

## From the Enlightenment to *Crawford* to *Holmes*

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Thank you very much for that gracious introduction, Michael; and thank you to the organizers and hosts of the conference for inviting me to speak to you today. I can conceive of no higher honor than to be asked by one's professional peers to address them on topics central to their scholarly interests, and I am thus at once grateful to you all for that honor and humbled by the task. I am humbled because the people in this room—and certainly the people who attended this conference, some of whom understandably have now returned to their home cities—collectively are the most gifted and knowledgeable students of juridical proof and epistemology that have ever been gathered together under one roof. Many of you are young scholars and think perhaps my comments do not apply to you, but they most assuredly do. Your entrance into this field brings with it a level of academic preparation that is accelerating the transformation of the field. I have been engaged with the study of evidence for close to thirty years and have seen close up of what I speak. For the first half of my career evidence was both a research and teaching backwater, the teaching to be done by whoever was at hand, and the research relegated to the chroniclers of the post-Wigmore era fascinated by such deep questions as whether a statement of state of mind was not hearsay or an exception to the hearsay rule. In the mid-80s the complacent view that all the interesting work in the field was done—much like the proposals at the end of the nineteenth century to close the patent office because everything that could had already been invented<sup>1</sup>—was exploded first by the probability debates that moved to the fore the deep questions of rationality and showed that

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<sup>1</sup> This possibly apocryphal quotation is often attributed to former Patent Commissioner Charles H. Duell. See Samuel Sass, *A Patently False Patent Myth*, 13 SKEPTICAL INQUIRER 310 (1989).

they had not been resolved,<sup>2</sup> followed by the recognition of the contextual nature of human inference, thus opening up the Pandora's box of the inadequacy of simple models of knowledge as justified true belief and of truth amounting to correspondence with an external, observer-independent (more or less) reality, whatever their philosophical charms. This opened the field to the influences of all forms of social constructivism, from the Nobel Prize winning work of Kahneman and Tversky,<sup>3</sup> to empirical studies of fact finding, to what somewhat ironically are now classic forms of critical theory.<sup>4</sup>

To you youngsters out there, none of this is new, which is exactly my point about the level of scholarly preparation you now bring to the field of evidence. And of course you are able to bring this level of preparation to bear because of the astonishing transformation of the field of evidence—attributable to your recent predecessors—that has occurred over the last quarter century that has made clear that the field of evidence, perhaps like the double helix of DNA fame, wraps around the deepest empirical and philosophical questions of our time, questions that we are all now engaged in studying from a wonderful cacophony of perspectives. With great respect to the former giants of the field, such as my predecessor at Northwestern University, John Henry Wigmore, the field of evidence today is at a level of creativity and contributions to knowledge unmatched in its history.

And interestingly, almost all of that work is being done in what is one of the jewels in the crown of western civilization: the American universities. While I do not purport to be a comparative law scholar, one looks for both conceptual insights and analytical tools where one can, and no matter what the language there is simply nothing in the West remotely comparable to the research programs of the people in this room. There are a few people here and there, England in particular, and a few elsewhere, pursuing interesting research, but these are exceptions.

I confess I should be somewhat more diffident than I appear in discussing the East, for there are vast areas of the world of which I,

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<sup>2</sup> See, e.g., Symposium, *Decision and Inference Litigation*, 13 CARDOZO L. REV. 253 (1991); Symposium, *Probability and Inference in the Law of Evidence*, 66 B.U. L. REV. 377 (1986).

<sup>3</sup> Kahneman and Tversky's work on prospect theory would win Kahneman the Nobel Prize in Economics in 2002. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

<sup>4</sup> See, e.g., Aviva A. Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159 (1997). There are powerful feminist critiques of Crawford itself. Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1 (2006).

and indeed all of us, are largely ignorant. I am aware of the state of affairs in the two great eastern cultures—Japan and China. I put aside India because of its British influence. In Japan, a new generation of young scholars largely trained at American universities—Harvard, Michigan, Northwestern, and others—is as we speak introducing the study of evidence to the country. In China, I have been involved with a group commissioned by the People’s Supreme Court to create out of whole cloth a rational regulation of evidence at trial. I say whole cloth advisedly because of the devastating impact of the Cultural Revolution that wiped out knowledge of western legal systems in China. Lawyers and judges were among the most virulently attacked during Mao’s madness, with many executed, thousands banished, law schools closed, and books burned.<sup>5</sup> When Deng Xiaoping uttered in 1992 what is probably the most significant single sentence any human being has ever uttered, “To be rich is glorious,”<sup>6</sup> it unleashed economic reform in China that has led to its ongoing capitalist transformation. It was not long, however, before the Chinese Government realized that the creation of wealth required a legal system that enforced rights and obligations, but there was no such system in place and no legal knowledge adequate to create one. To rectify this, the Government sent out waves of scholars from Chinese universities to study in many different countries, including with me at Northwestern, and to bring back to China hopefully useful knowledge. In the field of evidence, the American approach has provisionally won out, which is interesting because, to the extent there is a recognizable western influence on the Chinese legal system, it is Germanic. Two years ago, the Supreme People’s Court directed the preparation of a model uniform code of evidence. It has now been promulgated, and the Court has ordered its provisional adoption in six judicial districts. In July of 2009, a conference will be held in Beijing to appraise the results of the field test and hopefully pave the way for the universal adoption of the evidence code.<sup>7</sup>

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<sup>5</sup> See, e.g., Cynthia Losure Baraban, Note, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China*, 73 IND. L.J. 1247, 1257 (“[I]n 1966, Mao set out to destroy the entire legal culture. During the next ten years, a period known as the Cultural Revolution, Mao . . . closed all law schools and declared lawyers to be counterrevolutionaries and criminals. . . . Many Chinese lawyers were executed or sent to labor camps to work in primitive conditions.”). See also RANDALL P. PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 347 (2002) (describing the hardships faced by lawyers during the Cultural Revolution).

<sup>6</sup> See, e.g., Cheng Li, *Revolution Is No Dinner Party, but China’s Reform Is* (1999), <http://www.cnn.com/SPECIALS/1999/china.50/red.giant/communism/>.

<sup>7</sup> Welcome Address: Scientific Theory and Evidence Seminar, [http://www.icelfs.com/English/newsList.aspx?id=115&n\\_kind=1](http://www.icelfs.com/English/newsList.aspx?id=115&n_kind=1) (last visited Dec. 24, 2008).

So, I return to why I address you with some diffidence. Unlike the famous quote when President John F. Kennedy welcomed forty-nine Nobel Prize winners to the White House in 1962 and said he thought it was “the most extraordinary collection of talent, of human knowledge, that has ever been gathered together at the White House, with the possible exception of when Thomas Jefferson dined alone,”<sup>8</sup> you are the most extraordinary collection of talent and knowledge pertaining to juridical proof that the world has ever seen. Two things at least are responsible for this, in addition to your own interests. One is our jury system, of course, that divides responsibility for fact finding over various actors, thus necessitating the systemic treatment of evidence. But the other is these great American universities that provide you the opportunity to engage in the work that you are doing. Nowhere else in the world would you have comfortable salaries, a surplus of free time, and encouragement to engage in this kind of work, and frankly, if nothing else I say today has any effect or significance—and of course the primary point I have been making so far is that it is not at all clear what I could contribute to your knowledge and understanding—I hope that at least each of you will reflect, however briefly, on how such privilege carries with it a deep responsibility to increase, however incrementally, the store of human knowledge through your research and perpetuate it through your teaching.

How does all this tie to the Enlightenment? And from that chaotic human period to the recent Supreme Court cases of *Crawford* and *Holmes*?<sup>9</sup> Good question. And the answer is the primacy of facts, which is the central concern of the field of evidence. Facts are primary in any coherent study of evidence, obviously, but they are primary in an even deeper manner for they are the foundation upon which western civilization rests. Even though the field of evidence has undergone a renaissance, it still lacks the panache and status of constitutional law, yet in my opinion it is both more fundamental and more important. Those, surely, seem like rather bold claims, and I wonder how many of you would have agreed with them prior to today. I think if you asked most well-educated citizens, including law professors, what best characterizes our form of government and its handmaiden the legal system, the answer typically would have some-

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<sup>8</sup> See MAURICE ISSERMAN & MICHAEL KAZAN, *AMERICA DIVIDED: THE CIVIL WAR OF THE 1960s*, at 61 (2004).

<sup>9</sup> *Crawford v. Washington*, 541 U.S. 36 (2004); *Holmes v. South Carolina*, 547 U.S. 319 (2006). *Crawford* has been the subject of so much scholarship that I have kept citations to the bare minimum. To be fair to the academy would require a footnote of references two or three pages long. Interestingly, *Holmes* has been the subject of virtually no scholarship, which is yet another reason for stringent citations.

thing to do with constitutionalism on the one hand and, on the other, rights and obligations. You might say something about the rule of law, and if you were attempting to impress you might refer to the central contribution of the Magna Carta to Anglo-American forms of government that even the King was bound by the law—and you might of course bemoan the damage you think done to that concept by the Bush Administration. If you really got into it, you might fast forward to the Enlightenment and point out that what was nascent in 1215 in English history became explicit in the eighteenth century when Enlightenment thinkers inverted the old order of things to make the state the servant of the people, rather than the other way around.<sup>10</sup> And you might end your disquisition with the astonishing rhetorical flourish of quoting the last, deeply moving letter written by Thomas Jefferson on June 24, 1826, to Roger C. Weightman, in which with palpable regret Mr. Jefferson had to decline the invitation to travel to Washington, D.C., to celebrate the fiftieth anniversary of the signing of the Declaration of Independence:

[M]ay it [the Declaration of Independence] be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the Signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings & security of self-government. . . . All eyes are opened, or opening, to the rights of man. [T]he general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few bootied and spurred, ready to ride them legitimately, by the grace of god.<sup>11</sup>

Indeed, the creation of the United States, with its rule of law, separation of powers, limited and shared government, and its articulation of various individual rights in the body of the Constitution and its Bill of Rights is sometimes seen as the crowning achievement of

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<sup>10</sup> The idea of the state as social contract entered into by its citizens was of course popularized by John Locke. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Notably, Madison relied greatly on the shift from a sovereign government to a sovereign people in justifying his opposition to the Alien and Sedition Acts. JAMES MADISON, *REPORT ON THE VIRGINIA RESOLUTIONS* (1800), *reprinted in* 5 *THE FOUNDERS' CONSTITUTION* 141 (Philip B. Kurland & Ralph Lerner eds., 1987). For a general overview of enlightenment thought, see ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* (Fritz C.A. Koelln & James P. Pettegrove trans., 1951) (1932).

<sup>11</sup> Letter from Thomas Jefferson to Roger Weightman (June 24, 1826) (material is quoted exactly as it appeared in Mr. Jefferson's letter, except for the bracketed terms), *available at* <http://www.loc.gov/exhibits/jefferson/214.html>.

the Enlightenment in which the potential of rationality to improve the human condition finally reached full flower. The significance of the political side of the Enlightenment can even be seen in the famous essay by Immanuel Kant that named the period to which he contributed much, "What is Enlightenment?"<sup>12</sup> in which the answer that he gave to the question was simply freedom to use one's own intelligence. His opening paragraph captures its main theme:

Enlightenment is man's emergence from self imposed immaturity for which he himself was responsible. Immaturity and dependence are the inability to use one's own intellect without the direction of another. One is responsible for this immaturity and dependence, if its cause is not a lack of intelligence, but a lack of determination and courage to think without the direction of another. *Sapere aude! Dare to know!* is therefore the slogan of the Enlightenment.<sup>13</sup>

In my opinion, and with all due respect to Mr. Jefferson and the Declaration of Independence, the right to think without the direction of another reached its zenith in the brilliant innovation of the U.S. Constitution that memorialized sovereignty possessed by the people with rights granted to the government rather than being an attribute of government that permitted it to impress its will upon its subjects.

But, here is the critical point, or rather the background to the critical point: the political side of the Enlightenment grew out of its epistemological revolution, which finally saw the supplanting of dogmatic and revelatory sources of knowledge with rational empiricism.<sup>14</sup> To be sure, any *Reader's Digest*-like review of complex phenomena, such as I am engaging in here, will be rough and crude. For example, English empiricism traces its roots at least to Francis Bacon, and one can argue whether he should be thought of as the end of the Renaissance or the beginning of the Enlightenment. Whatever. By the time of the American Revolution, it was the promise of the application of systematic thinking of the kind that had revolutionized what we call science and they called natural philosophy that was being put to use to revolutionize the relationship between the state and the citizen. But, and here is truly the critical point, the significance of empiricism goes much deeper than just lending tools of rational inquiry to political science. The work product of political science depends

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<sup>12</sup> Immanuel Kant, *An Answer to the Question: What Is Enlightenment?* (1784), reprinted in KANT: POLITICAL WRITINGS 54 (H.S. Reiss ed., H.B. Nisbet trans., 2nd ed. 1991).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., Gary Hatfield, *Epistemology*, in 2 ENCYCLOPEDIA OF THE ENLIGHTENMENT 10–20 (Alan Charles Kors ed., 2005).

on rational empiricism, or more startlingly put, factual accuracy is more fundamental than rights and obligations because, conversely, they are parasitic on factual accuracy.

Take a simple example, but one at the heart of the political and epistemological currents we are discussing—the existence of property. What does it mean to own something—like the shirts, blouses, pants, and dresses that each of you is wearing? The conventional, law-school-esque answer is that you have the right to possess, alienate, control, and consume that physical item. Fine. But what happens when I demand that you give me the shirt off your back because I assert it is mine? You will scurry around and find a fact finder to whom you will present evidence of sale, gift, creation, discovery, whatever, to convince the fact finder that the universe was in a certain state at a certain time such that you rather than I have the right to possess, consume, etcetera.

Generalize this point. Rights and obligations of any sort whatsoever are meaningless without accurate fact finding. It doesn't matter whether the question is the age of the President, the powers distributed to different branches of government, the right to be free from torture, or your rights to possess, consume, and dispose of your clothes. It is the attachment of rights and obligations to the bedrock of facts—to how the universe actually was at a particular moment in time—that gives them substance. This is the single most significant feature distinguishing western liberal democracies and their market economies from eastern autocratic states and their centralized economies—and the consequences are obvious and predictable.

Thus, those who study and advance our knowledge of evidence are not just arguing over the proper conception of statements about states of mind but instead laying the ground work for the progression of western civilization. Nothing is more fundamental than the work that you all do in your classes and your research, for without it everything is vanity.

Now to *Crawford*<sup>15</sup> and *Holmes*.<sup>16</sup> These two cases are fascinating for many reasons. They pose interesting doctrinal questions about confrontation and the regulation of the inferential process at trial, *Crawford* holding that testimonial statements at trial may be used only if the accused has or has had the right to confront the person making the statements, and *Holmes* concluding that due process is violated by excluding plausible evidence that a third party committed a crime

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<sup>15</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>16</sup> *Holmes v. South Carolina*, 547 U.S. 319 (2006).

whenever the State's evidence against the defendant is "strong." They pose perhaps even more interesting questions about the nature of constitutional interpretation generally, and they pose startling questions about the significance of accurate fact finding at trial. Most interestingly of all, excluding the doctrinal holdings, the answers they give to each of these questions are quite at odds with each other.

To discuss the first question—the nature of constitutional interpretation—I must replace my evidence with my constitutional criminal procedure hat. To summarize what I will briefly discuss, as a general matter, and certainly as applicable to these two cases, in my years of teaching and writing in the field of constitutional criminal procedure, the only good theory of any general import that I have come across is Oliver Wendell Holmes's general proposition that no general proposition is worth a damn,<sup>17</sup> not at least to the questions that have risen to the Supreme Court since the beginning of the procedural revolution in the late 1950s. We have to do another *Reader's Digest* approach to complicated questions, but please bear with me. Roughly and crudely put, there are five general approaches to constitutional exegesis:

- A. Text (literalism)
- B. Originalism (meaning, intent, linguistic historicism generally)
- C. Structural questions (e.g. separation of powers)
- D. History
- E. Policy (utility, morality, whatever)<sup>18</sup>

So far as I can see, we can put aside structural issues, leaving us four. "Policy" is actually the opposite of an interpretive theory because it does the opposite of what interpretative theories are supposed to do, which is constrain decision. Thus, we are down to three, and none of them help very much in deciding the cases the Court is deciding today for a quite general and pervasive reason: today's world bears almost no relationship to that of 1791 or 1868. Moreover, there is no evidence, literally none, that what was uppermost on any of the drafters' or ratifiers' minds in dealing with individual rights was a general theoretical approach to a problem rather than provisions dealing with discrete, highly-contextualized political problems.

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<sup>17</sup> Letter from Oliver Wendell Holmes to Frederick Pollack (Sept. 9, 1904), in 2 HOLMES-POLLOCK LETTERS 59 (Mark D. Howe ed., 1941).

<sup>18</sup> For considerably more sophisticated detail, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) and PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

Just to set the stage, consider wiretapping. Electromagnetic transmittal of information was not even dreamt of in 1791, and, to the extent it existed in 1868, it had no claim to privacy—telegraph wires were open and anyone could receive a signal. What sense can even be made, then, of the question, “How does the Fourth Amendment—or the Due Process Clause—apply to wiretapping?” Whatever answer one gives will have to be made up. As I will return to in just a minute, one can make up better or worse answers, but they will still be made up.

Now consider the world of 1791. Criminal cases in England in the century preceding 1791 consisted roughly of three types: state trials for treason, political and religious persecution, and run of the mill criminality. There were certain abusive procedures employed in the first two categories that were plainly on the minds of the founding generation, such as the prosecution of Walter Raleigh,<sup>19</sup> oaths ex officio prior to formal charges or the disclosure of allegations,<sup>20</sup> torture and so on, but these were essentially nonexistent in the third category of crime, which involved private rather than state prosecution. Moreover, counsel not only was not the norm in common criminal cases but in many instances was disallowed. Those cases were basically all eyewitness cases with no investigative resources allocated to either side. Cross-examination was known, but without counsel or other aids it did not amount to much. Moreover, the highly skilled and intense examination that we use the phrase “cross-examination” to refer to is largely a product of the nineteenth century. And in any event, in cases of felony, the Marian statutes required committing magistrates to take formal statement of witnesses, and those statements were admissible at trial if the witness was unavailable.<sup>21</sup> As Tom Davies has demonstrated, the Marian statutes were part of the law the colonies inherited from Britain.<sup>22</sup>

Again, think *Reader’s Digest*, for there are immense complexities here, but nonetheless, as the Court in *Crawford* rather candidly said, “The most notorious instances of civil-law examination occurred in the great political trials of the sixteenth and seventeenth centuries.”<sup>23</sup>

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<sup>19</sup> *Crawford*, 541 U.S. at 44.

<sup>20</sup> And there is some historical evidence that the “point” of the Sixth Amendment was to ensure the validity of charges, i.e., that accusers had actually made them. Jeremy A. Blumenthal, Comment, *Reading the Text of the Confrontation Clause: “To Be” or “Not to Be”?*, 3 U. PA. J. CONST. L. 722 (2001).

<sup>21</sup> *Crawford*, 541 U.S. at 44.

<sup>22</sup> Thomas Y. Davies, *What Did the Framers Know, and When Did They Know it? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005).

<sup>23</sup> *Crawford*, 541 U.S. at 44.

And the abuses that were prevalent were abusive indeed, such as Raleigh being marched to his death without Lord Cobham being brought from the Tower.<sup>24</sup> Or consider another case that figures large in the *Crawford* opinion: “Fenwick’s counsel objected to admitting the examination of a witness who had been spirited away, on the ground that Fenwick had had no opportunity to cross-examine.”<sup>25</sup> By contrast, in run-of-the-mill felony cases, witness statements were regularly used.

Now, think about the implications of this for our three remaining sources of constitutional interpretation—text, originalism, and history. First, there is literally no applicable text with any determinate meaning in *Holmes*. Much like *Griswold v. Connecticut*’s<sup>26</sup> flailing away in a search for pertinent text, the Court in *Holmes* said, “This latitude [to control the admission of evidence], however, has limits. ‘Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.’”<sup>27</sup> Somewhere, in short, we find this idea, which is not, I would think, very comforting for those committed to textual sources.

The Confrontation Clause, by contrast, is sometimes suggested to be clear in its application to a case like *Crawford*, although to its credit the Court acknowledges to the contrary. And the Court is right, although for reasons that, in my opinion, the Court does not give. As some have noted, the Confrontation Clause, like the entire Sixth Amendment, is in the passive voice with the elided phrase being “by the Government,” presumably. Thus, what the clause means to “literalist”—how can anyone emending language to give it meaning be a literalist?—is that “the accused shall enjoy the right . . . to be confronted with the witnesses against him [by the government].”<sup>28</sup> Yet the “literal language” of the Sixth Amendment is supposed to say, “The defendant has the right to cross-examine the witnesses against him.” Those are obviously quite different and, if the latter was truly meant, it easily could have been said.

At a somewhat higher level of generality, the modern problem has nothing to do with allegations of treason and political or religious

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 45 (citing *Fenwick’s Case*, 13 How. St. Tr. 537, 591–92 (H.C. 1696)).

<sup>26</sup> 381 U.S. 479, 484 (1965) (finding the right to privacy in the “penumbras” and “emanations” of the Bill of Rights).

<sup>27</sup> *Holmes*, 547 U.S. at 319 (citing *Crane v. Kentucky*, 476 U.S. 683, 690 (2006)).

<sup>28</sup> U.S. CONST. amend VI.

persecution. The modern problem is standard criminality ranging, to be sure, from the petty to the serious, but still it is not focused on cases like Raleigh's or the use of governmental power to suppress matters of conscience. Moreover, all cases are surrounded by a web of procedural protection that was unthinkable in 1791 and 1868: the right to counsel, appeal, investigatory assistance, limits on interrogation, discovery, public and speedy trial rights, limits on the use of prejudicial evidence, restrictions on judicial control of jury verdicts, and on and on. I suggest it is literally a nonsensical question to ask what the fixed meaning of the language of the Sixth Amendment is as applied to this entity that previously did not exist and was not contemplated. Moreover, to the extent the modern trial has a historical analogue, it is to the trial of common-place felonies in which witness statements were widely used.

Going up the generality chain, the Confrontation Clause is part of the Sixth Amendment, and read as a whole the Sixth Amendment plainly is directed precisely at cases like Raleigh, the political persecutions of the royal courts, and the religious persecutions of the High Commission. What justification there is to take this one clause out of context in the service of an illusive literalism, ignoring its surroundings that give it meaning if anything does, is completely unclear.

What I have said of textualism presages and perhaps disposes of originalism and historicism, at least so far as *Crawford* is concerned. The text is unhelpful because the problems being addressed were different; there is neither original meaning to capture nor any pertinent historical evidence. If the Government today were to try a case solely through affidavits or having "spirited away" a significant witness to stop him from being examined in court, it would be a different matter. But those historical abuses bear no relationship to what is at stake today in American criminal procedure. Moreover, there is a critical difference between a right and its implementation. It is one thing for the government to affirmatively deny the defendant access to information; it is quite another for the government not to affirmatively provide it: the First Amendment does not mean government must subsidize speech; individuals can waive the Fourth and Fifth Amendments without knowing they have the right not to; the right to procreate does not mean that the government must assist in the process; the right to life is not violated when government does not protect you;<sup>29</sup> and so on. *Crawford* itself is a perfect example: how can anyone claim that the government denied him access to his wife? In

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<sup>29</sup> *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

any event, we have literally no knowledge of how any drafter or rati-fier of the Constitution would react to anything like the facts of *Crawford* or 911 calls, or statements by minors concerning sexual abuse, or lab reports, and especially not in the context of modern criminal procedure which guarantees much more than the drafters ever would have imagined.

At the highest level of generality, *Crawford* also embodies the deep philosophical question of the relationship between a rule and its underlying reasons. Suppose that you were convinced that the Confrontation Clause was designed to stop cases like Raleigh. What do you suppose the problem might have been? Simply that cross-examination had not occurred and, thus, that it would have been fine to call Cobham and then cut off Walter's head? Or do you suppose that the problem was that Raleigh faced trumped up charges that would have likely been exposed had Cobham been called? These questions answer themselves. There is no reason to think that the Sixth Amendment reflects a fetish for cross-examination rather than a concern about reliability during a time when unreliable outcomes were relatively easy to manufacture. What, then, is the meaning of the Amendment? Is it that each of the identified procedures must be provided regardless of the effect on reliability, or is that they were a rough estimation made 217 years ago in drastically different times of what might be useful palliatives to stop the abuses of the time? And if the latter, what is the rule that emerges that should be applied in our time and under our conditions? Is it these particularized procedures ripped from their historical context, or is it the underlying rationale that animates them? This is not an easy question, for the answer that one gravitates to—that reasons should dominate—has the capacity to make rules superfluous. Still, the farther one gets from the actual conditions anticipated by the rule, the greater the justification for looking to its animating spirit.

Interestingly, the procedure in *Holmes*, as described by the Court, was so weird that it too had no obvious analogues in historical practice. As described by the Court:

[u]nder this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great proba-

tive value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.<sup>30</sup>

Quite frankly, this seems more like a violation of the literal text of the Sixth Amendment than do the facts of *Crawford*, as it denies the right to present a defense. As to originalism and history, the lack of a clear textual source for the constitutional command the Court constructs is pretty good evidence of equivalent lack of any evidence of either, and the Court produces literally none.

That leaves policy, and here the cases stand in interesting and stark contrast. *Holmes* advances factual accuracy, and *Crawford* almost surely retards it. It is almost surely the case that *Crawford* himself was guilty, and the cases coming in the wake of *Crawford* are not indicative of an abusive government trying to frame innocent people. The real question seems to be how far commitment to the peculiar form of constitutional exegesis found in *Crawford* will be allowed to get in the way of sensible outcomes. This is not to say that the reliability standard of *Ohio v. Roberts*<sup>31</sup> did not result in erroneous outcomes; it is merely to say that, comparing the pre- and post-*Crawford* regimes, it is hard to see how factual accuracy will be advanced. The exact opposite is true of *Holmes*; indeed, it is hard to fathom what might have possessed the courts of South Carolina.

There are other interesting policy differences between *Holmes* and *Crawford*. All *Holmes* commits one to is the right of a defendant to present a defense. The Court was at pains to point out that the conventional regulation of the evidentiary process was not at stake; thus, rules like FRE 403 or 413 through 415<sup>32</sup> are not called into question. There will be some ambiguity at the edges of wholesale and retail regulation of the evidentiary process, but probably not very much.

*Crawford*, by contrast, commits one to an astonishing roll back of modern criminal procedure jurisprudence. As Donald Dripps has developed in detail,<sup>33</sup> the interpretive methodology of *Crawford* of searching for some foregone historical meaning would emasculate the entire line of right to counsel cases from *Gideon*<sup>34</sup> forward—indeed from *Powell*<sup>35</sup> forward. It also makes mincemeat out of *Miran-*

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<sup>30</sup> *Holmes*, 547 U.S. at 320.

<sup>31</sup> 448 U.S. 56 (1980).

<sup>32</sup> FED. R. EVID. 403, 413–15.

<sup>33</sup> Donald Dripps, *Sixth Amendment Originalism's Collision Course with the Right to Counsel: What's Titanic, What's Iceberg?* (San Diego Legal Studies, Paper No. 07-79, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=952508](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952508).

<sup>34</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>35</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

da,<sup>36</sup> for which there are no historical analogues from either 1791 or 1868. Habeas corpus would revert to being limited to challenging the jurisdiction of the incarcerating authority. *Brady v. Maryland*<sup>37</sup> would be a dead letter, as would almost all of the post-*Katz*<sup>38</sup> Fourth Amendment doctrine. It is rather hard to say with a straight face that textualism, originalism, or historicism result in the regulation of something nobody thought about until one hundred or so years later. Perhaps it is some solace that capital punishment would survive unscathed, whether conducted by lethal injection, hanging, or firing squad. Oh, yes, and challenges to the racial makeup of grand and petit juries would not be allowed.

Perhaps all this is simply the cost of other advantages that may flow from the decision—after all, factual accuracy is not the exclusive concern—but only two have been identified. One is that the holding of *Ohio v. Roberts*<sup>39</sup> was ambiguous, which is certainly true. Whether this is a benefit depends on the alternative, and it is becoming painfully obvious that the *Crawford* regime will be subject to just as much, if not more, ambiguity as what it replaces.<sup>40</sup> Indeed, we now have the spectacle of deciding what is testimonial by the oxymoronic standard of what, objectively speaking, the primary purpose of a government/citizen interaction might be. If it is to yield help, resulting statements are not testimonial; if it is to investigate, they are.

Those of you who do not study constitutional criminal procedure might justifiably wonder where this weird standard has come from. What can it possibly mean to look at what, objectively speaking, someone's internal motivations might be? And where in the Constitution is that peculiar line drawn? The answer is that this is an effort to borrow from the Fourth Amendment special needs cases,<sup>41</sup> where the primary purpose of legislation or general law enforcement techniques can determine the constitutionality of state action. At the same time, the Court has rigorously avoided allowing the subjective state of mind of individual officers to be the determining criterion, precisely because of the daunting task of piercing the mind of an-

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<sup>36</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>37</sup> 373 U.S. 83 (1963).

<sup>38</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>39</sup> 448 U.S. 56 (1980).

<sup>40</sup> See, e.g., Deborah Tuerkheimer, *Exigency*, 49 ARIZ. L. REV. 801, 813–16 (2007).

<sup>41</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (suspicion-less roadblocks only allowed to serve “special needs” not regular law enforcement); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 440 (1990) (random sobriety checkpoints are constitutional); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (allowing warrantless inventory searches of impounded cars).

other. But there is no general purpose to the government actions that will give rise to *Crawford* claims. For example, 911 calls have both attributes, as do lab reports, and statements by children reporting sexual abuse, and so on. Recognizing this, the Court has to, but does not want to, refer to internal intentional states, and thus this bastardized quasi-objective, quasi-subjective test.

I think there are deeper issues ahead, frankly. The Court has, apparently unknowingly, walked into a jurisprudential minefield. Virtually all knowledge is “testimonial” or rests on the “testimony” of other, as Coady in his book, *Testimony*<sup>42</sup> has pointed out convincingly. Consider, for example, the presentation of DNA testimony at trial showing a high probability that a specimen matches the defendant’s DNA, and assume the lab technician that has run the tests shows-up and is cross-examined. All she can be cross-examined about is the results that emerge from following certain protocols. She can’t testify about the theory of DNA. Suppose she could; how does she know it is true? Who is really doing the testifying here? Obviously the scientists who have convinced their peers of the truth of their account of DNA, but they won’t be testifying at trial.

But, the retort comes, they don’t have to testify because they were not thinking of testifying when they did their experiments. What if they were? What if the people in some research center are aware that their work may have legal implications, as frankly virtually all research today might? More importantly, in an effort to avoid “ambiguity” it seems as though the Court simply has recapitulated the troublesome problem in the hearsay rule involving the intent to assert: if a person intends to assert, it’s hearsay; if not, maybe not. I doubt anyone with experience with that aspect of the hearsay rule will think that the “primary motive, objectively determined” standard is likely to be less ambiguous than the straight forward question about reliability that *Roberts* asks. An example of the enormous ambiguity *Roberts* injects into the system is the recent Seventh Circuit case of *United States v. Moon*,<sup>43</sup> concluding that, since experts can testify on the basis of inadmissible data, *Crawford* may be avoided, and that, in any event, readings from tests are not testimonial.<sup>44</sup>

That leaves the last possible advantage of the *Crawford* regime, which is that it has in fact greater fidelity to the constitutional language. I must confess that, were I convinced of this being true, I would put aside all my objections. At the heart of the argument that I

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<sup>42</sup> C.A.J. COADY, *TESTIMONY: A PHILOSOPHICAL STUDY* (1992).

<sup>43</sup> 512 F.3d 359 (2008).

<sup>44</sup> *Id.* at 361–62.

have been making here is that constitutional interpretation is not really interpretation; it is prudence. For reasons I have given, I largely believe that. At the same time, it is troublesome, for it makes the existence of the written language largely irrelevant. To some extent, *Crawford* represents a struggle over the proper role of courts, and as ironic as it may sound, I am largely on Scalia's side. I prefer democratic to authoritarian sources of law. I just do not see how to recapture our lost innocence without declaring that the Constitution has become largely irrelevant. Thus, constitutional law is primarily prudence with some guideposts along the way.

Now at the conclusion, let me switch my hats again, and retake the mantle of an evidence professor. If any question, constitutional or otherwise, is going to be fought out over the field of policy, the single most important policy is factual accuracy. There may be other values, and at the end of the day they may outweigh the gains to factual accuracy that may be at play in some policy choice, but it is our job to ensure that the primacy of facts is never neglected.

Thank you.