a confrontation right that attaches at trial cannot make good on *Crawford*'s pledge to restore the "crucible of cross-examination."[7]

Judicial and scholarly interest in confrontation has been immense since *Crawford*.[8] Yet it has slipped under the radar that plea bargaining renders *Crawford* and the Confrontation Clause empty promises.[9] It doesn't have to be this way. Plea bargaining and a robust confrontation right could coexist. But for the Confrontation Clause to be more than a parchment barrier, the Supreme Court would have to update its doctrine to account for the world as it is—a world in which plea bargaining is ubiquitous. Fortunately, there is precedent for such a move, and it comes from one of the Confrontation Clause's closest neighbors. In *Lafler v. Cooper* and *Missouri v. Frye*, the Supreme Court updated the Sixth Amendment's Counsel Clause to make it relevant to today's criminal legal system.[10] This Essay shows how the Court could do the same for the Confrontation Clause.

---

5. See infra note 10 and accompanying text.

6. See Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

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

8. Since 2004, the Court has spent hundreds of pages in the United States Reports fleshing out what *Crawford* means for criminal trials. For a list of the cases, see infra note 52. Scholars have added tens or hundreds of thousands more. See Sopen B. Shah, Guidelines for Guidelines: Implications of the Confrontation Clause's Revival for Federal Sentencing, 48 J. Marshall L. Rev. 1039, 1050 (2015) (observing that "*Crawford*'s revival of the Confrontation Clause inspired an industry's worth of scholarship"); see also Andrew King-Ries, *State v. Mizenko*: The Montana Supreme Court Wades into the Post-*Crawford* Waters, 67 Mont. L. Rev. 275, 280 (2006) (noting two years after *Crawford* that "[n]early three hundred articles have been written that address the . . . decision").

9. Shaakirrah Sanders and Sopen Shah come the closest to exposing the problem. They (separately) argue that the practice of plea bargaining cuts in favor of extending the confrontation right past the trial stage of the criminal process into sentencing hearings. See Shaakirrah R. Sanders, Unbranding Confrontation as Only a Trial Right, 65 Hastings L.J. 1257, 1259 (2014) ("Testing the veracity of testimonial statements that are material to punishment is as compelling at felony sentencing as at trial . . . ."); Shah, supra note 8, at 1063 ("The confrontation right—or the probation department's mere anticipation of the confrontation requirement when preparing the [pre-sentence report]—could ameliorate . . . situation[s where limited criminal history information was obtained prior to a guilty plea]." (citing Stanley A. Weigel, The Sentencing Reform Act of 1984: A Practical Appraisal, 36 UCLA L. Rev. 83, 94 (1988))). I'm sympathetic to their arguments, but the claims I develop here—that the confrontation right should apply *prior* to the trial phase, during plea bargaining, and that it entitles defendants to take depositions in aid of the plea bargaining process—are very different.

10. See *Lafler*, 566 U.S. at 168–70 (acknowledging the ubiquity of pleas in the criminal justice system and extending the right to the effective assistance of counsel to plea negotiations); Missouri v. Frye, 566 U.S. 134, 143 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense

Here's the core argument. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[11] *Crawford* recognized that the crucial question in implementing this text is figuring out who counts as a "witness against" an accused.[12] The Court answered the question by defining a witness for purposes of the Confrontation Clause as one who (1) makes a "testimonial" statement that (2) the government uses at trial.[13] I take the "testimonial" component of the definition—which has generated a lion's share of the scholarly attention and case law—as given. Instead, I challenge the requirement that the statement be used *at trial*.[14]

The Court's trial-centric gloss on what it means to be a "witness against" an accused is at odds with the reality of the American criminal legal system—a "post-trial world" where the critical adjudicator is usually a prosecutor, not a judge or jury.[15] If only "trial witnesses" count as "witnesses," then in a world without trials there can be few "witnesses" and very little confrontation. The Court's restrictive gloss on "witnesses" is also inconsistent with the Sixth Amendment's text, which attaches the confrontation right to those facing "criminal prosecution," not just those in trial.[16] And it departs from the Court's treatment of the Sixth Amendment in *Lafler* and *Frye*, where the Court held that a defendant may assert an ineffective assistance of counsel claim when their lawyer's deficient performance caused them to miss out on a favorable plea deal.[17] In those cases, unlike in *Crawford*, the Court rejected the theory that the Sixth Amendment is meant only to ensure a fair trial.[18] That was because, as the Court explained in *Frye*, "ours 'is for the most part a system of pleas, not a system of trials.'"[19]

So then who *are* the "witnesses against" defendants in a system of pleas? They are the people whose "testimony" is used in the only adjudication that routinely matters—the plea bargain. The Confrontation Clause, I argue, commands that the government confront the defendant with *those* people, and the natural procedural mechanism for such confrontation is a deposition. I therefore propose that in the age of plea bargaining, the

---

counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires . . . .").

11. U.S. Const. amend. VI.

12. *Crawford*, 541 U.S. at 42–43.

13. See infra section II.B.

14. See infra section III.C.

15. See infra notes 66–68, 109–113 and accompanying text. See generally Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173 (2014) (coining the phrase "post-trial world").

16. See infra notes 188–190 and accompanying text.

17. See Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) (rejecting the contention that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining"); Missouri v. Frye, 566 U.S. 134, 145 (2012) (holding that, under the Sixth Amendment, defense counsel must communicate plea offers to their clients).

18. See infra section I.B.

19. *Frye*, 566 U.S. at 143–44 (quoting *Lafler*, 566 U.S. at 170).

Confrontation Clause entitles criminal defendants to take the deposition of any accusatory "witness" whom prosecutors rely on in plea bargaining.[20] Depositions are not a routine part of criminal practice today in the federal system or in most states.[21] But a few states already allow criminal defendants to take them, and nothing about the logic of criminal litigation is inconsistent with depositions.[22]

The objective for "Sixth Amendment depositions" would be to incorporate adversarial testing into plea bargaining outcomes. If the government's witnesses performed well under cross-examination, the prosecutor's negotiating leverage would increase, and with it the price of a plea. If the witnesses did poorly, that would strengthen the defendant's hand. But whether depositions led to a higher or a lower plea price in any particular case, adversarial testing of the government's evidence would have contributed to a fairer and more reliable adjudication.[23] That is the Confrontation Clause's purpose.[24] By modernizing the confrontation right, by bringing it into the twenty-first century (or just the twentieth),[25] the Court could restore some of the adversarial process that plea bargaining has upended.[26]

The full argument develops in three Parts. Part I describes the problem in more detail, Part II diagnoses its doctrinal roots, and Part III offers Sixth Amendment depositions as a solution. Part III also considers several likely objections to the proposal—that depositions would be too costly, that they would burden witnesses, and that they would become just one more bargaining chip for prosecutors and defendants to haggle over in plea bargaining—and argues that none justifies preserving the status

---

20. See infra section III.A. Because plea bargaining is a fluid process, I look to a fixed point—the filing of charges—to determine the class of people on whom the prosecution has relied. See infra note 209 and accompanying text.

21. See Ion Meyn, Discovery and Darkness: The Information Deficit in Criminal Disputes, 79 Brook. L. Rev. 1091, 1094 (2014) (highlighting that typically, criminal discovery statutes do not grant defendants formal pretrial information-gathering mechanisms such as depositions, interrogatories, and document requests).

22. See infra notes 283–297 and accompanying text.

23. See infra notes 247–250 and accompanying text.

24. See infra notes 139, 200–201 and accompanying text.

25. See generally William Ortman, When Plea Bargaining Became Normal, 100 B.U. L. Rev. 1435 (2020) (exploring the intellectual history of plea bargaining in the early- to mid-twentieth century).

26. See Stephanos Bibas, Incompetent Plea Bargaining and Extrajudicial Reforms, 126 Harv. L. Rev. 150, 164 (2012) ("Plea bargaining today is fundamentally not adversarial but collaborative (some would say collusive)."); see also Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2121 (1998) [hereinafter Lynch, Our Administrative System] (noting that the pervasiveness of plea bargaining "has resulted in the development of a system of justice that actually looks . . . far more like . . . an inquisitorial system than like the idealized model of adversary justice described in the textbooks"); James E. Pfander & Daniel D. Birk, Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction, 124 Yale L.J. 1346, 1472–74 (2015) (acknowledging the historical pedigree of certain nonadversarial functions of the court).

quo. Finally, a brief Conclusion situates the proposal as an installment payment on the project of constitutional criminal procedure modernization that the Court started in *Lafler* and *Frye*.

I. A TALE OF TWO CLAUSES

This Part provides background for the analysis to come. After briefly recapping *Crawford* and its progeny, section I.A explains why *Crawford*'s trial-centric account of confrontation renders the right ineffectual in a world with few trials. Section I.B then contrasts the Court's handling of the Confrontation Clause with its handling of the Sixth Amendment right to counsel in *Lafler* and *Frye*. The comparison matters not only because the two clauses share constitutional text but also because *Lafler* and *Frye* are proof that Sixth Amendment rights *can* be modernized. Taken together, the sections of this Part demonstrate that two of the major recent developments in Sixth Amendment jurisprudence—*Crawford*, on the one hand, and *Lafler* and *Frye*, on the other—rest on fundamentally different understandings about how American criminal justice works in the twenty-first century. *Crawford* imagines a world of trials, whereas *Lafler* and *Frye* are grounded in the reality of plea bargaining. The Court treats these Sixth Amendment neighbors as if they were strangers.

A. *The Marginal Confrontation Clause*

The Confrontation Clause guarantees criminal defendants the right to cross-examine the government's in-court witnesses.[27] In that respect, it's a pretty straightforward constitutional right.[28] But if that were *all* that it did, the government could circumvent it by relying on hearsay evidence instead of live testimony.[29] An absent hearsay declarant, after all, can't be

---

27. Douglas v. Alabama, 380 U.S. 415, 418 (1965) ("Our cases construing the [Confrontation Clause] hold that a primary interest secured by it is the right of cross-examination . . . .").

28. Difficult questions do arise, even with respect to in-court witnesses. For instance, can a witness be physically separated from a defendant? Compare Maryland v. Craig, 497 U.S. 836, 855–57 (1990) (approving a procedure in which a child-witness testified remotely using one-way closed-circuit video), with Coy v. Iowa, 487 U.S. 1012, 1020 (1988) (commenting that where a screen blocks the witness from seeing the defendant, it is "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter"). But as Richard Friedman observes, "For the most part, . . . the boundaries of the confrontation right as applied to trial witnesses are tolerably clear." Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1011–12 (1998) [hereinafter Friedman, Confrontation].

29. See Richard D. Friedman, The Mold that Shapes Hearsay Law, 66 Fla. L. Rev. 433, 441 (2014) [hereinafter Friedman, The Mold] ("Suppose . . . the witness does not attend trial and that the prosecution attempts . . . to introduce evidence of [the out-of-court witness's] statement . . . . 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.").

cross-examined, at least not in the traditional sense.[30] Thus, the Court has long understood that the Clause also constrains the government's reliance on hearsay evidence.[31] The question is *what* hearsay evidence runs afoul of it.

Before *Crawford*, the Court's answer was to "yoke" the confrontation right to the hearsay rules.[32] Under the Court's 1980 decision in *Ohio v. Roberts*, when an unavailable witness's out-of-court statement fell within a "firmly rooted hearsay exception," the Confrontation Clause posed no obstacle to its admissibility.[33] Indeed, even when an out-of-court statement was *not* admissible under a firmly rooted hearsay exception, the Confrontation Clause *still* might not have stood in its way.[34] The effect was to subordinate the Confrontation Clause to the subconstitutional rules governing hearsay.

That changed in 2004, when the Court announced in *Crawford* that the Confrontation Clause would no longer be tethered to the hearsay rules.[35] But if not the hearsay rules, what would guide the Confrontation Clause's reach? The Court looked to history, in particular early modern English history.[36] It used a two-step historical methodology: First identify the historical "abuses" that the Confrontation Clause was designed to avoid, then determine what contemporary practices are analogous to those abuses and ban them.[37] Below, we consider part of the Court's historical analysis in depth.[38] For now, a brief summary of the reasoning suffices.

---

30. But see John G. Douglass, Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay, 67 Geo. Wash. L. Rev. 191, 196–97 (1999) [hereinafter Douglass, Beyond Admissibility] (offering an approach for subjecting hearsay to adversarial testing and impeaching hearsay declarants).

31. See, e.g., Mattox v. United States, 156 U.S. 237, 242 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .").

32. David Alan Sklansky, Hearsay's Last Hurrah, 2009 Sup. Ct. Rev. 1, 3.

33. 448 U.S. 56, 66 (1980).

34. See id. (allowing for the possibility that hearsay may be admitted upon a "showing of particularized guarantees of trustworthiness"); see also Myatt v. Hannigan, 910 F.2d 680, 683 n.1, 685 (10th Cir. 1990) (affirming the admission of a child-victim's hearsay statements as sufficiently reliable but noting that "both sides agree that Kansas' child hearsay exception is not 'firmly rooted' and hence is not presumptively reliable under *Roberts*"). Courts admitting evidence on the "particularized guarantees of trustworthiness" logic sometimes declined to say whether the hearsay would have qualified under a firmly rooted hearsay exception. See, e.g., United States v. Aguilar, 295 F.3d 1018, 1021–23 (9th Cir. 2002) (affirming the admission of codefendants' guilty plea allocutions); United States v. Gallego, 191 F.3d 156, 167–68 (2d Cir. 1999) (affirming the admission of a plea allocution); Sherman v. Scott, 62 F.3d 136, 141–42 (5th Cir. 1995) (affirming the admission of laboratory test reports).

35. Crawford v. Washington, 541 U.S. 36, 50–51 (2004).

36. See id. at 42–43.

37. See id. at 44–45, 68.

38. See infra notes 143–161 and accompanying text.

The principal historical "abuse[]" that the Confrontation Clause was designed to avoid, the Court believed, was the use of "*ex parte* examinations as evidence against the accused."[39] A pair of statutes enacted during the reign of Queen Mary (in the sixteenth century) had directed justices of the peace to examine certain witnesses in felony cases.[40] While these examinations were not originally meant to substitute for live trial witnesses,[41] the Court reckoned that they eventually "came to be used as evidence" in trials.[42] As the common law evolved in the seventeenth and eighteenth centuries, however, it began to recognize the use of ex parte "Marian" examinations at trial as abusive.[43] By the time the Sixth Amendment was adopted, according to the Court's historical analysis, ex parte examinations were admissible against an accused only if the witness was not available to testify at trial *and* the defendant had previously had an opportunity to cross-examine the witness.[44]

Identifying the historical origins of the Sixth Amendment (or what it believed to be the historical origins) was not the end of the Court's interpretive work. There are no Marian examinations today, so the Court had to determine which contemporary practices are so similar to the historical "abuses" that they must be proscribed.[45] On reaching that question, the Court returned to the Confrontation Clause's text, which, the Court reasoned, "reflects" the historical "focus" on ex parte examinations.[46]

The Sixth Amendment affords defendants the right to be confronted with the "witnesses against" them. A "witness[]," the Court explained, citing the 1828 edition of Webster's Dictionary, is one who "bear[s] *testimony*," that is, "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[47] A "witness against" a criminal defendant is thus (on the Court's analysis) someone whose "testimony" is offered against the defendant. And that includes not only those who testify live at trial but also those whose "testimonial" hearsay the

---

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

40. They are known as the Marian bail and committal statutes. See id. at 43–44 (citing 1 & 2 Phil. & M., c. 13 (1554) (Eng.); 2 & 3 Phil. & M., c. 10 (1555) (Eng.)).

41. See John H. Langbein, Prosecuting Crime in the Renaissance: England, Germany, France 21–34 (1974) ("The predominant purpose of the statute was to institute systematic questioning of the accused and the witnesses.").

42. *Crawford*, 541 U.S. at 44 (citing 2 Matthew Hale, The History of the Pleas of the Crown 284 (Sollom Emlyn ed., London, Nutt & Gosling 1736)).

43. See id. at 43–47 ("Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these [examination] abuses.").

44. Id. at 54.

45. See id. at 51–53 ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England.").

46. See id. at 50–51.

47. Id. at 51 (third alteration in original) (emphasis added) (internal quotation marks omitted) (quoting 2 Noah Webster, An American Dictionary of the English Language (1828)).

government seeks to use.[48] Thus, the Court concluded, "testimonial" hearsay cannot be offered against a criminal defendant unless either (1) the declarant testifies at trial or (2) the declarant is unavailable *and* has previously been subject to cross-examination by the defendant.[49]

This new formulation of the confrontation right raised many questions, but the most confounding was what it means for hearsay to be "testimonial." The Court declined to offer a "comprehensive definition,"[50] but, drawing again on the history of Marian examinations, it did make one seemingly clear point: "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard," because they "bear a striking resemblance to examinations by justices of the peace in England."[51]

In the years since *Crawford*, the Court has decided nine major cases fleshing out its new Confrontation Clause jurisprudence.[52] Most of them have been about the meaning of "testimonial." Difficult questions have emerged in three interrelated contexts: (1) statements to law enforcement officials during "emergencies," (2) laboratory reports, and (3) statements by very young children. The first two categories spawned (separate) case trilogies but no clear answers. In the emergencies context, the Court first decided that some statements made to 911 operators are testimonial while others are not, with the distinction turning on whether the "primary purpose" was to "enable police assistance to meet an ongoing emergency" (not testimonial) or to gather evidence (testimonial).[53] Later, in a fact-intensive opinion with lots of interesting discussion and few clear

48. See id. at 52–53 ("In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.").

49. Id. at 53–54. The Court noted one historical "deviation" from this rule, for dying declarations. Id. at 56 n.6. The Court declined to "decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations" but noted that if the "exception must be accepted on historical grounds, it is *sui generis*." Id.

50. Id. at 68. The omission drew fire from Chief Justice Rehnquist. See id. at 75 (Rehnquist, C.J., concurring) ("[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists[] . . . is covered by the new rule." (citation omitted)).

51. Id. at 52 (majority opinion).

52. Ohio v. Clark, 576 U.S. 237 (2015); Williams v. Illinois, 567 U.S. 50 (2012) (plurality opinion); Bullcoming v. New Mexico, 564 U.S. 647 (2011); Michigan v. Bryant, 562 U.S. 344 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Giles v. California, 554 U.S. 353 (2008); Whorton v. Bockting, 549 U.S. 406 (2007); Davis v. Washington, 547 U.S. 813 (2006). For counting purposes, please note that *Davis* was consolidated with *Hammon v. Indiana*. *Davis*, 547 U.S. at 813 n.*. Two of the cases resolved discrete legal points about the Confrontation Clause's scope. *Whorton* handled two such points, ruling first that *Crawford* was not a "watershed" decision that would apply retroactively and second that after *Crawford*, "nontestimonial" statements were not subject to any Confrontation Clause scrutiny. 549 U.S. at 420–21. *Giles*, decided the next year, clarified that a defendant forfeits their right to confront a witness when they "engage[] in conduct *designed* to prevent the witness from testifying." 554 U.S. at 359.

53. *Davis*, 547 U.S. at 828.

guideposts, the Court ruled that a gunshot victim's statements to police officers about who shot him weren't testimonial because they'd been made in the context of an ongoing emergency.[54] In the laboratory test trilogy, the Court held first that a forensic report identifying a substance as drugs was testimonial, and thus inadmissible without testimony from the certifying technician;[55] then that the testimony of a different technician (who didn't perform the test) was not an adequate substitute;[56] and finally (in a plurality decision) that a technician could testify about a forensic analysis performed and certified by a nontestifying technician from an altogether different laboratory.[57] The Court addressed the final category in its most recent major confrontation case, *Ohio v. Clark*, yielding an unusually clear rule—that the statements of very young children to teachers and other caregivers are typically, and perhaps always, nontestimonial.[58]

To summarize the last seventeen years of Confrontation Clause jurisprudence, we've seen a landmark criminal procedure decision premised on how sixteenth-century statutes evolved in the seventeenth and eighteenth centuries, followed by more than a half-dozen Supreme Court decisions refining, confining, and questioning the resulting legal doctrine. For jurists, law professors, and law students interested in history or doctrinal puzzles, the *Crawford* "revolution" has been tremendous intellectual fun.[59]

But intellectual stimulation aside, has the revitalized Confrontation Clause mattered very much in the real world of criminal cases? Does the ordinary criminal defendant have greater access to adversarial testing of the government's case than they did before *Crawford*? It's unlikely. That's because *Crawford* and the Confrontation Clause doctrine it begot are trial-centric, but we inhabit a post-trial world.

Consider again *Crawford*'s definition of "witnesses" as "those who 'bear testimony.'"[60] The Court meant those who bear testimony *at trial*.[61]

---

54. *Bryant*, 562 U.S. at 377–78.

55. *Melendez-Diaz*, 557 U.S. at 310–11.

56. *Bullcoming*, 564 U.S. at 663.

57. *Williams*, 567 U.S. at 79.

58. Ohio v. Clark, 576 U.S. 237, 247–48 (2015). Adding to the uncertainty, since the decision in *Clark*, both Justice Scalia—*Crawford*'s author and principal defender—and Justice Kennedy—arguably its leading critic from the bench—have departed the Court. For analysis of *Crawford*'s future in a post-Scalia and -Kennedy Court, see generally Pardo, supra note 3.

59. See supra note 3 and accompanying text.

60. Crawford v. Washington, 541 U.S. 36, 51 (2004) (quoting 2 Noah Webster, An American Dictionary of the English Language (1828)).

61. In this respect *Crawford* was consistent with suggestions (short of holdings) in the Court's earlier cases that the confrontation right applies only at trial. See Barber v. Page, 390 U.S. 719, 725 (1968) (surmising that the "right to confrontation is basically a trial right"); see also Pennsylvania v. Ritchie, 480 U.S. 39, 53 n.9 (1987) (plurality opinion) (Powell, J.) ("[T]he Confrontation Clause only protects a defendant's trial rights, and does

Thus, in criticizing the *Roberts* approach to confrontation, the Court observed that "the Constitution prescribes a procedure for determining the reliability of testimony *in criminal trials*, and we, no less than the state courts, lack authority to replace it with one of our own devising."[62] The Court made no effort to justify the "at trial" limitation, perhaps because the point appeared self-evident to *Crawford*'s author, Justice Scalia. Part II of the opinion begins by positing a range of definitions of "witness," each of which assumed a trial: "One could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial," Scalia wrote, or "those whose statements are offered at trial," or (as the Court ultimately found) "something in-between."[63] In *Crawford*'s wake, moreover, lower courts have (with very few exceptions) understood that when the Court said "witnesses," it meant "witnesses at trial."[64]

---

not compel the pretrial production of information that might be useful in preparing for trial."). Importantly (for purposes of the claim Part III develops), Justice Blackmun concurred and wrote separately in *Ritchie*, denying Justice Powell the fifth vote he needed for a majority, because Blackmun did "not accept the plurality's conclusion . . . that the Confrontation Clause protects only a defendant's trial rights and has no relevance to pretrial discovery." Id. at 61 (Blackmun, J., concurring).

62. *Crawford*, 541 U.S. at 67 (emphasis added); see also id. at 50–51 ("[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements *introduced at trial* depends upon 'the law of Evidence for the time being.'" (emphasis added) (quoting 3 John Wigmore, A Treatise on Evidence § 1397, at 101 (2d ed. 1923))). Justice Scalia was even more unequivocal about the "at trial" limitation in his pre-*Crawford* dissent in *Maryland v. Craig*, writing that "[t]he phrase ['witness against'] obviously refers to those who give testimony against the defendant at trial." 497 U.S. 836, 865 (1990) (Scalia, J., dissenting).

63. *Crawford*, 541 U.S. at 42–43. Though less important, the *Crawford* doctrine's trial-centrism can also be seen in how it evaluates whether statements are "testimonial." Only out-of-court statements that the declarant would reasonably expect to be used *at trial* count. See id. at 51–52. While this limitation is merely implied in *Crawford*, it is explicit in the Court's post-*Crawford* cases. In *Bryant*, Justice Sotomayor explained for the Court that when the "primary purpose of an interrogation" is "not to create a record for trial," the statement is not testimonial. Michigan v. Bryant, 562 U.S. 344, 358 (2011); see also Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009) ("Business and public records are generally admissible absent confrontation . . . because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial."). This limitation is problematic. Considering that only a tiny fraction of criminal cases go to trial, see infra notes 66–68 and accompanying text, even someone reporting a crime to police in an ordinary, nonemergency interrogation should not *rationally* expect their report to be used at a *trial*. Richard Friedman has formulated the meaning of testimony as "the transmittal of information for use *in prosecution*." Richard D. Friedman, Grappling with the Meaning of Testimonial, 71 Brook. L. Rev. 241, 251 (2005) [hereinafter Friedman, Meaning of Testimonial] (emphasis added).

64. See, e.g., Vanmeter v. State, 165 S.W.3d 68, 74–75 (Tex. Ct. App. 2005) ("[W]e conclude that *Crawford* did not change prior law that the constitutional right of confrontation is a trial right, not a pretrial right which would transform it into a 'constitutionally compelled rule of [sic] discovery.'" (quoting *Ritchie*, 480 U.S. at 52) (misquotation)); State v. Zamzow, 892 N.W.2d 637, 646 (Wis. 2017) ("We agree with those jurisdictions in concluding that the Confrontation Clause does not apply during suppression hearings."). But see Curry v. State, 228 S.W.3d 292, 297 (Tex. Ct. App. 2007) ("To deny a defendant the

Crawford thus created a confrontation right that excludes certain evidence that prosecutors might otherwise use against defendants at trials. By definition, that right cannot bear (at least not directly) on criminal cases that are resolved by means other than trial.[65] There are no "witnesses" in such cases, as the Court defines the term, and so nobody for defendants to be confronted with. And the vast majority of criminal cases *are* resolved by means other than trial. According to the commonly cited figures, ninety-seven percent of federal convictions and ninety-four percent of state convictions are secured by guilty pleas,[66] many of which are entered pursuant to some sort of agreement.[67] As the Supreme Court famously remarked in a case we examine closely in section I.B, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[68]

Crawford, and the cases implementing and refining it, thus created a robust confrontation right that applies to a tiny fraction of criminal cases. This is likely why *Crawford*'s practical consequences have been more muted than its critics warned.[69] In the laboratory test cases, the Justices debated

---

protections afforded by the Confrontation Clause at [a suppression hearing] essentially denies him his only opportunity to ensure that the evidence presented against him is reliable."); *Zamzow*, 892 N.W.2d at 652 (Abrahamson, J., dissenting) ("The text of the Sixth Amendment does not use the word 'trial' in stating the accused's confrontation right."). Many of the lower court cases are collected and analyzed in an excellent student note. See Christine Holst, Note, The Confrontation Clause and Pretrial Hearings: A Due Process Solution, 2010 U. Ill. L. Rev. 1599, 1613–18.

65. At least not with respect to the guilt phase of a criminal prosecution. For an argument that the confrontation right should attach to sentencing proceedings, see generally Sanders, supra note 9 (proposing "uniform application at felony sentencing of the Sixth Amendment's structurally identical Counsel, Jury Trial, and Confrontation Clauses").

66. These figures trace to the Supreme Court's decision in Missouri v. Frye, 566 U.S. 134, 143 (2012) (citing Sean Rosenmerkel, Matthew Durose & Donald Farole, DOJ, Felony Sentences in State Courts, 2006—Statistical Tables 1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/BH6F-2W7U] (last updated Nov. 22, 2010); Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, Univ. Albany, http://www.albany.edu/sourcebook/pdf/t5222009.pdf [https://perma.cc/4M6E-ZUTX] (last visited Oct. 14, 2020)).

67. See Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911, 912 & n.1 (2006) (indicating that most felony guilty pleas result from plea bargains); Darryl K. Brown, Judicial Power to Regulate Plea Bargaining, 57 Wm. & Mary L. Rev. 1225, 1228 (2016) ("Plea bargaining, or some comparable form of abbreviated, consent-based adjudication process, is widely and routinely relied upon in criminal justice systems worldwide as an alternative to trials.").

68. *Frye*, 566 U.S. at 144 (internal quotation marks omitted) (quoting Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992)).

69. See Catherine Bonventre, The Implementation of Judicial Policy by Crime Laboratories: An Examination of the Impact of *Melendez-Diaz v. Massachusetts* 71 (2015) (Ph.D. dissertation, University at Albany, State University of New York) (ProQuest) (on file with the *Columbia Law Review*) (describing the effects of *Melendez-Diaz* as "muted"); see also Erin Murphy, The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System, 87 S. Cal. L. Rev. 633, 661 (2014) ("Even the most robust discovery and confrontation regimes will have little impact on the overwhelming

whether requiring testimony from technicians would be a significant burden on states. Writing for the Court in *Bullcoming v. New Mexico*, Justice Ginsburg explained that because few criminal cases make it to trial, the burden would be minimal.[70] In dissent, Justice Kennedy predicted that "rigorous empirical studies . . . detailing the unfortunate effects of [requiring technician testimony] are sure to be forthcoming."[71] Who was right? In a 2015 dissertation, Catherine Bonventre reported the results of a survey of forensic laboratory personnel about the consequences of the Court's decisions.[72] "In general," she found, "the impact of [the case law] that emerged from the survey was not the catastrophe predicted by the dissenting Justices," explaining that the "majority of the respondents reported minimal increases in personal appearances at trial, defense subpoenas, and in-court testimony in specific forensic disciplines."[73] As Bonventre recognized, an important factor contributing to her findings was "the role of guilty plea dispositions in minimizing the impact of requiring live testimony on the administration of justice."[74]

It may be, however, that while the confrontation right does not bear directly on a large share of criminal cases, it nonetheless influences the prices that prosecutors and defendants negotiate for guilty pleas.[75] If so, it might be *indirectly* affecting a broad swath of criminal cases. Though possible, this is unlikely, because of how plea bargaining works in the American criminal legal system. A defendant's trial rights come bundled—he must take them all, by going to trial, or leave them all, by pleading guilty.[76] But the choice is often more theoretical than real. That's because

---

majority of cases so long as those entitlements do not materialize until a case is set for trial.").

70. Bullcoming v. New Mexico, 564 U.S. 647, 667 (2011).

71. Id. at 683 (Kennedy, J., dissenting).

72. Bonventre, supra note 69, at 57–69.

73. Id. at 71.

74. Id. at 110; see also Richard D. Friedman, The Sky Is Still Not Falling, 20 J.L. & Pol'y 427, 438–39 (2012) [hereinafter Friedman, The Sky] (positing that the assertion of a confrontation right could, in some circumstances, be seen as "game-playing" and hamper the defendant's ability to reach a favorable plea bargain).

75. See generally Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 951 (1979) (developing a framework "to consider how the rules and procedures used in court for adjudicating disputes affect the bargaining process" in divorce courts). Justice Breyer raised this possibility at the oral argument in *Melendez-Diaz*, speculating about how the Court's ruling might affect bargaining leverage. See Transcript of Oral Argument at 21, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (No. 07-591).

76. For intriguing claims that criminal trial rights are or could be "unbundled," see generally Gregory M. Gilchrist, Trial Bargaining, 101 Iowa L. Rev. 609, 614 (2016) ("Trial bargaining occurs where the defendant waives only limited trial rights, thus preserving a trial that is shorter, cheaper, less uncertain, or some combination thereof, in exchange for limited leniency."); John Rappaport, Unbundling Criminal Trial Rights, 82 U. Chi. L. Rev. 181, 181 (2015) ("Criminal defendants can, and sometimes do, 'unbundle' their jury trial rights and trade them piecemeal, consenting to streamlined trial procedures to reduce their sentencing exposure.").

prosecutors usually enter plea negotiations with all or nearly all of the leverage. They can credibly threaten that if the defendant goes to trial and is convicted, his punishment will be *far* worse than if he pleads guilty.[77] By doing so, they can price the bundle of trial rights out of reach for most defendants.

An example will illustrate. Imagine that you are indicted for marijuana distribution and possession of a firearm. The prosecutor offers you a deal—fifteen years. But, she tells you, if you insist on a trial and lose, she will seek—and she expects the judge will impose—a sentence of fifty-five years.[78] Now imagine that the government's case turns on a confidential informant who says that you sold him marijuana while wielding a gun. If the jurors believe the informant, you're done. If they don't, you'll probably be acquitted. You know that there's a chance that if your lawyer cross-examines the informant, he'll poke holes in the informant's story and expose him for the liar you know him to be. But witnesses are unpredictable. Is the chance worth forty years of your life? Probably not. And because she *knows* that it's not, the prosecutor can safely ignore your lawyer when he insists that the informant is lying.

Confrontation at trial is an element in a bundle of rights that few defendants can credibly threaten to exercise. Accordingly, confrontation's value as a negotiating chip in plea bargaining is usually slight.[79] In our system of pleas, coercive trial penalties relegate confrontation to the margins of criminal justice.

---

77. See William Ortman, Second-Best Criminal Justice, 96 Wash. U. L. Rev. 1061, 1071–73 (2019) [hereinafter Ortman, Second-Best] (summarizing the literature on trial penalties).

78. The plea–trial sentencing differential in the example replicates the trial penalty in a real case. Weldon Angelos was sentenced to fifty-five years in federal prison for marijuana distribution and firearm possession after turning down the prosecutor's offer of fifteen years. See Jamie Fellner, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty, 26 Fed. Sent'g Rep. 276, 276 (2014). Aside from the sentencing differential and the charges, however, the example is hypothetical.

79. There is a possible exception—domestic violence cases. Immediately after *Crawford* was decided, many observers expressed concern about the case's implications for domestic violence prosecutions. See Tom Lininger, Prosecuting Batterers After *Crawford*, 91 Va. L. Rev. 747, 749 (2005); see also Carol A. Chase, Is *Crawford* a "Get Out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of "Testimonial", 84 Or. L. Rev. 1093, 1093–95 (2005); Myrna Raeder, Remember the Ladies and the Children Too: *Crawford*'s Impact on Domestic Violence and Child Abuse Cases, 71 Brook. L. Rev. 311, 311 (2005). Domestic violence cases frequently turn on the testimony of a single witness—the victim—and victims often recant or refuse to testify at trial. Lininger, supra, at 768. Prior to *Crawford*, prosecutors relied on victims' hearsay statements—often in 911 calls or to police officers—rather than live trial testimony. Id. at 773, 776–77. *Crawford* obviously made it more difficult to rely on that kind of hearsay. Yet it is unclear whether *Crawford* actually had a long-term impact on domestic violence prosecutions. No retrospective empirical study that I have found examines the question. While it is possible that *Crawford* affected the mix of domestic violence cases selected for prosecution, it is also possible that even in this context, a trial-centric confrontation right doesn't matter very much in world of pervasive plea bargaining.

B. *Confrontation's Neighbor*

In the previous section, we saw that *Crawford*'s trial-centrism leaves the Confrontation Clause with an ephemeral relationship to the real world of criminal cases.[80] This section juxtaposes the Court's recent treatment of the Confrontation Clause with its handling of the Sixth Amendment's Counsel Clause.[81] The comparison is useful because the two clauses—separated by only ten words—share the same introductory text, which specifies the bearer of both rights (the "accused") and their scope ("all criminal prosecutions").[82] But the comparison is relevant for a deeper reason as well: It demonstrates that Sixth Amendment rights *can* be modernized for the real world of criminal justice. The Court's recent Counsel Clause cases are thus evidence that the Confrontation Clause need not be obsolete.

The Court's key moves came in a pair of cases decided in 2012—*Lafler v. Cooper* and *Missouri v. Frye*.[83] In *Lafler* and *Frye*, criminal defendants sought postconviction relief on the grounds that their lawyers had rendered ineffective assistance (thus depriving them of the "assistance of counsel" guaranteed by the Counsel Clause) during plea negotiations.[84] Anthony Cooper (the defendant in *Lafler*) had been charged with an array of crimes in Michigan, including assault with intent to murder, after an incident in which he fired a gun at a person.[85] Though he'd been inclined to accept the prosecutor's plea offer to a sentence of fifty-one to eighty-five months, he rejected it based on his lawyer's novel and nonsensical belief that Cooper could not be convicted of attempted murder because he'd shot the victim "below the waist."[86] (Note for first-year law students and bar-takers: This is *not* a legal defense to attempted murder.) Cooper proceeded to trial and was convicted, whereupon he received the mandatory minimum sentence of 185 to 360 months.[87] Galin Frye, meanwhile, had been charged in Missouri with operating a vehicle while his license was revoked, an offense carrying up to four years.[88] The prosecutor sent Frye's lawyer a letter offering to resolve the case in one of two ways—either Frye could plead to a misdemeanor and serve a ninety-day sentence, or he could plead to a felony and immediately serve ten days in jail.[89] The letter gave Frye a deadline (about a month and a half later)

---

80. See supra section I.A.

81. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence.").

82. Id.

83. Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012).

84. See *Lafler*, 566 U.S. at 160; *Frye*, 566 U.S. at 138.

85. *Lafler*, 566 U.S. at 160–61.

86. Id. at 161.

87. Id.

88. *Frye*, 566 U.S. at 138.

89. Id. at 138–39.

to make his choice.[90] But Frye's lawyer never told Frye about the prosecutor's letter, and the offers expired.[91] Frye subsequently entered an "open" guilty plea—i.e., he pled guilty without an agreement with the prosecutor—and was sentenced to three years in prison.[92]

In both cases, a lawyer's incompetence led a defendant to lose a favorable plea offer. By the time the cases reached the Supreme Court, prosecutors made no attempt to justify the defense lawyers' performances. Instead, they argued "prejudice."[93] To win relief on an ineffective assistance of counsel claim under the famous (or infamous) *Strickland* test, a defendant must show not only that his lawyer performed inadequately, but also that the lawyer's incompetence prejudiced him.[94] In the Supreme Court, the state prosecutors (and the United States as amicus) contended that neither defendant was prejudiced by the lawyers' failings because they received full and fair process after the missed plea offers—for Cooper a trial and for Frye a valid guilty plea.[95]

In 5-4 decisions, the Court, per Justice Kennedy, rebuffed the prosecutors' arguments.[96] The Court noted first that the Sixth Amendment right to counsel "extends to the plea-bargaining process," such that defendants are "entitled to the effective assistance of competent counsel" during plea negotiations.[97] It then explained that "in the context of pleas," *Strickland*'s prejudice element means that a defendant "must show the outcome of the plea process would have been different with competent advice."[98] In Cooper's case, where his lawyer's incompetent advice had led him to reject a favorable offer, that meant that he would have to show a "reasonable probability" that, but for the advice, he would have accepted the offer and the trial court would have signed off.[99] As to Frye, whose lawyer didn't even communicate the prosecutor's offer, it meant that he would need to "demonstrate a reasonable probability [that he] would have accepted the earlier plea offer" had he known about it, and that the plea would have not have been cancelled by the prosecutor or rejected by the trial court.[100] The Court ruled that Cooper had made his showing and

---

90. Id.

91. Id. at 139.

92. Id.

93. Lafler v. Cooper, 566 U.S. 156, 174 (2012); Brief for the Petitioner at 18–19, *Frye*, 566 U.S. 134 (No. 10-444), 2011 WL 1593613.

94. See Strickland v. Washington, 466 U.S. 668, 694–95 (1984); see also Hill v. Lockhart, 474 U.S. 52, 57–60 (1985) (applying *Strickland* to a case involving a negotiated guilty plea).

95. See *Lafler*, 566 U.S. at 164–65; *Frye*, 566 U.S. at 141–42.

96. *Lafler*, 566 U.S. at 160, 164–65, 175, 187; *Frye*, 566 U.S. at 138, 141–45, 151.

97. *Lafler*, 566 U.S. at 162 (internal quotation marks omitted) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

98. Id. at 163.

99. Id. at 164.

100. *Frye*, 566 U.S. at 147.

remanded the case to the lower courts to work out the remedy.[101] It remanded Frye's case for a determination of whether he too had satisfied *Strickland*'s prejudice element.[102]

On one level, these outcomes seem obvious. Cooper and Frye were sentenced to spend additional years in prison because they had incompetent lawyers. If the right to counsel in the Sixth Amendment means anything, it must surely condemn that.[103] The obviousness of *Lafler* and *Frye*, however, obscures the subtle jurisprudential move that the Court made in these cases. As Justice Scalia explained in dissent, the prosecutors *had* support in the Court's cases.[104] That's because the Court's pre-*Lafler* and *Frye* jurisprudence was consistent with a trial-centric theory of the Counsel Clause.

"Until today," Justice Scalia declared, exaggerating only slightly, it had been "entirely clear" that "the right to effective assistance has as its purpose the assurance of a fair trial."[105] Scalia pointed out that in the Court's earlier cases dealing with ineffective assistance in plea bargaining, *Padilla v. Kentucky* and *Hill v. Lockhart*, lawyers' incompetence had caused defendants to take *bad* plea deals, not to miss good ones.[106] If the Sixth Amendment's exclusive purpose is to *assure a fair trial*, as Scalia claimed, that procedural distinction makes all the difference. When a defendant relies on incompetent advice to plead *guilty*, he has been wrongly deprived of his right to a fair trial. When he relies on incompetent advice to plead *not guilty*, on the other hand, he still gets a trial. He hasn't given up anything of constitutional significance and, in Scalia's view, he has suffered no prejudice. Justice Scalia insisted that the Sixth Amendment demands effective counsel for the "*acceptance* of a plea offer," but not the rejection of one.[107]

The majority spurned Justice Scalia's trial-centric view of the Counsel Clause. Rejecting his claim that the Sixth Amendment's "protections are . . . designed simply to protect the trial," the Court instead embraced a fair *prosecution* model of the Counsel Clause.[108] And the Court made clear why it was doing so. "[T]he right to adequate assistance of counsel cannot be defined or enforced," the Court observed in *Lafler*, "without taking

---

101. *Lafler*, 566 U.S. at 174–75.

102. *Frye*, 566 U.S. at 151.

103. See Gerard E. Lynch, *Frye* and *Lafler*: No Big Deal, 122 Yale L.J. Online 39, 39–40 (2012) ("The only surprise about the Supreme Court's recent decisions . . . is that there were four dissents."); see also Albert W. Alschuler, *Lafler* and *Frye*: Two Small Band-Aids for a Festering Wound, 51 Duq. L. Rev. 673, 674–75 (2013) [hereinafter Alschuler, Two Small Band-Aids].

104. *Lafler*, 566 U.S. at 177–81 (Scalia, J., dissenting).

105. Id. at 178.

106. Id. at 177; Padilla v. Kentucky, 559 U.S. 356 (2010); Hill v. Lockhart, 474 U.S. 52 (1985).

107. *Lafler*, 566 U.S. at 177 (Scalia, J., dissenting).

108. See id. at 165 (majority opinion).

account of the central role plea bargaining plays in . . . determining sentences."[109] Noting statistics showing that the vast majority of criminal convictions are based on guilty pleas, the Court in *Frye* explained that "ours 'is for the most part a system of pleas, not a system of trials,'" and "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[110] Given that ground truth, the Court reasoned, the Sixth Amendment's right to counsel must assign defense lawyers "responsibilities in the plea bargain process."[111] "Anything less," the Court observed, "might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."[112]

The Court thus fashioned a Sixth Amendment right to counsel for the *actual* criminal legal system, a system in which a plea bargain is, as Josh Bowers puts it, "the expected mode of disposition."[113] For Justice Scalia, this was madness, as the Constitution envisions *trials* as the ordinary vehicle for criminal prosecutions.[114] The disagreement between the Court and Scalia in these cases implicated a deep question—whether constitutional rules should be written for the world as it exists, with all its messy compromises and complexities, or for the normative world in which constitutional first principles hold.[115] The majority ruled for reality.

The Court's opinions in *Lafler* and *Frye* can be understood as examples of a mode of constitutional interpretation that Lawrence Lessig dubs "translation."[116] "Context matters" in reading legal texts, Lessig observes, but it changes over time, exposing gaps between the "context of

---

109. Id. at 170.

110. Missouri v. Frye, 566 U.S. 134, 143–44 (2012) (quoting *Lafler*, 566 U.S. at 170).

111. Id. at 143.

112. Id. at 144 (internal quotation marks omitted) (quoting Massiah v. United States, 377 U.S. 201, 204 (1964)).

113. Josh Bowers, Plea Bargaining's Baselines, 57 Wm. & Mary L. Rev. 1083, 1087 (2016) (emphasis omitted).

114. See *Lafler*, 566 U.S. at 185 (Scalia, J., dissenting) ("In the United States, we have plea bargaining aplenty, but until today it has been regarded as a necessary evil.").

115. To be clear, this is not an easy question. Imagine that you think that plea bargaining fundamentally perverts the criminal legal system. A constitutional rule that regulates plea bargaining might well lead to a more sensible plea-bargaining regime. But it may also further normalize the practice, making a world without plea bargaining even less likely. On the other hand, a constitutional rule that prioritizes the constitutional first principle of trials would leave the unregulated "Wild West" of plea bargaining in place, leading to discrete injustices in cases like *Lafler* and *Frye*, but at least it wouldn't put another nail in the coffin of trials. I explore this dynamic in Ortman, Second-Best, supra note 77.

116. Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1189–211 (1993) [hereinafter Lessig, Fidelity in Translation]; see also Lawrence Lessig, Fidelity & Constraint: How the Supreme Court Has Read the American Constitution 49–64 (2019) [hereinafter Lessig, Fidelity & Constraint]. For a review of Lessig's theory of translation, see Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 885, 941–42 (2003).

the writing" and the "context of the reading."[117] A legal interpreter committed to remaining "faithful" to legal texts thus "needs a way to *neutralize* or *accommodate* the effect that changing context may have on meaning."[118] Enter "translation," a "device for rendering a reading of a text in the target context (usually a judicial opinion) that preserves the meaning of the source text."[119] Translation, Lessig explains, "aims to achieve the same meaning in the target context that a faithful reading of the source context would have produced."[120]

This was the Court's approach in *Lafler* and *Frye*. No one could plausibly claim that there was a Sixth Amendment right to counsel *for plea bargaining* when the Sixth Amendment was adopted. Because plea bargaining didn't exist (in any meaningful sense) in the Founding Era, such a claim would be incoherent.[121] But defendants had the right to have a lawyer assist them with the critical part of their criminal cases. It just so happened that, in the Founding Era, the critical part of a criminal case was a trial. That's why the Counsel Clause meant a right to counsel *for trial* in its "source context." But between 1791 and 2012, the context changed, with plea bargaining replacing trial as the critical part of most criminal cases. The Court's core holding in *Lafler* and *Frye*—that today there is a right to counsel *for plea bargaining*—translated the Counsel Clause to preserve its meaning in a new context.[122]

The Supreme Court decisions analyzed closely in this Part—*Crawford*, *Lafler*, and *Frye*—understand twenty-first century American criminal justice very differently. *Lafler* and *Frye* are built for the world of plea bargaining; *Crawford* is decidedly not. The result is a Sixth Amendment at odds with itself. Its Counsel Clause stands ready (more or less) to deliver the right to counsel to defendants in the age of plea bargaining.[123] Its Confrontation Clause, meanwhile, serves up the "crucible of cross-examination" mostly on paper.

---

117. Lessig, Fidelity in Translation, supra note 116, at 1175; see also Lessig, Fidelity & Constraint, supra note 116, at 56.

118. Lessig, Fidelity in Translation, supra note 116, at 1177.

119. Lessig, Fidelity & Constraint, supra note 116, at 56.

120. Id.

121. On the lack of plea bargaining at the Founding, see Albert W. Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 7–16 (1979).

122. My point is not to endorse "translation" as a general model of constitutional interpretation. It is (more modestly) to suggest that Lessig's theory aptly describes what the Court did in *Lafler* and *Frye*.

123. "More or less" because while *Lafler* and *Frye* broke jurisprudential ground, they are a far cry from thoroughgoing plea-bargaining reform. For critical perspectives on the decisions, see Cynthia Alkon, Plea Bargain Negotiations: Defining Competence Beyond *Lafler* and *Frye*, 53 Am. Crim. L. Rev. 377, 407 (2016); Alschuler, Two Small Band-Aids, supra note 103, at 674–77. The point is comparative. At least the Court paid attention to plea bargaining and *tried* to make the right to counsel relevant. See Alkon, supra, at 407 ("Through its decisions in *Lafler* and *Frye*, the Supreme Court is finally showing a willingness to more critically examine plea bargaining to better protect defendants' rights.").

II. UPDATING CONFRONTATION

This Part explores the doctrinal roots of the problem Part I identifies. One source of trouble, section II.A explains, is that the Court has long treated the Confrontation Clause as if it directly governs when hearsay can be used by prosecutors in criminal trials. I argue that this approach is mistaken. Although the Confrontation Clause has *implications* for the admissibility of hearsay evidence, it announces a substantive right, not an evidentiary rule. The rest of this Part concerns the most critical phrase in the Confrontation Clause—"witnesses against." Section II.B briefly fills out details of the Court's current approach to defining who is a "witness against" an accused. Section II.C does the Essay's doctrinal heavy lifting. It takes aim at the Court's position that "testimony" (whether live or hearsay) must be used *at trial* to turn its maker into a "witness" for purposes of the Confrontation Clause. This limitation is both textually unnecessary and purpose defeating. The Court should instead deem a person a Confrontation Clause "witness" if their "testimony" is used against a defendant in a "critical adjudication," a class of procedures that in today's criminal legal system would include both trials and plea bargains.

A. *Confrontation as a Substantive Right*

As we see later in this Part, updating the Confrontation Clause for a post-trial world means taking it beyond the courtroom.[124] Before we get there, we need to do some doctrinal brush clearing. The Supreme Court has long treated the Confrontation Clause (as it pertains to information from people not testifying live in court) as a rule governing the admissibility of evidence.[125] It construes the Confrontation Clause, that is, as giving defendants the right to have certain hearsay excluded under certain circumstances.[126] John Douglass calls this the Court's "exclusionary thinking" about confrontation.[127] It is an obstacle in our path. If the Confrontation Clause is merely a rule of admissibility, it plainly has nothing to say about what goes on outside of courtrooms. This section clears the way forward by showing that the Confrontation Clause is properly understood as creating a substantive right, not an evidentiary one.[128]

---

124. See infra section II.C.

125. The Clause includes other rights with respect to in-court witnesses. See supra note 28 and accompanying text.

126. See supra note 31 and accompanying text.

127. Douglass, Beyond Admissibility, supra note 30, at 194; see also Eileen A. Scallen, Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause, 76 Minn. L. Rev. 623, 628 (1992) ("When the Supreme Court focuses only on the evidentiary dimension of confrontation, however, the other dimensions of the Confrontation Clause fade into the background . . . .").

128. In that it is a rule of constitutional criminal *procedure*, it might be more fully described as a "substantive rule of criminal procedure." That more elaborate phrasing is unwieldy (and unnecessary).

In an article published shortly before *Crawford*, Douglass explained that the Court's exclusionary thinking about confrontation dominated both before and during the era of *Ohio v. Roberts*.[129] What he couldn't know at the time was whether the approach would survive the demise of *Roberts*. But survive it did.[130] The Court thus wrote in *Crawford* that the Framers of the Sixth Amendment "would not have allowed *admission* of testimonial statements of a witness who did not appear at trial."[131] And the leading evidence treatise explains that *Crawford* "established a new mode of analyzing how the Confrontation Clause regulates *admission* of hearsay."[132]

What is wrong with the admissibility approach to confrontation? Begin with the Sixth Amendment's text. The Confrontation Clause, recall, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[133] Nowhere does it mention the admissibility of evidence,[134] but it easily could have. The clause might have provided that "no witness may testify against a defendant without confrontation," which would have sounded in admissibility. Instead, it bestows a specific right on a criminal defendant—the right to "be confronted with" a person—that applies to anyone who qualifies as a "witness against" him.[135]

The text is describing a substantive right, not an evidentiary one. Evidentiary rules exclude evidence because *the evidence* isn't relevant or reliable. The Confrontation Clause works differently. As Richard Friedman observes, the Confrontation Clause "does not prescribe that a piece of evidence is inadmissible because there is some defect in the evidence itself."[136] Instead, it demands a process—cross-examination.[137] As the Court itself explained in *Crawford*, the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[138] And the Confrontation Clause's demand for cross-examination contributes directly to the Sixth Amendment's broader purpose—ensuring an adversarial

---

129. Douglass, Beyond Admissibility, supra note 30, at 197–219. For a discussion of the *Roberts* approach to confrontation, see supra notes 32–35 and accompanying text.

130. See Brooks Holland, *Crawford* & Beyond: How Far Have We Traveled from *Roberts* After All?, 20 J.L. & Pol'y 517, 537 (2012) ("*Crawford* hitched confrontation's wagon to an exclusionary rule without clearly defining the right itself.").

131. Crawford v. Washington, 541 U.S. 36, 53–54 (2004) (emphasis added).

132. Kenneth S. Broun, George E. Dix, Edward J. Imwinkelried, David H. Kaye & Eleanor Swift, McCormick on Evidence § 252(A) (Robert P. Mosteller ed., 8th ed. 2020) (emphasis added).

133. U.S. Const. amend. VI.

134. Douglass, Beyond Admissibility, supra note 30, at 224 ("The text says nothing of excluding a witness's testimony.").

135. See Friedman, The Mold, supra note 29, at 440–41.

136. Id. at 441.

137. See id. at 440 ("[The Sixth Amendment] seems to say quite clearly that the accused has a right to insist that those who testify against him be brought in his presence . . . .").

138. Crawford v. Washington, 541 U.S. 36, 61 (2004).

criminal process in which an accused has the "tools," as Randolph Jonakait puts it, "to challenge the evidence against him."[139]

Still, it should probably not be a surprise that the Court hewed to an admissibility approach during the *Roberts* era. Part I explains that *Roberts* tied confrontation to the subconstitutional rules governing hearsay,[140] and those are quintessential rules of admissibility. It is more puzzling that the Court persisted in its exclusionary thinking about confrontation in *Crawford*, which detached the confrontation right from the hearsay rules.[141] But while *Crawford* separated confrontation from the specific *details* of hearsay law, and especially from the hearsay exceptions, it retained hearsay law's focus on evidentiary admissibility.

The text and purposes of the Sixth Amendment may not support an admissibility approach to the Confrontation Clause, but *Crawford* directs us to focus on history, especially early modern English history.[142] Can we account for the persistence of "exclusionary thinking" using the historical methodology that *Crawford* prescribed? We can, but only superficially.

Crawford's key historical "finding" was that by the time the Sixth Amendment was adopted, English common law courts excluded out-of-court witness statements unless the defendant had a prior opportunity to cross-examine the declarant.[143] The Court based that conclusion principally on four cases—a misdemeanor case, *Rex v. Paine*, decided in 1696,[144] and three felony cases decided between 1787 and 1791.[145] In the misdemeanor and one of the felonies, judges excluded out-of-court examinations because the defendants had not been afforded the opportunity to cross-examine the accusers.[146] In another of the felonies, the court permitted the jury to hear the accusation because the defendant *had* been present for her accuser's deposition.[147] And in the remaining felony, the court

---

139. Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 114 (1995); see also Holland, supra note 130, at 537; Sklansky, supra note 32, at 64–67.

140. See supra notes 32–35 and accompanying text.

141. See supra note 35 and accompanying text.

142. See supra notes 36–44 and accompanying text.

143. *Crawford*, 541 U.S. at 45–47.

144. R v. Paine (1696) 87 Eng. Rep. 584, 5 Mod. 163, 165.

145. R v. Dingler (1791) 168 Eng. Rep. 383, 384, 2 Leach 561, 563; R v. Woodcock (1789) 168 Eng. Rep. 352, 354, 1 Leach 500, 503–04; R v. Radbourne (1787) 168 Eng. Rep. 330, 331–32, 1 Leach 457, 457–61.

146. See *Dingler*, 168 Eng. Rep. at 384, 2 Leach at 562 (excluding evidence because "in the course which has been perused by [the magistrate], as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination"); *Paine*, 87 Eng. Rep. at 585, 5 Mod. at 165 ("[T]he Chief Justice declared, that it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.").

147. *Radbourne*, 168 Eng. Rep. at 332, 1 Leach at 461 (noting the prosecution's argument that the victim's deposition "was admissible as an information taken by a regular

admitted the accusation as a dying declaration, but indicated (in dicta) that it would otherwise have to be excluded.[148]

All four of *Crawford*'s principal historical cases thus *were* about the admissibility of hearsay evidence at trial. But the cases share another distinctive feature. In each, the hearsay declarant was dead by the time of trial.[149] When an accuser dies without being cross-examined, confrontation is (obviously) impossible. Thereafter the only way to avoid denying the accused their confrontation right at trial is to exclude the out-of-court accusation.[150] That's exactly what happened in *Rex v. Paine*, the misdemeanor, and in *Rex v. Dingler*, the most on-point of the felony cases.[151] The exclusion of hearsay evidence in those cases was not a function of the confrontation right alone, but the *combination* of the confrontation right and a dead declarant.

A broader look at early modern English cases reveals that confrontation and evidentiary admissibility are independent concepts.[152] The confrontation right that took shape in the eighteenth century developed in part as a reaction to the political "state trials" of the sixteenth and seventeenth centuries, where defendants were often denied the opportunity to confront their accusers "face-to-face."[153] As the nineteenth-century historian James Fitzjames Stephens explained, the "proof" in these cases was "usually given by reading depositions, confessions of accomplices, [and] letters," a practice that "occasioned frequent demands by the prisoner to have his 'accusers,' i.e., the witnesses against him, brought before him face to face."[154] Note that the defendants were *not* asking the judges or juries to disregard the depositions, confessions, and

---

magistrate, under the statutes of Philip & Mary; for it had been given in the presence and hearing of the prisoner").

148. *Woodcock*, 168 Eng. Rep. at 353, 1 Leach at 502 (explaining that examination "was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of contradicting the facts it contains").

149. The felonies were all homicide cases in which the declarant was the victim. *Dingler*, 168 Eng. Rep. at 383, 2 Leach at 561; *Woodcock*, 168 Eng. Rep. at 352, 1 Leach at 500–01; *Radbourne*, 168 Eng. Rep. at 331–32, 1 Leach at 459–60. In *Paine*, the declarant was the witness to whom the defendant's allegedly libelous writing was delivered. 87 Eng. Rep. at 584, 5 Mod. at 163–64.

150. The dying declaration exception to confrontation may come into play, though, as it did in *Woodcock*. See 168 Eng. Rep. at 352–54, 1 Leach at 501–04.

151. See supra note 146 and accompanying text.

152. In *Crawford*, the Court recounted aspects of the broader history but then looked elsewhere when formulating its admissibility-focused holding. See Crawford v. Washington, 541 U.S. 36, 43–45 (2004).

153. See Friedman, Confrontation, supra note 28, at 1024; see also 30 Charles Wright, Kenneth W. Graham, Jr. & Daniel D. Blinka, Federal Practice and Procedure § 6321 (2d ed. 2020).

154. 1 James Fitzjames Stephens, A History of the Criminal Law of England 326 (1883); see also *Crawford*, 541 U.S. at 43 (quoting Stephens, supra).

letters. They wanted something else—to confront the people who made or spoke them.[155]

The most prominent example of this phenomenon was the treason trial of Sir Walter Raleigh.[156] At Raleigh's trial, the Attorney General (Edward Coke himself) read ex parte confessions by Henry Brooke (usually referred to by his title, Lord Cobham), implicating Raleigh in a plot against King James I.[157] Raleigh demanded that Lord Cobham testify. "[L]et my accuser come face to face and be deposed," Raleigh insisted, observing the irony that "[w]ere the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!"[158] As John Douglass explains, Raleigh's demand was "for confrontation, not for the exclusion of evidence."[159] And Raleigh's example is only the most prominent. In an earlier treason trial, during the reign of King Edward VI, the Duke of Somerset "objected . . . many things against the Witnesses, and desired they might be brought face to face."[160] Defendants' demands for confrontation were, to be sure, often rebuffed.[161] But the denials were among the historical "abuses" that, as the Supreme Court explained in *Crawford*, hastened the confrontation right of the late eighteenth century.[162]

The state trials support the claim that the Confrontation Clause should not be understood as a rule that exclusively governs the

---

155. See Douglass, Beyond Admissibility, supra note 30, at 237 (explaining that the "Star Chamber battles focused on confrontation, not on exclusion of hearsay").

156. Raleigh's trial is described in David Jardine, Trial of Sir Walter Raleigh, *in* 1 Criminal Trials 400 (1832). For accounts of the Raleigh trial's significance on the development of the confrontation right, see Allen D. Boyer, The Trial of Sir Walter Ralegh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause, 74 Miss. L.J. 869, 869 (2005); Charles R. Nesson & Yochai Benkler, Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause, 81 Va. L. Rev. 149, 150 (1995). For a fascinating look at Raleigh's life and trial, see Anna Beer, Patriot or Traitor: The Life and Death of Sir Walter Ralegh (2018).

157. See Jardine, supra note 156, at 410–11.

158. Id. at 427.

159. Douglass, Beyond Admissibility, supra note 30, at 237.

160. See Proceedings Against Edward Duke of Somerset, for High Treason and Felony, at Westminster: 5 Edward VI AD 1551., *in* 1 A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783, at 515, 520 (T.B. Howell ed., 1816).

161. Sir Raleigh's request, for instance, was denied because (as the Chief Justice explained) Lord Cobham "having first confessed against himself voluntarily, and so charged another person, if we shall now hear him again in person, he may for favour or fear retract what formerly he hath said, and the jury may, by that means, be inveigled." Jardine, supra note 156, at 427.

162. Crawford v. Washington, 541 U.S. 36, 44 (2004); see also Friedman, Confrontation, supra note 28, at 1024 ("[B]eginning even before the middle of the sixteenth century, we find repeated demands by treason defendants that their accusers be brought 'face-to-face,' and also repeated statutory support for this position. By the middle of the seventeenth century, this position, and the accused's right to examine the witness, had prevailed." (footnotes omitted)).

admissibility of evidence. It is instead a substantive right of a criminal defendant to "confront" (or "be confronted with") the government's "witnesses" via cross-examination. That right has critical *implications* for the admissibility of hearsay evidence, but treating it as a rule that directly governs admissibility—as the Supreme Court has long done—skips several steps.

Here is how the Court in *Crawford should* have explained the connection between the Confrontation Clause and the admissibility of testimonial hearsay. As a substantive right, the Confrontation Clause doesn't directly prohibit the government from using any evidence, hearsay or otherwise. Rather, it dictates what happens *after* the government uses a witness's testimony (including an out-of-court witness's "testimonial hearsay") against a defendant.[163] Namely, it tells us that the defendant must "be confronted with" that witness.[164] But imagine that the government uses "testimonial hearsay" against a defendant, and—for whatever reason—does not confront the defendant with the witness. Perhaps the declarant is dead, making confrontation impossible, or perhaps the government just prefers the declarant's hearsay to what they'd say in court. Unless an exception to the Confrontation Clause applies, the government's failure to confront the defendant with the witness violates the Sixth Amendment.[165] This is where the Confrontation Clause's *indirect* effect on the admissibility of evidence comes into play. When the government uses testimonial hearsay against a defendant in circumstances where confrontation will not be forthcoming, a Sixth Amendment violation becomes inevitable.[166] In order to avoid inevitable (or even just probable) Sixth Amendment violations, courts exclude uncrossed testimonial hearsay at trial. But the exclusion of evidence is, strictly speaking, prophylactic. It's the failure of confrontation *following* the introduction of

163. See supra note 48 and accompanying text.

164. This assumes, of course, that the defendant has not previously cross-examined the declarant. If the defendant *has* cross-examined the declarant, however, and if the declarant has since become unavailable, *Crawford* provides that further confrontation isn't constitutionally required. See *Crawford*, 541 U.S. at 59.

165. Thus, if the defendant is convicted, the conviction will have to be set aside, unless perhaps the error could be deemed harmless. On harmless error analysis of Confrontation Clause violations, see Daniel Epps, Harmless Errors and Substantial Rights, 131 Harv. L. Rev. 2117, 2167–68 (2018); John M. Greabe, Criminal Procedure Rights and Harmless Error: A Response to Professor Epps, 118 Colum. L. Rev. Online 118, 123–27 (2018). See generally David H. Kwasniewski, Note, Confrontation Clause Violations as Structural Defects, 96 Cornell L. Rev. 397 (2011) (discussing the Confrontation Clause and harmless error review jurisprudence).

166. The inevitability of a violation is most obvious, of course, where the declarant is dead or otherwise unavailable.

testimonial hearsay—not the testimonial hearsay itself—that would actually violate the Sixth Amendment.[167]

Thus the Confrontation Clause regulates the admissibility of testimonial hearsay indirectly. Courts want to avoid Sixth Amendment violations, and for good reason. Accordingly, they do not permit prosecutors to offer evidence that would likely or inevitably lead to a Confrontation Clause violation. But the Confrontation Clause's evidentiary implications are just that—implications. The main show is the *substantive* right of defendants to confront the witnesses against them. And as we will see, that right can be invoked in settings that have nothing to do with the admissibility or inadmissibility of hearsay at trial.

B. *Witnesses Against: The Conventional Account*

We have seen that the Confrontation Clause is best understood as creating a substantive right, rather than an evidentiary rule governing the admissibility of hearsay evidence.[168] Because we are working with a substantive right, we need to consider the two questions that together delineate any substantive right: (1) When does it apply (or "attach," in criminal procedure lingo), and (2) what does it entitle its holder to have or do?[169] The remainder of this Part explores the "attachment" question. I take up the second question in Part III.

Determining when the confrontation right "attaches" is deceptively simple, because the text of the Confrontation Clause appears to provide an easy answer. The right to "be confronted," the Sixth Amendment tells us, attaches to a "witness[] against" an "accused" in a "criminal prosecution[]."[170] This formulation, of course, just shifts the inquiry. What does it *mean* for a person to be a "witness against" a criminal defendant? This section examines the Supreme Court's current answer to that question, which comes mostly from *Crawford*. Because we've already encountered aspects of the Court's key moves in defining a "witness against" in *Crawford*, the discussion here can be brief.[171]

---

167. For a somewhat similar argument, see Friedman, The Mold, supra note 29, at 441 ("[T]he procedural requirement of the Confrontation Clause is necessarily enforced by means of an evidentiary rule of exclusion.").

168. See supra section II.A.

169. This framework for understanding individual rights is most familiar from the procedural due process context. See Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (canonical case on what procedural due process requires); Goldberg v. Kelly, 397 U.S. 254, 261–63 (1970) (canonical case on whether procedural due process applies); see also Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510, 1510 (1975) ("Due process adjudication typically involves two analytically distinct issues: whether the right to due process is applicable; and, if so, what procedures must be provided.").

170. U.S. Const. amend. VI.

171. See supra notes 60–64 and accompanying text.

Under the Court's current approach, a person becomes a witness against an accused when two elements are present: (1) The person makes an out-of-court "testimonial statement,"[172] and (2) the statement is used by the government at the accused's criminal trial.[173] This section considers each element in turn.

A large share of the post-*Crawford* writing about the Confrontation Clause, both in the United States Reports and in the pages of law reviews, has been about the distinction between testimonial and nontestimonial statements.[174] As Part I explains, *Crawford* declared that a witness is one who "bear[s] testimony," and testimony is "typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[175] Only statements that do *that*, the Court decided in *Crawford*, can trigger the Confrontation Clause.[176] The testimonial/nontestimonial distinction has its supporters and detractors in the academy,[177] and on the Court.[178] And then there is the difficult matter of figuring out what testimonial means in a variety of litigated contexts, a project that has frequently

---

172. Crawford v. Washington, 541 U.S. 36, 53–54 (2004).

173. See id. at 50–51 ("[T]he principal evil at which the Confrontation Clause was directed was the . . . use of *ex parte* examinations as evidence against the accused."). Arguably, the second element should be further limited to instances in which the statement is used to prove the truth of the matter which it asserts, the traditional definition of hearsay. In *Crawford*, the Court reaffirmed its holding in Tennessee v. Street, 471 U.S. 409 (1985), that out-of-court statements offered for propositions other than the truth of what they assert raise no Confrontation Clause problems. *Crawford*, 541 U.S. at 60 n.9. The *Crawford* Court did not specifically say that the *reason* nonhearsay statements are constitutionally unproblematic is that their declarants are not "witnesses against" the accused, but that was the explanation in *Street*. 471 U.S. at 414. That explanation makes sense. With a nonhearsay statement—for instance a verbal act—the declarant's veracity does not matter.

174. See supra notes 52–62 and accompanying text; see also Sabine Gless, AI in the Courtroom: A Comparative Analysis of Machine Evidence in Criminal Trials, 51 Geo. J. Int'l L. 195, 232 (2020) ("The meaning of the word 'testimonial,' or rather, the type of witness that will trigger the Confrontation Clause, has been the subject of vigorous debates.").

175. *Crawford*, 541 U.S. at 51 (internal quotation marks omitted) (quoting 2 Noah Webster, An American Dictionary of the English Language (1828)); see also supra notes 47–49 and accompanying text.

176. See *Crawford*, 541 U.S. at 51.

177. Compare, e.g., Friedman, The Sky, supra note 74, at 428 ("But it appeared to me that the basic principle of *Crawford* was so obviously correct, so fundamental to our system, . . . and so far superior to what had prevailed before, that prosecutors and judges as well as those on the defense side would quickly come to accept it. Silly me."), with George Fisher, The *Crawford* Debacle, 113 Mich. L. Rev. First Impressions 17, 17 (2014) ("[T]here's no denying [the] doctrine's a muddle, if not as conceived, then as realized.").

178. Compare Ohio v. Clark, 576 U.S. 237, 252 (2015) (Scalia, J., concurring) ("*Crawford* sought to bring our application of the Confrontation Clause back to its original meaning, which was to exclude unconfronted statements made by witnesses—i.e., statements that were testimonial." (emphasis omitted)), with Bullcoming v. New Mexico, 564 U.S. 647, 678 (2011) (Kennedy, J., dissenting) ("[P]rinciples have weaved in and out of the *Crawford* jurisprudence. Solemnity has sometimes been dispositive, and sometimes not. So, too, with the elusive distinction between utterances aimed at proving past events, and those calculated to help police keep the peace." (citations omitted)).

divided the Court in cases decided over the last seventeen years.[179] These debates are interesting, but they are for another day. All we need to say is that under *Crawford*, a defendant's confrontation right attaches only when a person makes a testimonial statement—whatever that means. Of course, the Court might someday replace the testimonial/nontestimonial distinction in favor of some other limitation on what kinds of out-of-court statements can trigger the confrontation right.[180] For our purposes—understanding the structure of the confrontation right—any such new approach would simply slide into the position that "testimonial" occupies currently.

Uttering a "testimonial" statement does not, by itself, make a person a "witness against" an accused. Rather, the speaker is a "witness" under *Crawford* only if their statement is used against a defendant at trial.[181] There are two pieces to this requirement—that the testimony be *used* by the government, and that it be used at *trial*.[182] We've already assessed the Court's trial-centric gloss on the Confrontation Clause,[183] but we need to focus briefly on the other part of this requirement, that the government actually *use* the evidence.

American courtrooms operate on the principle of party control of the evidence.[184] This principle means that a nonparty cannot (typically) become a "witness" *unilaterally*; rather, they have to be called by a party.[185] The same logic applies to people made "witnesses" by dint of their out-of-court "testimony." A person who has made a testimonial statement is *eligible* to become a witness against a defendant, but until their statement is actually used by a prosecutor, they are not one. The point may sound needlessly formalistic, but it isn't. During the course of an investigation, many people might provide tips to the police, and, under virtually any definition, those tips will qualify as "testimonial" statements. But police receive lots of unhelpful tips of no value to them or to prosecutors. These

---

179. See supra notes 53–58 and accompanying text.

180. Some scholars, for instance, have suggested that the question should be whether a statement is "accusatory." See Jennifer L. Mnookin, Expert Evidence and the Confrontation Clause After *Crawford v. Washington*, 15 J.L. & Pol'y 791, 847–49 (2007) ("Limiting the Confrontation Clause's operation to accusations . . . would not be inconsistent with the principles that underlie *Crawford*."); Robert P. Mosteller, *Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses, 39 U. Rich. L. Rev. 511, 544 (2005) [hereinafter Mosteller, Confrontation of Witnesses] ("When a statement is accusatory and intended to be conveyed beyond those who would be expected to keep it confidential . . . it should be considered testimonial.").

181. See supra notes 172–174 and accompanying text.

182. See supra notes 172–174 and accompanying text.

183. See supra notes 60–64 and accompanying text.

184. See, e.g., Mirjan R. Damaska, Evidence Law Adrift 74–75 (1997) (describing how the adversarial system reserves to litigants the power to decide what evidence will be gathered, introduced, and presented in court for proof).

185. Or, at least in some jurisdictions, they can be called to testify by the judge. See Fed. R. Evid. 614(a) ("The court may call a witness on its own or at a party's request.").

"unused" tips, despite being testimonial, obviously trigger no confrontation rights.[186]

C. *Witnesses Against: Updated Account*

A quick recap for those just joining us—under current law, criminal defendants have the right to be confronted with anyone whose "testimonial" hearsay is used against them *at trial*.[187] This section makes the case for revisiting the last two words of this test. My argument mirrors the Court's in *Lafler* and *Frye*. To put it simply—denying a defendant confrontation during plea bargaining makes no more sense than denying him an effective lawyer during plea bargaining. But I need to back up.

As a preliminary matter, the Court's "at trial" limiting principle has no anchor in the text of the Sixth Amendment. The amendment's opening phrase makes clear that the Confrontation Clause applies to "criminal prosecutions," not just to trials.[188] That same phrase, moreover, applies to the Counsel Clause, and we see in section I.B that the Sixth Amendment right to counsel applies to at least one stage of a "criminal prosecution" (plea bargaining) that is entirely independent of trial.[189] It's not *impossible* that the single phrase "criminal prosecution" in the Sixth Amendment means different things for different clauses, but that reading is awkward.[190]

---

186. The Court confirmed that testimonial statements must be *used* to trigger the Confrontation Clause by approving "notice-and-demand" statutes for laboratory analyst testimony in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326–27 (2009). These statutes, the Court explained, "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial," at which point the defendant has the opportunity (and obligation) to object under the Confrontation Clause. Id. The statutes make sense only if the defendant's confrontation right is triggered by the government's *use* of testimonial statements, and not their mere existence.

187. See supra section II.B.

188. U.S. Const. amend VI; see also Friedman, Meaning of Testimonial, supra note 63, at 250 ("Indeed, it seems the confrontation right should be independent of a right to trial."). Friedman goes on to note that "[e]ven if there were no proceeding recognizable as a trial—even if all testimony were recorded and delivered piecemeal behind closed doors to a fact-finder—the accused should have a right to confront the witness." Friedman, Meaning of Testimonial, supra note 63, at 250–51. In a very rough sense, this foreshadows what this Essay proposes in Part III.

189. See supra notes 108–115 and accompanying text.

190. See John G. Douglass, Confronting Death: Sixth Amendment Rights at Capital Sentencing, 105 Colum. L. Rev. 1967, 2009 (2005) ("The text suggests that, whenever the rights of notice, confrontation, compulsory process, and counsel apply, they apply together. All of those rights are in the same sentence, which, as a matter of simple grammar, lists them collectively as the rights an accused 'shall enjoy' 'in all criminal prosecutions.'" (quoting U.S. Const. amend. VI)).

That said, the text by itself is hardly dispositive.[191] The bigger reason for revisiting the "at trial" limitation is that, in our post-trial world, it drains the confrontation right of meaning. To develop this part of the argument, I'll need to explain what would replace "at trial." It takes a doctrine to beat a doctrine.[192]

In lieu of the "at trial" limitation in the current definition of a Confrontation Clause "witness," I propose substituting "critical adjudication." On this approach, confrontation would attach whenever the government uses a person's (1) testimonial hearsay at (2) a critical adjudication.[193] The limitation is borrowed from the Court's Counsel Clause jurisprudence, so we need to take a quick detour back to that corner of the Sixth Amendment.

The Court has long held that the Sixth Amendment right to counsel applies only in "critical stages" of criminal prosecutions.[194] It has articulated the distinction between critical and noncritical stages in various ways over the years.[195] One of the most useful formulations was from

---

191. It rarely is on questions involving the Confrontation Clause. See Crawford v. Washington, 541 U.S. 36, 42 (2004) ("The Constitution's text does not alone resolve this case.").

192. This is a variant of the well-known (among law professors anyway) expression that "[i]t takes a theory to beat a theory." See, e.g., Tamara R. Piety, In Praise of Legal Scholarship, 25 Wm. & Mary Bill Rts. J. 801, 815 (2017) (alteration in original) (internal quotation marks omitted) (quoting Lawrence Solum, Legal Theory Lexicon: It Takes a Theory to Beat a Theory, Legal Theory Blog, https://lsolum.typepad.com/legaltheory/2018/07/legal-theory-lexicon-it-takes-a-theory-to-beat-a-theory.html [https://perma.cc/GQ6Z-H8UL] (last modified July 8, 2018)).

193. In principle, it would be possible to eliminate the "at trial" limitation and not replace it with anything. On that reading, a defendant's confrontation right would attach whenever the government uses a person's testimonial statement against him at any point in a criminal prosecution. We needn't go that far to make the Confrontation Clause relevant in today's criminal legal system. The Supreme Court has insinuated that the Confrontation Clause does not apply at preliminary hearings, see Barber v. Page, 390 U.S. 719, 725 (1968), and the state and lower courts have, for the most part, taken the Court's hint, see supra note 64. Updating the Confrontation Clause does not require calling the holdings of those cases into question. It does require questioning their dicta. See supra note 61.

194. E.g., Lafler v. Cooper, 566 U.S. 156, 165 (2012). For noncritical stages, defendants can (constitutionally) be left to fare for themselves. Examples of noncritical stages include photo identifications, see United States v. Ash, 413 U.S. 300, 317–18 (1973), and handwriting exemplars, see Gilbert v. California, 388 U.S. 263, 267 (1967).

195. See Van v. Jones, 475 F.3d 292, 297–316 (6th Cir. 2007) (reviewing Supreme Court and Sixth Circuit cases). Drawing from the Court's cases, the leading criminal procedure treatise sets forth the following complex, multipart test for determining whether a stage is critical:

> In determining whether a judicial proceeding meets the "critical stage" standard, a court must ask: (1) whether the proceeding either (i) had a consequence adverse to the defendant as to the ultimate disposition of the charge which could have been avoided or mitigated if defendant had been represented by counsel at that proceeding, or (ii) offered a potential opportunity for benefitting the defendant as to the ultimate disposition of the charge through rights that could have been exercised by counsel, and (2) whether that adverse consequence could have been avoided, or

Coleman v. Alabama: "The determination . . . depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.'"[196] The Court shed additional light on the meaning of a critical stage in *United States v. Wade*, observing that the Sixth Amendment right to counsel reaches "pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[197] Combining *Coleman* and *Wade*, a "critical stage" is a proceeding where the outcome of a defendant's case may be prejudiced by not having a lawyer at his side.[198] By guaranteeing a defendant the assistance of counsel at those proceedings, the Sixth Amendment (in *Wade*'s words) "assure[s] that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."[199]

The same "adversary theory of criminal prosecution" animates the Confrontation Clause.[200] As the Court noted in *Maryland v. Craig*, the Confrontation Clause's purpose is "ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."[201] That said, the benefits of adversarial process can be realized more easily in the confrontation context than in the right to counsel arena. Whereas defendants need counsel for every proceeding in which their rights are at stake, they don't need to *repeatedly* confront the government's witnesses in order to ascertain the strength (or lack thereof) of the government's

---

> the lost opportunity regained, by action that subsequently provided counsel could have taken. Answering these inquiries will require a court to examine various features of the procedural rules of the particular jurisdiction.

3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.2(b) (4th ed. 2019).

196. 399 U.S. 1, 9 (1970) (quoting United States v. Wade, 388 U.S. 218, 227 (1967)).

197. 388 U.S. at 224.

198. See *Van*, 475 F.3d at 313 ("In order to assess if a given portion of a criminal proceeding is a critical stage, we must ask how likely it is that significant consequences might have resulted from the absence of counsel at the stage of the criminal proceeding.").

199. 388 U.S. at 227.

200. See Crawford v. Washington, 541 U.S. 36, 43 (2004) ("The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers."); Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. Rev. 557, 585–86 (1988) ("[W]hile confrontation, in its service to the adversary system, may concomitantly advance the truth-determining process, confrontation's mission, like the mission of other sixth amendment rights, is to help guarantee the adversary system."); see also Mosteller, Confrontation of Witnesses, supra note 180, at 514 (explaining that "the positive procedural goal of the confrontation right" is "encouraging and ensuring that evidence is presented in the courtroom in the presence of the accused and subject to adversarial testing").

201. 497 U.S. 836, 846 (1990).

case.[202] In the context of confrontation, the "adversary theory of criminal prosecution" means that a defendant must have the opportunity to test the government's witnesses at some point before or during the adjudication that actually resolves his case. Hence a "critical adjudication" standard. Just as the Sixth Amendment guarantees criminal defendants a lawyer at each critical stage, it should be understood to guarantee the confrontation of the witnesses against them in adjudications that "might well settle [their] fate."[203]

So which parts of modern criminal procedure count as "critical adjudications"? Trials count, of course. They may not happen very often, but when they do, they certainly "settle the accused's fate," subject to appeal. Preliminary hearings don't count. As the Supreme Court observed in *Barber v. Page*, a "preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial."[204] A similar logic would probably apply as to other pretrial hearings (e.g., suppression hearings) that do not implicate the ultimate merits of a case.[205]

Then there is plea bargaining. Even a glance at the contemporary criminal legal system should leave no doubt about *its* status. The Supreme Court has already told us that plea bargaining is the adjudication that matters for almost every defendant. In a passage of *Frye* that we encounter in Part I, the Court was forthright about that fact, observing that "ours 'is for the most part a system of pleas, not a system of trials,'" such that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[206] And within the plea bargaining system, the key adjudicators are prosecutors. As Gerard Lynch (now a Second Circuit Senior Judge) wrote in an influential article, an "alien anthropologist" sent from Mars to study our criminal legal system would recognize that the "substantive evaluation of the evidence and assessment of the defendant's responsibility . . . in the office of the prosecutor" is the "actual adjudication process for criminal cases."[207] If you are persuaded that the confrontation right should apply to critical

---

202. This is why, under *Crawford*, testimonial hearsay may be used at trial against a defendant who has previously had the opportunity to cross-examine the declarant. See supra note 49 and accompanying text.

203. See *Wade*, 388 U.S. at 224–27.

204. 390 U.S. 719, 725 (1968).

205. See supra note 64.

206. Missouri v. Frye, 566 U.S. 134, 143–44 (2012) (quoting Lafler v. Cooper, 566 U.S. 156, 170 (2012)).

207. Lynch, Our Administrative System, supra note 26, at 2123; see also Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 876–77 (2009); Máximo Langer, Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure, 33 Am. J. Crim. L. 223, 248 (2006).

adjudications other than trial, extending it to plea bargaining should not be a further stretch.

To be sure, there are practical difficulties in recognizing plea bargaining as a "critical adjudication." That's because plea bargaining is an informal process and the information on which participants rely can shift quickly,[208] making it tricky to determine whose statements the government has "used." But there is a fixed point in the process: the criminal charge. In the age of plea bargaining, a charge functions as the starting gun for plea negotiations (except when they've begun already) and is a prerequisite (or at least a corequisite) for any plea.[209] My proposal thus looks to the charge as the crucial moment for fixing Confrontation Clause witnesses. In the age of plea bargaining, the confrontation right should attach as to any person whose "testimony" the government relies on to *charge* a defendant. For ease of discussion, I call these people the government's "charging witnesses."

The argument for this approach to the Confrontation Clause does not depend on the notion that anyone in 1791, on either side of the Atlantic, thought confrontation rights should apply to charging witnesses. The argument is not originalist in that sense.[210] That said, the approach is

---

208. See Stephen Lee, De Facto Immigration Courts, 101 Calif. L. Rev. 553, 568 & n.77 (2013) ("Plea bargaining can be a dynamic process, and the parties can manipulate the parts comprising the record of conviction all the way up to the moment that the disposition is submitted to the court for approval."); see also Donald A. Dripps, Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies, 109 Penn St. L. Rev. 1155, 1159 (2005).

209. See Brian M. Murray, Prosecutorial Responsibility and Collateral Consequences, 12 Stan. J. C.R. & C.L. 213, 221 (2016) ("[P]rosecutors decide the charges from the start, thereby setting the terms of the negotiation . . . ."). The parenthetical caveats in the text are because plea negotiations sometimes begin before prosecutors file formal charges, even during the pendency of an investigation. This is especially common in white-collar criminal matters. See Daniel S. McConkie, Judges as Framers of Plea Bargaining, 26 Stan. L. & Pol'y Rev. 61, 70 (2015).

210. There are plausible historical antecedents for a *pretrial* right to confrontation. In the sixteenth century, Parliament enacted a statute providing that in treason cases, the accusers, "at the tyme of the arraynement[,] . . . yf they be then livinge, shalbe brought in pson before the partie soe accused." 5 & 6 Edw. 6 c. 11, § 9 (1552) (Eng.). Similar provisions appear at 1 & 2 Phil. & M. c. 10, § 11 (1554) (Eng.), and 13 Car. II, c. 1, § 5 (1661) (Eng.). It is unclear, however, whether defendants were permitted to ask questions of the arraignment witnesses. A single (rather ambiguous) sentence from Matthew Hale suggests that they were. 1 Matthew Hale, The History of the Pleas of the Crown 306 (Sollom Emlyn ed., London, Nutt & Gosling 1736) ("[T]he statute requires, that [the witnesses] be produced upon the arraignment in the presence of the prisoner to the end that he may cross examine them."). But this would be surprising in light of the (apparent) fact that cross-examination by the defendant was uncommon even at trial in the Tudor era. See John Bellamy, The Tudor Law of Treason: An Introduction 160 (1979). Another plausible antecedent for a right to pretrial confrontation looks to the examinations conducted under the Marian bail and committal statutes at the end of the eighteenth and beginning of the nineteenth century. Robert Kry examined the records of more than two dozen such examinations used in London trials in 1789. Robert Kry, Confrontation Under the Marian Statutes—A Response to Professor Davies, 72 Brook. L. Rev. 493, 513–16 (2007). Based on that review

consistent with the historical practice of confrontation in precisely the same way that the Court's approach in *Lafler* and *Frye* was consistent with the historical practices surrounding the right to counsel.[211] Part I explains that the Supreme Court "translated" the Sixth Amendment Counsel Clause (in the Lessig sense of translation), such that the meaning of the clause in its original context—ensuring that defendants had the assistance of counsel for the important part of their criminal cases—continues to govern in an era where plea bargaining is the important part of criminal cases.[212] My approach to confrontation works just the same way.[213]

It makes sense that the Confrontation Clause, like the Counsel Clause, began life as "basically a trial right."[214] In the criminal legal system of the Founding, trial was the only kind of critical adjudication that the system knew.[215] Confrontation *at trial* thus fully satisfied the desire for adversarial testing of the government's witnesses. But meaning depends on context,[216] and the relevant context has changed dramatically. For better or worse,

---

(and other legal materials of the era), Kry concluded that "Marian depositions were routinely conducted in the prisoner's presence" and that "[a]t some point before the framing, that practice hardened into a procedural right." Id. at 527; see also Thomas Y. Davies, Revisiting the Fictional Originalism in *Crawford*'s "Cross-Examination Rule": A Reply to Mr. Kry, 72 Brook. L. Rev. 557, 569 (2007) (criticizing Kry's analysis, sometimes harshly, but acknowledging that Kry's "description of the evolution of English Marian practice . . . [is] plausible"). As with the earlier treason statutes, the availability of cross-examination is less clear. Kry concludes that "at the time of the framing, the right to cross-examine at a committal hearing was not firmly established." Kry, supra, at 541. But, he continues, the "post-framing" evidence for a right to cross-examination is clearer, as "[e]very reported American decision to address the issue conditioned the admissibility of a committal examination on presence, and in most cases expressly on opportunity to cross-examine." Id. at 551. Even so, it is difficult to say whether, in the early decades of the nineteenth century, defendants had an affirmative right to cross-examination in Marian examinations or merely a right not to have evidence from uncrossed examinations used against them at trial. Both views can be found in Kry's sources. Compare State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (Super. Cts. L. & Eq. 1794) ("[O]ur act of Assembly . . . clearly implies the depositions to be read, must be taken in [the defendant's] presence"), with People v. Restell, 3 Hill 289, 300 (N.Y. Sup. Ct. 1842) ("The legislature has thus carefully provided that the defendant shall have the opportunity to cross-examine, and if that right is not enjoyed, the deposition cannot be read in evidence against him on the trial."). The Tudor/Stuart treason statutes and the Marian examination procedure of the eighteenth and nineteenth century each provided some kind of pretrial confrontation, but given the uncertainties surrounding cross-examination, I do not rely on either in making the case for updating the modern confrontation right to account for plea bargaining.

211. See supra section I.B.

212. See supra notes 116–122 and accompanying text.

213. As noted above, my point is not to defend translation as a general approach to constitutional interpretation. See supra note 122. I lack both the space and the inclination to weigh in on that question. My claim is only that if translation is appropriate for the Sixth Amendment right to counsel, it's appropriate for the Sixth Amendment confrontation right as well.

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

215. See supra note 121 and accompanying text.

216. See supra note 117 and accompanying text.

our criminal legal system uses two kinds of critical adjudications—trials, in a few cases, and plea bargains, in the rest. A criminal defendant's access to confrontation needn't and shouldn't hinge on which adjudicatory path their case takes.

III. SIXTH AMENDMENT DEPOSITIONS

This Part introduces and seeks to justify "Sixth Amendment depositions" as the mechanism for putting the updated Confrontation Clause into practice. Section III.A makes the affirmative case for depositions. After walking through how depositions would work, it argues that they would lead to better-informed plea prices, making plea bargaining fairer and more reliable. It also reflects briefly on the irony that a constitutional provision meant to end the practice of "trial by deposition" could, through the twists and turns of history, come to actually *require* depositions in criminal cases. Section III.B considers how a defendant's right to conduct Sixth Amendment depositions could be enforced. It suggests that an exclusionary rule—under which prosecutors would be barred from calling Sixth Amendment witnesses not made available for deposition—could be an effective tool. Section III.C evaluates potential objections. Would depositions cost too much?[217] Would they unduly burden witnesses?[218] While these are serious objections, they do not justify maintaining the status quo, which denies the confrontation right to the vast majority of criminal defendants. Section III.C also considers whether depositions would become just one more thing for prosecutors and defendants to negotiate about.[219] Would prosecutors demand that defendants waive depositions in exchange for a plea? In some cases, of course, they would, or they would try. But we know empirically that defendants do regularly exercise their *pretrial* rights, for instance when they move to suppress unconstitutional searches. The same would likely be true of depositions. Defendants would take depositions in cases where depositions would be valuable and trade them in cases where they would not.

A. *Confrontation by Deposition*

We have seen that the Sixth Amendment confrontation right should attach as to any "witness" whose testimonial hearsay the government relies on to charge a criminal defendant (i.e., the government's "charging witnesses").[220] The question remains: What does the updated confrontation right entitle defendants to do? The answer, of course, is cross-examination.[221] But when? At what point in a criminal proceeding should

217. See infra section III.C.1.

218. See infra section III.C.2.

219. See infra section III.C.3.

220. See supra Part II.

221. See Crawford v. Washington, 541 U.S. 36, 61 (2004) ("[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular

defendants be entitled to cross-examine the government's charging witnesses?

We can dispense with an implausible option—that cross-examination of the government's charging witnesses *at trial* is sufficient. As a practical matter, that option renders the Confrontation Clause once again ineffectual, given the tiny percentage of criminal cases that go to trial.[222] As the Court noted in *Frye*, "[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."[223] To be sure, for cases that actually make it to trial, in-court cross-examination of the government's witnesses *would* satisfy the adversarial testing purpose of the Confrontation Clause. But there is no good reason to design a rule that accomplishes its mission in a small fraction of the cases and leaves the others untouched.

A pretrial right of confrontation demands a pretrial procedural vehicle. The natural candidate is a deposition.[224] At a deposition, lawyers

---

manner: by testing in the crucible of cross-examination."); Akhil Reed Amar, Sixth Amendment First Principles, 84 Geo. L.J. 641, 706 (1996) (characterizing cross-examination as a right "at the heart of the Confrontation and Compulsory Process Clauses"); Richard D. Friedman, Anchors and Flotsam: Is Evidence Law "Adrift"?, 107 Yale L.J. 1921, 1939 (1998) (describing cross-examination as a right "underlying the Confrontation Clause"). That's not to say, of course, that cross-examination is the Confrontation Clause's sole concern. See Friedman, Meaning of Testimonial, supra note 63, at 257.

222. See supra notes 66–68 and accompanying text.

223. Missouri v. Frye, 566 U.S. 134, 143–44 (2012).

224. Another option would be to harness an existing procedural mechanism—the preliminary hearing—for the purpose. The way in which preliminary hearings are currently structured, however, poses difficulties. For one, preliminary hearings are constitutionally required only for charges filed by information, not by grand jury indictment. See 4 LaFave et al., supra note 195, § 14.2(d). A bigger problem is prosecutors are not obligated to call every witness at a preliminary hearing whose testimonial statements they used to charge, but only enough to satisfy a minimal evidentiary threshold. See Abraham S. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149, 1183 (1960). The purpose of a preliminary hearing, moreover, is not to probe the strengths and weaknesses of the prosecution's case. See Barber v. Page, 390 U.S. 719, 725 (1968). To be sure, it would be possible to reengineer the preliminary hearing so that it would provide pretrial confrontation. Indeed, something like this has been done in Great Britain in the modern era. See William J. Knudsen, Jr., Pretrial Disclosure of Federal Grand Jury Testimony, 48 Wash. L. Rev. 423, 429 (1973). Such a reengineered preliminary hearing would look a lot like the depositions proposed in this section, but likely with two differences. One is that there would be a judge or magistrate present, which would tend to increase the cost of pretrial confrontation. The other is that preliminary hearings, unlike depositions, are open to the public. This has both costs and benefits. On the one hand, as we will see below, there is reason to think that private depositions are less taxing on vulnerable crime victims than testifying in open court. See infra note 315 and accompanying text. On the other hand, those emphasizing the dignitary interests of the Confrontation Clause may see an advantage to face-to-face confrontation between accuser and defendant happening in a public forum. On the Confrontation Clause as serving dignitary interests, see Sherman J. Clark, An Accuser-Obligation Approach to the Confrontation Clause, 81 Neb. L. Rev. 1258, 1270–71 (2003); Toni M. Massaro, The Dignity Value of Face-to-Face Confrontations, 40 Fla. L. Rev. 863, 897–917 (1988).

examine a witness under oath in the presence of a court reporter. Depositions are an essential element of pretrial civil discovery, but they are rarely used or even available in criminal cases.[225] This Essay's approach to the Confrontation Clause would change that. In an era where plea bargaining is the dominant mode of adjudication, the Sixth Amendment should guarantee criminal defendants the opportunity to depose the government's charging witnesses.

How might these "Sixth Amendment depositions" work as a practical matter? The first step would be for the prosecutor to identify the "witnesses" whose testimonial statements she relied on to charge the defendant.[226] Some jurisdictions already require prosecutors to do something like this. In Iowa, for instance, when returning a formal charge, the prosecutor must attach a "minutes of evidence" containing "the name and occupation of the witness upon whose testimony" the "indictment is found" or the "information is based."[227] Jurisdictions without such a mechanism would need to develop a procedural vehicle for prosecutors to disclose their charging witnesses.[228]

After the government named its charging witnesses—and after any motions practice about whether those witnesses' statements qualify as testimonial—the defendant would be entitled to take depositions. In civil litigation, depositions are of two basic types—perpetuation and discovery.[229] Perpetuation depositions are conducted to "perpetuate" testimony when a witness is expected to be unavailable at trial.[230] Discovery depositions, as their name suggests, are tools for discovering new information from or about the deponent.[231] Functionally, Sixth Amendment depositions would work much like discovery depositions. That is, defense lawyers would probe the government's charging witnesses to test their testimony. Prosecutors could attend as well to interpose objections and ask

---

225. 5 LaFave et al., supra note 195, § 20.2(e).

226. The details of Sixth Amendment deposition procedure would need to be worked out over time. This Essay's goal is simply to provide a procedural sketch sufficient to show that Sixth Amendment depositions are practically feasible.

227. Iowa R. Crim. P. 2.4, 2.5(3). Iowa is one of a handful of states that currently permit discovery depositions in criminal cases. These state practices are discussed below. See infra note 284 and accompanying text.

228. Further discussion of the government's obligation to disclose witnesses, and how to enforce it, appears in section III.B.

229. See Jean Montoya, A Theory of Compulsory Process Clause Discovery Rights, 70 Ind. L.J. 845, 856 (1995) (distinguishing perpetuation and discovery depositions).

230. In a pre-*Crawford* article, John Douglass argued that expanded use of these kinds of depositions would advance Confrontation Clause values. See Douglass, Beyond Admissibility, supra note 30, at 269–70.

231. See generally John G. Douglass, Balancing Hearsay and Criminal Discovery, 68 Fordham L. Rev. 2097, 2188–89 (2000) [hereinafter Douglass, Balancing Hearsay] (describing discovery depositions).

questions of their own.[232] Prosecutors do not, of course, represent victims or other witnesses,[233] so jurisdictions would need to decide whether to permit the deponent to bring a lawyer.[234] Except in cases where the deponent had some sort of personal exposure in the matter, though, a lawyer for the deponent would, at least ordinarily, probably not be necessary.

Sixth Amendment depositions would differ from discovery depositions in two key respects. First, only "charging witnesses" would be required to sit for depositions. That means that Sixth Amendment depositions would not be a tool to discover exculpatory information from witnesses overlooked by law enforcement. Further, among people who did provide information to law enforcement, only those who made "testimonial" statements would be subject to deposition. People who sat for ordinary police interrogations could be deposed, as could police officers who made oral or written reports to prosecutors, but not individuals who spoke to the police with the "primary purpose" of handling an ongoing emergency;[235] people who made statements in informal contexts;[236] or (probably) very young children.[237] These limitations mean that a Sixth Amendment deposition regime would be more limited, and less costly, than a discovery deposition regime.

Second, Sixth Amendment depositions and discovery depositions have different purposes. The ostensible purpose of a discovery deposition

---

232. Because these witnesses would often be aligned with the prosecution (and thus amenable to speaking with the prosecutor informally), such cross-examination might be rare. That would be consistent with practice in civil litigation, where "counsel [frequently] will choose not to cross-examine one of their own witnesses during the witness's deposition." See 1 Steven G. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary Rule 32 cmt. (Feb. 2020 update).

233. See Laurie L. Levenson, Post-Conviction Death Penalty Investigations: The Need for Independent Investigators, 44 Loy. L.A. L. Rev. S225, S241 (2011).

234. Permitting the nonparty deponent to bring an attorney would be consistent with the "general rule" in civil litigation. Women in City Gov't United v. City of New York, 112 F.R.D. 29, 32 (S.D.N.Y. 1986) ("As a general rule, a person being deposed, whether a party or a non-party witness, is entitled to have counsel present at his deposition. This rule is intended to allow the deponent to intelligently exercise testimonial privileges—chief among them being the privilege against compulsory self incrimination."). In Florida, one of the few states that permits discovery depositions in criminal cases, victim-witnesses are entitled to have a victim advocate at their depositions. Fla. Stat. § 960.001(1)(q) (2020).

235. See Michigan v. Bryant, 562 U.S. 344, 349 (2011) (holding that statements by a shooting victim were not testimonial); Davis v. Washington, 547 U.S. 813, 828–30 (2006) (holding that statements of certain 911 callers were not testimonial, depending on whether circumstances indicated an ongoing emergency).

236. Crawford v. Washington, 541 U.S. 36, 51 (2004) ("An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.").

237. See Ohio v. Clark, 576 U.S. 237, 247–48 (2015) ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system.").

is to prepare a case for trial.[238] As the Supreme Court observed in 1947, depositions under the then-new Federal Rules of Civil Procedure play "a vital role in the preparation for trial," helping to ensure that "civil trials in the federal courts no longer need be carried on in the dark."[239] Though Sixth Amendment depositions might sometimes be useful to defendants as a trial preparation tool, that is incidental to their real function—providing information useful in plea bargaining.

The core purpose of the Confrontation Clause is to deploy adversarial testing of the government's case to enhance the fairness and accuracy of criminal adjudication.[240] That is precisely what Sixth Amendment depositions would do. "Accuracy," in the context of plea bargaining, means plea prices that reflect the likely outcomes of trials.[241] That means "higher prices" (longer sentences) for defendants without viable trial defenses and "lower prices" (shorter sentences, noncarceral dispositions, and dismissals) for defendants with a realistic prospect of acquittal at trial. By closing a crucial information deficit in plea bargaining, Sixth Amendment depositions would make it possible for plea prices to more accurately track what would happen at a hypothetical trial.

Witness testimony is the heart of many, if not all, criminal trials.[242] As an experienced criminal defense lawyer observed in a trade publication, "[E]ffective cross-examination that casts doubt on the credibility of a witness is what wins cases, period."[243] Yet when lawyers negotiate plea bargains, they usually have to speculate about the credibility and

---

238. See James W. McElhaney, Objecting at Depositions, Litigation, Summer 1988, at 51, 51–52 ("We use depositions for lots of purposes—to investigate the case, learn what the witnesses will say, prepare them for trial, evaluate our opponent's witnesses, give our own cases a trial run, keep witnesses from changing their stories, and push our opponents toward settlement."). But see Steven Lubet, Showing Your Hand: A Counter-Intuitive Strategy for Deposition Defense, Litigation, Winter 2003, at 38, 67 ("[I]t is simply an empirical error to treat deposition defense as though its primary purpose is to prepare for trial. Instead, the deposition should be recognized as a critical stage of an ongoing negotiation.").

239. Hickman v. Taylor, 329 U.S. 495, 501 (1947).

240. See supra notes 139, 200–201 and accompanying text.

241. See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2465 (2004) [hereinafter Bibas, Shadow of Trial] ("[T]he classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains."). There is now a large literature on the many factors that render actual plea outcomes "inaccurate" on this metric. See, e.g., id. at 2465–67 (describing factors—such as risk preferences, time discounting, agency costs, and poor lawyering—that render the shadow-of-trial model overly simplistic); see also William Ortman, Probable Cause Revisited, 68 Stan. L. Rev. 511, 555 n.250 (2016) [hereinafter Ortman, Probable Cause] (collecting sources).

242. Cf. Crawford v. Washington, 541 U.S. 36, 43 (2004) (observing that the "common-law tradition is one of live testimony in court subject to adversarial testing").

243. Denis M. de Vlaming, Practice Points: Trying a Criminal Case: A Primer, Champion, May 2005, at 46, 47.

effectiveness of the accusatory witnesses.[244] This information deficit impairs litigants' ability to predict their chances of prevailing at trial, which in turn distorts plea prices.[245] If a defendant doesn't know that the prosecution's eyewitness is partially blind, they may agree to an unduly harsh plea.[246] Conversely, if a defendant erroneously believes that the government's star cooperating witness can't put together two coherent sentences, they might refuse a plea deal that would be in their interest to accept.

Now enter Sixth Amendment depositions. Pretrial depositions of the government's charging witnesses would improve the informational ecosystem of plea negotiations in two principal ways. First, as the examples above suggest, they would be a mechanism for both sides to acquire information about the strengths and weaknesses of the government's case. Sometimes (as in the case of the eyewitness revealed to be partially blind) the new information would strengthen the defendant's hand in plea negotiations, leading (ceteris paribus) to a lower plea price. In other cases (like the supposedly bumbling cooperator revealed to be a polished witness), the new information would redound to the prosecution's benefit, leading to a higher plea price.[247]

Second, depositions would also have a signaling function. When a defendant knows that a prosecution witness has a credibility problem, they can use a deposition to signal that the problem exists and that they know about it. In some cases, where the revelation is serious, prosecutors might decide to dismiss the case.[248] More often, the revelation would cut into the prosecutor's leverage, leading to a lower plea price.

Less intuitively, but perhaps more importantly, Sixth Amendment depositions would be an opportunity for defense counsel to credibly signal

---

244. See Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, Civilizing Criminal Settlements, 97 B.U. L. Rev. 1607, 1625 (2017) ("The lack of access to evidence often inhibits defendants from forming an accurate, independent assessment of their likelihood of conviction to inform their bargaining positions."); see also Bibas, Shadow of Trial, supra note 241, at 2495 ("[I]nformation deficits are much greater in plea bargaining than in civil settlement negotiations.").

245. On plea bargaining as "pricing," see generally Russell D. Covey, Plea Bargaining and Price Theory, 84 Geo. Wash. L. Rev. 920 (2016) ("[E]xamining the impact of the major trends in criminal justice through the lens of price theory reveals how the state has managed to manipulate the plea bargaining market . . . ."); Anne R. Traum, Fairly Pricing Guilty Pleas, 58 How. L.J. 437 (2015) (describing how the imbalance between a defendant and a prosecutor's access to information can result in unfair pricing).

246. This example is inspired by one in Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1338 (2018).

247. Depending on the thoroughness of the prosecutor's precharge (or at least predeposition) investigation, this information might be new to them too.

248. See Mary Prosser, Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities, 2006 Wis. L. Rev. 541, 613 ("If the state finds that it cannot have confidence in its witnesses, for example, the prosecutor may decide to terminate the prosecution, amend the charges to more accurately correspond to the evidence, or revise its plea offer.").

to their client that their case would have problems at trial.[249] It is one thing for a defense lawyer to relay a prosecutor's insistence that a witness is credible. It is a far different thing for a defendant to see the witness's credibility firsthand. Like the information-acquisition function, the signaling function of Sixth Amendment depositions would contribute to more realistic assessments of what would happen if cases went to trial and, thus, to fairer and more accurate plea prices.[250]

I have to acknowledge that there is a degree of irony to this proposal. In *Crawford*, the Court pointed a finger at the English system of Marian examinations (sometimes called depositions)[251] as the very "abuse[]" that the right of confrontation emerged to curtail.[252] "[T]rial by deposition," Judge Nancy Gertner has observed, is "precisely what the Confrontation Clause was designed to avoid."[253] Yet I am arguing that the Confrontation Clause is not only compatible with depositions in criminal cases, but that it *requires* them. How can that be? The surface answer is that it was never the *taking* of depositions, but their *use* at trial, that brought constitutional scorn.[254] And even then, the Court in *Crawford* wasn't concerned with examinations (or depositions) full stop, but just ex parte ones.[255]

---

249. Cf. William J. Brennan, Jr., The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report, 68 Wash. U. L.Q. 1, 2 (1990) ("Discovery serves other ends as well. The most important of these subsidiary purposes, given courts' crowded criminal dockets, is that a guilty defendant is more likely to plea-bargain and plead if the prosecution discloses to him a strong government case.").

250. To be sure, there is a range of criminal cases in which even a revealing Sixth Amendment deposition might not materially affect the parties' plea bargaining leverage. That's because menus of overlapping criminal statutes with variable sentencing severity sometimes give prosecutors so much leverage that a defendant's probability of acquittal at trial doesn't figure meaningfully into the price of a plea. See Ortman, Second-Best, supra note 77, at 1078–83 ("[W]hen criminal codes are stacked with overlapping offenses, pleas are not negotiated 'in the shadow of the law.' . . . [F]or many crimes, the details of substantive law are unlikely to affect plea outcomes." (citing William J. Stuntz, Plea Bargaining and Criminal Law's Disappearing Shadow, 117 Harv. L. Rev. 2548, 2250–52 (2004))). In those cases, even a Sixth Amendment deposition that uncovered a prosecution witness's serious credibility problems might not result in a more favorable plea offer. But this dynamic does not apply in all cases. In high-stakes cases—homicides, for example—and in cases where the government's evidence is very weak, prosecutors lack leverage to set plea prices unilaterally. Id. at 1081. These are cases in which Sixth Amendment depositions would be particularly valuable.

251. See Davies, supra note 210, at 580 n.80 (describing and criticizing this nomenclature).

252. Crawford v. Washington, 541 U.S. 36, 44 (2004) ("Through a series of statutory and judicial reforms, English law developed a right of confrontation that limited these abuses.").

253. United States v. Nippon Paper Indus. Co., 17 F. Supp. 2d 38, 41 (D. Mass. 1998); see also Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993) ("[A]llowing trial by deposition violates both the literal language and the purpose of the Confrontation Clause . . . .").

254. See supra notes 129–132 and accompanying text.

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

The surface answer isn't wrong, but it's not satisfying. The deeper answer is that I am proposing a "second-best" approach to the Confrontation Clause.[256] A criminal legal system in which the government's evidence is probed via cross-examination at trial may be the ideal ("first-best") constitutional ordering. In a world of trials, Sixth Amendment depositions would be redundant, and maybe even wasteful. But our criminal legal system has very few trials. If the values behind the Confrontation Clause matter, it is better to test the government's evidence via depositions than to "adjudicate" cases with no adversarial testing at all. In this way, Sixth Amendment depositions are a second-best response to a criminal legal system in which trials have vanished.[257]

B. *Enforcing Sixth Amendment Depositions*

As the previous section explained, the Sixth Amendment deposition process would begin with the prosecutor disclosing the names of witnesses they relied on to charge the defendant.[258] The list would include those who provided information directly to the prosecutor, as well as those who are "witnesses" by virtue of making a testimonial statement to another witness, such as a police officer. The government's disclosure is necessary (defendants cannot depose the government's charging witnesses unless they know who they are), but it introduces complications. One complication is that prosecutors might sometimes have a legitimate need to keep a charging witness anonymous at the time they file an information or indictment; that complication is addressed in the next section.[259] Another significant complication—and the one addressed here—is that a prosecutor might not be fully forthcoming in their witness disclosure. A prosecutor who wanted to avoid a particular deposition might, that is, leave a witness off the list.[260] So we need an enforcement mechanism.

An exclusionary rule would be a useful, albeit incomplete, solution. Absent special circumstances, prosecutors could be prohibited from calling a witness at any proceeding that implicates the merits of the case (such as a preliminary hearing or a trial) if the witness was (1) known to the government when it filed charges, but (2) not included in its disclosure

---

256. For background on the general theory of second best, see Ortman, Second-Best, supra note 77, at 1062–65. For an illuminating discussion of second-best thinking in constitutional interpretation, see Lawrence B. Solum, Constitutional Possibilities, 83 Ind. L.J. 307, 311–12 (2008).

257. On the "vanishing" criminal trial, see Ortman, Second-Best, supra note 77, at 1062–63.

258. See supra notes 226–228 and accompanying text.

259. See infra section III.C.2.

260. The well-known problem of prosecutorial noncompliance with Brady v. Maryland, 373 U.S. 83 (1963), suggests that this has to be taken seriously. See Bennett L. Gershman, Litigating *Brady v. Maryland*: Games Prosecutors Play, 57 Case W. Rsrv. L. Rev. 531, 533 (2007) ("[V]iolations of *Brady* are the most recurring and pervasive of all constitutional procedural violations, with disastrous consequences . . . .").

of charging witnesses.[261] The point of such an exclusionary rule is not to ensure fair preliminary hearings or trials, though that may be a side benefit. Rather, the point is to give prosecutors an incentive to be comprehensive in their disclosures, lest an omission leave them without their in-court witnesses when they need them.[262]

With an exclusionary rule, the government's disclosure of its charging witnesses would no longer present a ripe opportunity for gamesmanship. When a prosecutor chooses not to include a witness they relied on to charge the defendant, then (again, absent special circumstances) that witness would simply be out of the case, permanently. The strength of the witness's inculpatory information would no longer be one of the factors that prosecutors and defense lawyers need to take into account when evaluating the government's case.[263] It would be as if the government's witness had never made a testimonial accusatory statement at all.

There would be circumstances where prosecutors knew, at the time they charged a defendant, that a witness had made a testimonial statement concerning the case but did not know that the statement was inculpatory (or where they knew that it was inculpatory but not that it was reliable) until later. And sometimes prosecutors would not even learn of a witness's existence until after they had charged the defendant. A question thus arises about how to deal with these new or newly relevant witnesses. Should the defendant have the opportunity to depose them? There are two approaches the law could take on that question, and each has advantages and disadvantages. As this Essay is the first to make the case for Sixth Amendment depositions, it seems unnecessary to take a firm position on this subsidiary question. Instead, I'll present the options.

One option—call it the "closed list" approach—is to make Sixth Amendment depositions available only for witnesses disclosed when the defendant is charged.[264] The primary advantage of this approach is its administrability. With a closed list, the number of potential depositions would be fixed from the inception of the case. If the defendant intended to actually conduct depositions (as opposed to trading depositions for leniency),[265] those depositions could be completed, and their

---

261. In previous work I suggested a similar exclusionary rule to counter a different problem in modern criminal procedure—the lack of precharge evidentiary scrutiny. See Ortman, Probable Cause, supra note 241, at 567 n.323 (proposing "an exclusionary rule providing that, absent special circumstances, at trial the government may only offer evidence that it presented to the grand jury or screening magistrate").

262. Cf. Erica Hashimoto, Motivating Constitutional Compliance, 68 Fla. L. Rev. 1001, 1010 (2016) (observing that "shaping . . . law enforcement incentives" is "the primary purpose of the [Fourth Amendment] exclusionary rule").

263. See supra notes 242–247 and accompanying text.

264. Note, however, that where the government files a superseding indictment or information, new charges would require new disclosures. Even on the closed-list approach, then, the universe of Sixth Amendment depositions wouldn't be entirely fixed upon the filing of the *first* charges.

265. See infra section III.C.3.

informational value incorporated into plea negotiations, by a date (relatively) certain.

The closed list's chief disadvantage is that it reintroduces the prospect of prosecutorial misconduct. Prosecutors wishing to avoid depositions might assert disingenuously that they did not rely on a particular witness to charge the case, counting on the fact that they could point to some intervening development as their reason for "reevaluating" that determination if the case went to trial. Even more dangerously, prosecutors might cut precharging investigations short to intentionally avoid learning about witnesses until after charges are filed and the list of deposable witnesses closed. Courts would have to develop rules to curtail such abuses. One possibility would be a rebuttable presumption that prosecutors relied on any witnesses whose inculpatory information they possessed or reasonably should have possessed at the time of charging. That would put the burden on prosecutors to defend their omissions.[266] The trial court would hear the prosecutor's explanation and determine whether the person should have been on the list of charging witnesses. If so, the court would enter an order excluding the person (or the person's testimonial hearsay) from any subsequent trial or hearing going to the merits.

The second option—the "open list" approach—would allow the prosecutor to amend her disclosure of charging witnesses prior to trial (or some date close to trial), with the defendant acquiring the opportunity to depose any witness added to the list.[267] The theory would be that once the government identifies additional witnesses, they become part of the body of evidence under which the defendant is charged. The advantages and disadvantages of this approach are a mirror image of the advantages and disadvantages of the closed list. The major advantage is that it (largely) avoids the risk of prosecutorial manipulation. The prosecutor would gain no advantage from holding back witnesses at the time of charging, because the witnesses would have to be identified (and subjected to deposition) later. Its chief disadvantage is that it would be practically unwieldly. The deposition "phase" of litigation would have to be reopened every time the prosecutor identified an additional witness. Moreover, depositions taken as a trial date nears may be more about preparing a case for trial than providing information useful for plea bargaining, and thus attenuated from the rationale for having Sixth Amendment depositions in the first

266. To the extent that the explanation relied on confidential information involving an ongoing law enforcement investigation, it might be provided in an "attorney's eyes only" context or even in an ex parte declaration from the prosecutor to the judge. See Ion Meyn, The Unbearable Lightness of Criminal Procedure, 42 Am. J. Crim. L. 39, 86 (2014).

267. This is how it works in at least some of the states that permit criminal depositions. See, e.g., State v. Damme, 522 N.W.2d 321, 326 (Iowa Ct. App. 1994) (affirming conviction notwithstanding late-added witness where the "[d]efendant was given the opportunity to depose the witness").

place.[268] I leave it to future analysis to decide which set of advantages and disadvantages is better.

C. *Objections*

If you are with me so far—that is, if you agree that the right to depose the government's charging witnesses would update the Confrontation Clause for the age of plea bargaining—you might still be worried about the practicality or desirability of incorporating depositions into criminal cases. This section is meant to assuage such concerns.

While this Essay is the first to locate a right to depositions in criminal cases in the Confrontation Clause, others have advocated for criminal depositions on policy grounds, and still others have opposed them.[269] One of the sharpest objections to depositions in criminal cases was published by a committee of the ABA in 1970. The committee articulated several reasons for its opposition:

> First, there is no inherent limitation of cost on the conduct of unnecessary depositions, because in many cases the costs of the defense must be borne by the state . . . . [Second,] the imposition on civilian witnesses may discourage their coming forward in criminal cases. And, finally, underlying the importance of these considerations is the belief that depositions in addition to the disclosures otherwise required by these standards will not be necessary in most criminal cases. Under its responsibilities in bringing a criminal case, the prosecution will ordinarily possess written statements or transcripts of testimony of potential witnesses of such completeness that additional interrogation by the defense attorney, prior to trial, will be of only marginal value in most cases.[270]

The subsections below address the first two of these objections—that criminal depositions would be too costly and that they would impede

---

268. See supra notes 240–242 and accompanying text.

269. For an overview of the debate, see generally John F. Yetter, Discovery Depositions in Florida Criminal Proceedings: Should They Survive?, 16 Fla. St. U. L. Rev. 675 (1988). Interesting recent calls for criminal depositions (on nonconstitutional, policy grounds) include Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 Calif. L. Rev. 1585, 1638–40 (2005) [hereinafter Brown, The Decline]; Douglass, Balancing Hearsay, supra note 231, at 2187–92; Prosser, supra note 248, at 607–13.

270. Standards Relating to Discovery & Proc. Before Trial § 2.5 cmt. at 87 (Am. Bar Ass'n, Approved Draft 1970). The quoted text omits one other objection advanced by the ABA committee: "[I]f stated as a right, the need to take depositions might be construed as part of the adequacy of representation required by the constitutional right to counsel." Id. This objection is quite peculiar. It is true that if criminal defendants have a right to take depositions, then competent defense counsel would, under some circumstances, have the duty to assist their clients by conducting them. Sixth Amendment depositions would not be necessary in every case; sometimes, the best and highest use of the right would be to trade it away in plea bargaining. See infra section III.C.3. But yes, of course, it would sometimes be a defense attorney's duty to take depositions.

witnesses. A final subsection deals with an objection the committee did not raise—that depositions would just become just another bargaining chip for prosecutors and defense lawyers to wrangle over.

Before turning to those serious concerns, however, a word on the ABA committee's remaining critique—that criminal depositions are unnecessary because the "written statements" of government witnesses are reliable enough. If you read section II.A of this Essay, the ABA's final objection may sound familiar, as it picks up just where the judges who tried Sir Walter Raleigh left off.[271] It is hard to conjure an outlook more antithetical to the values underlying the Confrontation Clause. As the Supreme Court observed in *Crawford* (channeling an important Antifederalist): "[W]ritten evidence . . . [is] almost useless; it must be frequently taken *ex parte* [sic], and but very seldom leads to the proper discovery of truth."[272]

1. *Resource Considerations.* — One persistent objection to depositions in criminal cases is that they would be too expensive.[273] Opponents point out that the state must pay not only for the costs of prosecutors (and often public defenders) to attend but also for the time of law enforcement officers called to sit for depositions.[274] On one level, this objection rings true—depositions are not free.[275] Of course, that could be said about almost any rule or procedure involved in the criminal legal system. Requiring police officers to write out affidavits to secure search warrants is expensive.[276] So is providing lawyers for indigent defendants.[277] Trials are really expensive,[278] as are appeals,[279] as are collateral proceedings attacking convictions.[280] That something isn't free tells us virtually nothing about whether it is worthwhile.[281]

---

271. See supra notes 156–158, 161 and accompanying text.

272. Crawford v. Washington, 541 U.S. 36, 49 (2004) (emphasis added) (internal quotation marks omitted) (quoting Richard Henry Lee, Letter IV by the Federal Farmer, reprinted in 1 Bernard Schwartz, The Bill of Rights: A Documentary History 469, 473 (Leon Friedman, Karyn Gullen Browne, Joan Tapper, Betsy Nicolaus, Christine Pinches & Jeanne Brody eds., 1971) (misquotation)).

273. See Douglass, Balancing Hearsay, supra note 231, at 2190 (describing objections to discovery depositions); Prosser, supra note 248, at 613 (same).

274. See Yetter, supra note 269, at 684.

275. See Ortman, Second-Best, supra note 77, at 1101.

276. See William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 Harv. L. Rev. 842, 848 (2001).

277. See Lawrence C. Marshall, *Gideon*'s Paradox, 73 Fordham L. Rev. 955, 960–61 (2004).

278. See Bibas, Shadow of Trial, supra note 241, at 2504 n.166 ("Even a slam-dunk trial imposes significant costs on the court and lawyers . . . ."); Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1932 (1992) ("Trials are elaborate and costly affairs.").

279. See Peter D. Marshall, A Comparative Analysis of the Right to Appeal, 22 Duke J. Compar. & Int'l L. 1, 10 (2011).

280. See Ryan W. Scott, In Defense of the Finality of Criminal Sentences on Collateral Review, 4 Wake Forest J.L. & Pol'y 179, 185 (2014).

281. See Prosser, supra note 248, at 613 (contending that arguments about the costs of depositions "ignore the significant truth-seeking value of criminal depositions"). The ideal

Perhaps, then, the objection is really that depositions would be *impractically* expensive. If so, the objection has a ready answer. Sixth Amendment depositions would, as suggested above, be functionally similar to discovery depositions.[282] Though most states do not afford criminal defendants the opportunity to conduct discovery depositions, a handful do, and they seem no worse for the wear.[283] The procedural details vary, but in at least six states—Florida, Indiana, Iowa, Missouri, North Dakota, and Vermont—criminal defendants may depose prosecution witnesses as a matter of right.[284] Some of these states are thinly populated, and perhaps their experience is not generalizable.[285] Florida is the third largest state by population, so it makes sense to focus there.[286]

Florida has permitted criminal defendants to take discovery depositions as a matter of right for almost half a century.[287] At least twice in that time, criminal depositions have come under political attack by law enforcement interests.[288] In 1988, a coalition of Florida's elected prosecutors, the Florida Department of Law Enforcement, police departments, and organizations representing crime victims attempted to have depositions abolished.[289] They estimated that depositions cost the

---

way to address the question would be through cost-benefit analysis. But analyzing the costs and benefits of a procedural mechanism that does not yet exist is probably impossible. My aim for this section is more modest—to show that Sixth Amendment depositions are not *impractical*. In other words, I hope to show that courts would not be dooming (or further dooming) the criminal legal system if they adopted my proposed approach to confrontation.

282. See supra text accompanying notes 231–232.

283. See George C. Thomas III, Two Windows into Innocence, 7 Ohio St. J. Crim. L. 575, 592–601 (2010) (examining the frequency and costs associated with discovery depositions in various states).

284. See Fla. R. Crim. P. 3.220(h); Ind. Code § 35-37-4-3 (2020); Iowa R. Crim. P. 2.13; Mo. R. Crim. P. 25.12; N.D. R. Crim. P. 15(a)(2); Vt. R. Crim. P. 15; see also Darryl K. Brown, Discovery, *in* 3 Reforming Criminal Justice 147, 156 & n.29 (Erik Luna ed., 2017). In a handful of other states, defendants may be allowed deposition based on a showing of good cause, or something akin to it. See Prosser, supra note 248, at 609 ("In [some jurisdictions], such as Texas, Nebraska, and New Hampshire, the defendant must make a showing of the need for the deposition."); Thomas, supra note 283, at 592–98 ("[S]ix states . . . permit[] defendants to depose all prosecution witnesses and five others . . . permit[] discovery upon leave of the court.").

285. Thomas, supra note 283, at 592–93 ("A discovery process that might work just fine in Vermont could pose an administrative nightmare in a more populous state. Indeed, of the six states that permit defendants to depose all prosecution witnesses, four of them are primarily rural—Iowa, Missouri, North Dakota, and Vermont.").

286. Press Release, U.S. Census Bureau, Florida Passes New York to Become the Nation's Third Most Populous State, Census Bureau Reports (Dec. 23, 2014), https://www.census.gov/newsroom/press-releases/2014/cb14-232.html [https://perma.cc/P3RR-URQL]. In highlighting Florida, I am following George Thomas's lead. See Thomas, supra note 283, at 593.

287. Yetter, supra note 269, at 680–81 (explaining the origins of Florida's discovery deposition procedure in 1972).

288. On prosecutorial opposition to depositions generally, see Ion Meyn, The Haves of Procedure, 60 Wm. & Mary L. Rev. 1765, 1819 (2019).

289. Yetter, supra note 269, at 684.

state more than $35 million annually in attorney and police officer time.[290] The legislature directed the state's supreme court to look into the matter, and the court assigned the task to a commission.[291] The commission reported back that while some tinkering with the procedural details would be useful, depositions "make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process" and "should be retained as part of Florida's Criminal Justice process and . . . not abolished or significantly curtailed."[292] A strikingly similar process played out in 1996, when a coalition that included the state's Attorney General, twenty of its elected state's attorneys, all three United States Attorneys, and a host of organizations representing police officers and prosecutors again attempted to persuade the legislature or the state supreme court to abolish criminal depositions.[293] And again, while the abolitionists succeeded in getting some minor procedural reforms, the system of depositions proved resilient to their attacks.[294]

The coalitions seeking to abolish Florida criminal depositions in 1988 and 1996 were not lacking for political influence. Prosecutors tend to get their way on matters of criminal justice policy.[295] If they had a good case to make that criminal depositions in Florida were impractically expensive, one can reasonably expect that they would have made it.[296] Yet these coalitions failed in their efforts to abolish depositions twice in less than ten years. Their failure is circumstantial evidence that criminal depositions are *not* impractical in Florida. That, in turn, is evidence—again circumstantial—

290. Id.

291. Id. at 675–76.

292. Id. at add. at 695 (internal quotation marks omitted) (quoting Crim. Discovery Comm'n, Report of the Florida Supreme Court's Commission on Criminal Discovery 20 (1989)).

293. See Howard Dimmig, Deposition Reform: Is the Cure Worse than the Problem?, Fla. Bar J., July–Aug. 1997, at 52, 53–55.

294. Id.

295. See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 727–28 (2005) (noting that "one of the most . . . powerful lobbying groups in criminal law consists of those exercising the penal power: law enforcement and, in particular, prosecutors"); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 534 (2001) (explaining that "legislators have good reason to listen when prosecutors urge some statutory change" and describing this dynamic as "the single most important feature for defining criminal law"). But see Jeffrey Bellin, The Power of Prosecutors, 94 N.Y.U. L. Rev. 171, 207–08 (2019) (noting that "[t]he mechanism by which prosecutorial lobbying influences criminal law is unclear" and arguing that "[w]hat commentators think of as effective prosecutor lobbying may, in fact, be a shared interest among prosecutors and lawmakers").

296. The law enforcement coalition estimated that "in 1987, discovery depositions cost police departments statewide 750,000 lost police man hours." Thomas, supra note 283, at 594. Noting that there were approximately 350,000 serious crimes in Florida that year, George Thomas calculates that this amounts to "about two police hours per case." Id.

that recognizing a Sixth Amendment right to depositions wouldn't overwhelm our criminal legal systems.[297] If Florida can do it, so can the rest of us.

2. *Confidential Informants and Vulnerable Witnesses.* — A more substantial policy objection to depositions in criminal cases focuses on their effects on witnesses. Witnesses may be "discouraged" (the ABA committee's term) from reporting crimes to police if they know that they will have to undergo a deposition.[298] Relatedly, defense lawyers might use depositions to "harass" witnesses by asking about embarrassing or otherwise private matters.[299] And defendants themselves, armed with knowledge of the witnesses against them and their testimony, might—in the words of an oft-cited New Jersey Supreme Court decision—"take steps to bribe or frighten [witnesses] into giving perjured testimony or into absenting themselves so they are unavailable to testify."[300]

As applied to ordinary prosecution witnesses, these concerns look like thin pretexts for denying criminal defendants the information-gathering tools possessed by civil litigants. In an influential address on criminal discovery generally, Justice William Brennan refuted several of them.[301] To the possibility that defendants might use discovery tools to harm witnesses or bully them into not testifying, Brennan replied that while "there have been instances where this has happened," it could and should be handled on a case-by-case basis.[302] And as for the "old hobgoblin perjury," Brennan wrote: "I should think . . . that its complete fallacy has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed and perjury has not been fostered."[303]

Because he did not focus on depositions, Brennan did not have reason to consider the possibility that defense lawyers would, by asking harassing questions at depositions, discourage witnesses from testifying. The line between harassing deposition questions and probative deposition questions, though, depends on one's vantage point. Imagine that a defense lawyer is deposing an eyewitness to a bank robbery who called a police tip line promising a $5,000 reward for information leading to an arrest. From the witness's perspective, the lawyer's questions about their

---

297. Id. at 601 (concluding, based on the experience of Florida and other states that have tried criminal depositions, that incorporating depositions into criminal practice is "achievable").

298. See Standards Relating to Discovery & Proc. Before Trial, supra note 270, at § 2.5 cmt. at 87.

299. See Yetter, supra note 269, at 685 (describing the argument of deposition "abolitionists" in Florida).

300. State v. Tune, 98 A.2d 881, 884 (N.J. 1953).

301. See Brennan, supra note 249, at 290–94.

302. Id. at 292.

303. Id. at 291; see also Rand N. White & Tom E. Wilson, Note, The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice, 28 Stan. L. Rev. 1207, 1235 (1976) (explaining that the experience of civil depositions "deflates the proposition that a correlation exists between expanded use of the deposition and unlawful conduct").

child's medical bills will undoubtedly feel like harassment. From the lawyer's perspective, the questions are essential to determining whether the monetary reward biased the accusation.

Witness-related objections to criminal depositions have more force if we focus on two specific types of prosecution witnesses: confidential law enforcement witnesses, on the one hand, and crime victims, especially vulnerable victims of crimes involving sexual and domestic violence, on the other.

a. *Confidential Witnesses.* — Prosecutors may object that depositions of confidential informants and undercover law enforcement agents would risk witness safety.[304] This objection is not entirely without merit.[305] Confidential informants and undercover agents whose testimonial hearsay prosecutors rely on would be subject to deposition under my proposal. Their identity would thus need to be disclosed to defendants at an earlier point in the criminal process than it is today. In some cases, the change in timing could implicate legitimate law enforcement interests.[306] That might happen, for instance, when a confidential informant is still conducting controlled drug buys on other targets, or where an undercover agent stays in the field after charges are filed against some, but not all, members of a criminal conspiracy.

In the unusual case where the timing of the disclosure implicates legitimate law enforcement interests, there are a number of things courts could do. The simplest option would be to delay depositions until the relevant law enforcement activities were complete, but this will not always be possible.[307] Courts have allowed witnesses to testify anonymously even at trials,[308] and anonymous depositions—using, for instance, screens and voice disguising technology—could be an option in extreme cases. Or the witness's identity might be kept secret from the defendant, but disclosed to his lawyer under a protective order. It is even possible that a defendant

---

304. I am grateful to Darryl Brown for suggesting this point.

305. Informants who provided background information that does not form part of the corpus of the government's evidence against a defendant would, however, remain out of sight. See generally United States v. Green, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (describing the "informant's privilege," which "allows the Government to refuse to disclose the identity of a person who has furnished information about criminal activities").

306. See Miriam H. Baer, Timing *Brady*, Colum. L. Rev. 1, 55 (2015) ("[I]nformation that enables one defendant to warn his compatriots that they are investigative targets also harms society."); Brown, The Decline, supra note 269, at 1622 ("In some contexts [especially federal practice], information disclosure might compromise ongoing investigations based on confidential government information, such as informant identities. It could also facilitate defendant perjury.").

307. This approach may be problematic where the defendant is detained pending trial, as delaying depositions could extend the period of pretrial confinement.

308. See United States v. Gutierrez de Lopez, 761 F.3d 1123, 1139–47 (10th Cir. 2014) (using a two-prong framework to evaluate whether "anonymous" trial testimony violates the Confrontation Clause).

could be excluded altogether from a particularly sensitive deposition conducted by his lawyer, though this would raise additional difficulties.[309]

b. *Victims/Vulnerable Witnesses.* — The other category of witnesses for whom depositions pose special concerns are victims (and potentially other witnesses) of violent crime. George Thomas explains the difficulty: "Depositions are traumatic experiences for all witnesses and more so for victims of crime, particularly violent crime, because they must relive the incident and also must face aggressive questioning."[310] There's no denying that recognizing a Sixth Amendment right to depositions in criminal cases would impose additional burdens on crime victims, including the victims of sexual and domestic violence.[311] There are, however, a few reasons why those burdens may be less extensive than they first appear.

First, it is significant that the right to Sixth Amendment depositions would extend only to those who have made "testimonial" statements. After *Ohio v. Clark*, that limitation means there would probably not be Sixth Amendment depositions of very young children, an important subcategory of vulnerable crime victims.[312] It also means that there would not be Sixth Amendment depositions of victims who provided information to police under circumstances where the "primary purpose" of the interrogation was to deal with an ongoing emergency.[313] As noted earlier, the reach of Sixth Amendment depositions would be narrower than the reach of ordinary discovery depositions.[314]

Second, there is reason to think that deposition testimony is less traumatic than trial testimony. In a 2005 article on *Crawford*'s impact in domestic violence cases, Tom Lininger quotes a technical assistance packet prepared by Nicole Lindenmyer of the Battered Women's Legal Advocacy Project*:* "Depositions are usually less stressful" than testifying at

---

309. Excluding the defendant altogether poses a knotty legal question. On one hand, personal presence *at trial* is a core component of the Confrontation Clause. See Illinois v. Allen, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."). On the other hand, it isn't obvious whether adversarial testing at a deposition depends on the defendant's personal presence. I see reasonable arguments on both sides and leave the question to future analysis.

310. Thomas, supra note 283, at 598.

311. See Gold et al., supra note 244, at 1648 ("[Vulnerable] witnesses and victims already face the emotional turmoil of having to tell their stories at trial, and allowing them to be deposed would force them to experience that trauma twice in the criminal process.").

312. 576 U.S. 237, 247–48 (2015) ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system.").

313. Davis v. Washington, 547 U.S. 813, 828–30 (2006) (holding that where the "primary purpose" of an interrogation "was to enable police assistance to meet an ongoing emergency," the declarant's statement was nontestimonial).

314. See supra notes 235–237 and accompanying text.

trial, Lindenmyer noted, "because the victim may have her own attorney present, and she can take breaks as often as needed."[315]

Third, so long as *Maryland v. Craig* remains good law,[316] steps could be taken to ensure that vulnerable witnesses are not physically in the deposition room with defendants.[317] In *Craig*, the Court approved the trial testimony of a child-witness using a one-way video system in which the defendant could see the witness, but the witness could not see the defendant.[318] The argument for procedures like the one approved in *Craig* would be even stronger in depositions than in trials, as there is no risk that the technique could prejudice the defendant in a jury's eyes. Upon a "case-specific" finding of "necessity,"[319] Sixth Amendment depositions could proceed with the defendant watching by video from a separate location. With real-time video, defendants could even suggest lines of questioning to counsel electronically or during breaks.[320] Depositions taken under these circumstances would allow for adversarial testing of the government's case without subjecting vulnerable witnesses to the trauma of being in a small room with the defendant.

To be sure, these are points in mitigation—it remains true that Sixth Amendment depositions would impose burdens on crime victims, including vulnerable ones. Those costs are the unfortunate byproduct of an adversarial system of criminal justice.[321] Maybe we would be better off with an inquisitorial system where factfinding is left to a neutral arbiter

---

315. Lininger, supra note 79, at 796 (internal quotation marks omitted) (quoting Nicole A.F. Lindenmyer, *Washington v. Crawford*: Must Crime Victims Testify Against the Defendant?, Battered Women's Legal Advocacy Project Technical Assistance Packet 4 (2004)); see also Mosteller, Confrontation of Witnesses, supra note 180, at 610 (noting that victims may be more willing to testify at "the outset of the prosecution").

316. 497 U.S. 836 (1990). At the moment, *Craig* is good law. See 6 LaFave et al., supra note 195, § 24.2(e) & n.101. It may be hanging on by a thread. See Mary Fan, Adversarial Justice's Casualties: Defending Victim-Witness Protection, 55 B.C. L. Rev. 775, 806 (2014) (noting that after *Crawford*, "the continued viability of *Craig* . . . is unclear"); Richard D. Friedman, The Confrontation Clause Re-Rooted and Transformed, 2004 Cato Sup. Ct. Rev. 439, 454 ("The categorical nature of [Justice Scalia's] opinion in *Crawford* squares better with his *Craig* dissent than with Justice O'Connor's looser majority opinion in *Craig*.").

317. Of course, if criminal defendants are not entitled to be personally present at depositions, see supra note 309, the *Craig* point is moot.

318. *Craig*, 497 U.S. at 841–42.

319. Id. at 855.

320. Id. at 840–42 (explaining that the defendant maintained "electronic communication with defense counsel" throughout the child-witness's testimony).

321. The Court addressed this issue squarely in *Coy v. Iowa*: "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." 487 U.S. 1012, 1020 (1988).

rather than to the clash of dueling advocates.[322] Maybe not.[323] But for better or worse, we have a system that *depends* on adversarial testing, yet does not *do* adversarial testing. That's the void that we need Sixth Amendment depositions to fill.

3. *Confrontation as Unbundled Bargaining Chip.* — Like nearly all criminal procedure rights,[324] Sixth Amendment depositions would be waivable.[325] Does that mean that they would inevitably become just one more chip for defense lawyers or prosecutors to use in bargaining? Yes, to an extent. As Anne Traum observes, "In guilty plea adjudication, defendants do not so much exercise constitutional rights as convert them to bargaining chips to use in the plea-bargaining process."[326] In some situations, defendants might trade their right to conduct depositions for a reduced charge or sentence. In others, prosecutors might penalize a defendant who insisted on taking depositions by, for instance, adding charges onto their case.[327] The inevitable emergence of a "market" for

---

322. See Robert P. Mosteller, Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness, 36 N.C. J. Int'l L. & Com. Reg. 319, 353 (2011) ("As to whether the adversarial or inquisitorial model is superior in factfinding, new empirical evidence supports the theoretical superiority of inquisitorial side."); Franklin Strier, Making Jury Trials More Truthful, 30 U.C. Davis L. Rev. 95, 143–44 (1996) ("As opposed to the adversary system, the inquisitorial system trial is remarkably unencumbered in its search for truth.").

323. See Gerald Walpin, America's Adversarial and Jury Systems: More Likely to Do Justice, 26 Harv. J.L. & Pub. Pol'y 175, 175 (2003) ("The Article advocates for America's adversarial and jury systems because they are logically superior and, in my experience, they most often succeed in rendering justice.").

324. See United States v. Mezzanatto, 513 U.S. 196, 200–01 (1995) ("Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption."); see also William J. Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 772 n.28 (1989) ("For reasons that are not altogether clear, courts have never seriously considered the possibility of making criminal defendants' rights nonwaivable.").

325. It would be unwise to make Sixth Amendment depositions nonwaivable, as we would not want a rule that *requires* (for instance) a child-sex-abuse defendant to take the victim's deposition. A closer "waivability" question concerns the prosecutor's disclosure of their charging witnesses. See supra notes 226–228 and accompanying text. An argument could be made that a defendant cannot "knowingly" waive their right to Sixth Amendment depositions until they ascertain (from the prosecutor's list) who they would have the right to depose. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."). Given the strong preference for waivability, see supra note 324, such an argument seems unlikely to succeed. A nonwaivable right to the prosecutor's disclosure of charging witnesses would, moreover, complicate the practice of precharge plea bargaining. For a discussion of that practice, see Michael M. O'Hear, The End of *Bordenkircher*: Extending the Logic of *Apprendi* to Plea Bargaining, 84 Wash. U. L. Rev. 835, 895–97 (2006).

326. Anne R. Traum, Using Outcomes to Reframe Guilty Plea Adjudication, 66 Fla. L. Rev. 823, 827 (2014); see also Russell D. Covey, Plea-Bargaining Law After *Lafler* and *Frye*, 51 Duq. L. Rev. 595, 619 (2013) [hereinafter Covey, Plea-Bargaining Law] ("In essence, virtually anything and everything can be a bargaining chip.").

327. Or these might be the same situations and vary only depending on the viewer's normative priors. In that, they mirror the debate between "trial penalties" and "plea

depositions means that not every case would actually see Sixth Amendment depositions. It does not, however, mean that incorporating depositions into our criminal procedure would be a futile exercise.

The approach to the Sixth Amendment this Essay proposes would "unbundle" the confrontation right from a defendant's package of trial rights.[328] Defendants could invoke their right to confrontation without simultaneously invoking all the other rights that accompany a trial. Unbundled rights are easier (i.e., less costly) for defendants to exercise.[329] That's significant. For one thing, if defendants can *credibly* threaten to exercise their Sixth Amendment confrontation right, that supplements their leverage in plea negotiations. In a world where prosecutors hold almost all the negotiating power,[330] changing the bargaining dynamic is not a bad thing.

But more importantly, making the right to confrontation less costly to exercise means that in many cases, it *could* be exercised. In today's criminal legal system, prosecutors have enough leverage to dissuade defendants from invoking their trial rights in all but the most unusual cases.[331] But they don't have enough leverage to systematically dissuade defendants from invoking their *pretrial* constitutional criminal procedure rights. Some try. Some prosecutors, that is, condition plea offers on the defendant not filing, for instance, a Fourth Amendment motion to suppress.[332] That practice surely deters some defendants, but motions to suppress under the Fourth Amendment remain fairly common in criminal litigation, as do motions to suppress under the Fifth Amendment.[333] The same would likely

---

discounts." See generally Allison D. Redlich, Miko M. Wilford & Shawn Bushway, Understanding Guilty Pleas Through the Lens of Social Science, 23 Psych. Pub. Pol'y & L. 458, 460 (2017) ("Whether [the] difference between the sentences received upon trial conviction versus plea is called the 'trial penalty' or the 'plea discount' is often a matter of perspective . . . .").

328. On unbundling trial rights generally, see supra note 76.

329. Rappaport argues that some trial rights already are traded in piecemeal fashion. See Rappaport, supra note 76, at 181.

330. See Thea Johnson, Fictional Pleas, 94 Ind. L.J. 855, 895 (2019) ("But if everything is a bargaining chip, the party that benefits is the one with the most power to negotiate. In the criminal system, that is the prosecutor."); Ortman, Second-Best, supra note 77, at 1063 ("Plea bargaining today transpires in the shadow of overlapping offenses, draconian sentencing laws, and punitive pre-trial detention, facets of our criminal law that add up to enormous prosecutorial leverage.").

331. See supra note 77 and accompanying text.

332. On the existence of such plea offers, see Stephen B. Bright & Sia M. Sanneh, Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*, 122 Yale L.J. 2150, 2157 (2013); Gabriel J. Chin, Do Procedural Claims Drive Out Merits Claims in Plea Bargaining?: A Comment on the Work of the Late Professor William Stuntz, 51 Duq. L. Rev. 767, 771 (2013).

333. See Stephen G. Valdes, Comment, Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations, 153 U. Pa. L. Rev. 1709, 1728 (2005) ("[Survey respondents] reported that a suppression motion was made in 7.34% of all cases, led to acquittal or dismissal in 11.62% of the cases where the motion was made, and resulted in nonprosecution in an additional 0.69% of

be true of Sixth Amendment depositions. Prosecutors would have the incentive and the leverage to induce defendants to waive Sixth Amendment depositions in some cases, but not in all. In cases where defendants perceived their confrontation right to have significant value, they would have a meaningful opportunity to exercise it.[334]

CONCLUSION

In his *Lafler* dissent, Justice Scalia lamented that the Court had "open[ed] a whole new field of constitutionalized criminal procedure: plea-bargaining law."[335] He predicted that the "'constitutional' rules governing [defense] counsel's behavior" announced in *Lafler* and *Frye* would inevitably "be followed by rules governing the prosecution's behavior in the plea-bargaining process."[336] Indeed, he regarded it as "foolish to think" otherwise.[337]

Scalia's nightmare should be our ambition. Yet no robust body of constitutional plea bargaining law has materialized. The few times the Court has waded into plea bargaining since *Lafler* and *Frye*, its interventions have been aggressively modest.[338] Nine years on, we are still

---

cases."); id. at 1729 ("While the empirical costs of the *Miranda* rule are hotly debated, this survey found that the motions were made in 3.97% of cases and succeeded 9.86% of the time." (footnote omitted)).

334. Florida's experience with criminal depositions may be instructive here. As explained above, Florida is among the states that permit defendants to conduct depositions. See supra section III.C.1. Leaders of the Florida defense bar report that depositions are, in actual practice, routine. Matthew Meyers, President of the Miami Chapter of the Florida Association of Criminal Defense Lawyers (FACDL), observes: "[D]epositions are a *very* regular part of my practice and that of a vast majority of my colleagues in Miami, and throughout the State." E-mail from Matthew Meyers, President, Miami FACDL, to author (Nov. 2, 2020) (on file with the *Columbia Law Review*). "We may not take the deposition of every witness listed [by the prosecution]," Meyers explains, "but the lead LEO [law enforcement officer], complaining witnesses, eyewitness, etc. are usually taken." Id. Michelle Lambo, President of the Hillsborough County FACDL chapter, notes that she "usually conduct[s] . . . a minimum of [two] depositions per case" and that "[m]ore complicated matters[] will usually require more than [two] witnesses being deposed." E-mail from Michelle D. Lambo, President, Hillsborough Cnty. FACDL, to author (Nov. 2, 2020) (on file with the *Columbia Law Review*). Benjamin Wurtzel, President of the Central Florida FACDL chapter, agrees that depositions are an important and routinely-used defense tool in Florida criminal cases. Telephone Interview with Benjamin Wurtzel, President, Cent. Fla. FACDL (Nov. 6, 2020). Though it is beyond this Essay's scope to empirically assess the incidence of criminal depositions in Florida, these attorneys' observations corroborate that Florida defendants' opportunity to conduct depositions is indeed meaningful.

335. Lafler v. Cooper, 566 U.S. 156, 175 (2012) (Scalia, J., dissenting).

336. Id. at 176 (emphasis omitted).

337. Id.

338. In *Lee v. United States*, the Court held that a defendant established prejudice to support his ineffective assistance of counsel claim when his lawyer told him repeatedly (and wrongly) that a guilty plea wouldn't subject him to deportation. 137 S. Ct. 1958, 1963, 1967 (2017). Though the defendant had "no real defense" to the charge, and the Court

waiting on the Court to take the next step in updating the constitutional law of criminal procedure to account for the fact that ours is a post-trial world.

The principal aim of this Essay is to nominate the Confrontation Clause as the site of that next step. It's a credible candidate, considering its similarity (and proximity) to the Sixth Amendment's Counsel Clause. And there is a viable path forward. That path begins with recognizing that the Confrontation Clause announces a substantive right, not an evidentiary rule, and with discarding the principle that limits the "witnesses against" an accused to *trial* witnesses. Those doctrinal adjustments would open the door to Sixth Amendment depositions and, thus, to restoring the Confrontation Clause to its purpose of promoting fair and reliable adjudication via adversarial testing.

To be sure, engrafting depositions into our criminal process will not solve the deepest ills of American criminal justice. No one thing can. But it would make the criminal legal system a notch "less awful."[339] More than that, it would be an installment payment on the broader project the Court began in *Lafler* and *Frye*.[340] Many other aspects of our criminal procedure might fruitfully be reconsidered and updated in light of plea bargaining,

---

recognized that this would ordinarily mean that a plea caused no prejudice, the Court stressed the "unusual circumstances" of the case in its ruling. Id. at 1962–67. The next Term, in *Class v. United States*, the Court held that a guilty plea does not, absent an explicit waiver, preclude a defendant from filing an appeal to challenge the constitutionality of the offense to which he pleaded guilty. 138 S. Ct. 798, 801–02 (2018). The likely consequence of *Class* is that standard plea agreements will include express waivers of this right. For a post-*Class* example, see Plea Agreement at 9, United States v. DeVoe, No. 3:19CR86 (KAD) (D. Conn. Apr. 8, 2019) ("[T]he defendant waives his right to challenge his conviction based on . . . a claim that the statute(s) to which the defendant is pleading guilty is unconstitutional . . . ."). For an interesting argument that *Class* and *Lee* are more significant than they first appear, see Lucian E. Dervan, *Class v. United States*: Bargained Justice and a System of Efficiencies, 2017–2018 Cato Sup. Ct. Rev. 113, 119–25; see also Julian A. Cook, III, Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process, 60 B.C. L. Rev. 1073, 1091–99 (2019).

339. See Alschuler, Two Small Band-Aids, supra note 103, at 707 ("[T]he time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. Their principal mission today should be to make it less awful.").

340. See Simonson, supra note 15, at 2218 ("The Supreme Court's . . . rulings in *Lafler v. Cooper* and *Missouri v. Frye* provide further support for the extension of the Sixth Amendment into routine nontrial proceedings, as the Court indicated its willingness to regulate the constitutionality of everyday plea bargaining procedures in light of the rarity of trials today." (footnotes omitted)).

from pretrial discovery,[341] to the right to compulsory process,[342] to the standard for initiating charges,[343] to bail,[344] to the prohibition against double jeopardy,[345] to name just a few. Updating the Confrontation Clause could be a good step on the long road to criminal procedure modernization.

---

341. Should defendants be constitutionally entitled to discovery before a guilty plea? See, e.g., Cynthia Alkon, The Right to Defense Discovery in Plea Bargaining Fifty Years After *Brady v. Maryland*, 38 N.Y.U. Rev. L. & Soc. Change 407, 409 (2014) ("[I]t is time for the Court to recognize that effective assistance of counsel in plea bargaining requires that defense lawyers have basic information about the case, both to fully advise their clients and to effectively negotiate on behalf of their clients."); Covey, Plea-Bargaining Law, supra note 326, at 610–18 ("Given the Court's repeated emphasis on the importance of adequate investigation . . . counsel's duty to make some minimally sufficient investigation prior to advising a client to plead guilty is both consistent with the Court's Sixth Amendment case law and logically apparent."). But see United States v. Ruiz, 536 U.S. 622, 628–33 (2002) (holding that the government need not disclose impeachment *Brady* material prior to a plea, but leaving open the question as to *exculpatory Brady* material); Susan R. Klein, Monitoring the Plea Process, 51 Duq. L. Rev. 559, 580 n.72 (2013) ("There is currently a circuit split on the issue of whether a defendant can waive her right to exculpatory evidence of actual innocence." (citation omitted)).

342. Should defendants be constitutionally entitled to subpoena witnesses for exculpatory evidence useful to them in plea bargaining? For scholarly efforts to ground a right to criminal discovery in the Compulsory Process Clause (albeit not focused on plea bargaining), see Montoya, supra note 229, at 873–78; Peter Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 121–31 (1974).

343. Does the dominant probable cause standard for criminal charges continue to make sense in a system dominated by pleas? I have argued that it does not. See Ortman, Probable Cause, supra note 241, at 558–68 (contending that the probable cause charging standard "exacerbates plea bargaining's vices" and should "probably [be] on the chopping block").

344. Does due process preclude the setting of unaffordable bail as leverage to coerce guilty pleas? See Paul Heaton, Sandra Mayson & Megan Stevenson, The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711, 784–87 (2017) (exploring this question). Further, in the age of plea bargaining, should the right to counsel extend to bail hearings? See Charlie Gerstein, Note, Plea Bargaining and the Right to Counsel at Bail Hearings, 111 Mich. L. Rev. 1513, 1516–17 (2013) (arguing that it should).

345. In the age of plea bargaining, should jeopardy attach when plea negotiations commence? For the current law on when jeopardy attaches in the context of guilty pleas, see 6 LaFave et al., supra note 195, § 25.1(d) & nn.63–88.