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## Article

# Counsel and Confrontation

Todd E. Pettys<sup>†</sup>

### INTRODUCTION

The United States Supreme Court recently declared that, when interpreting the Sixth Amendment's Confrontation Clause,<sup>1</sup> it will ascribe decisive weight to the English common law as it existed in the states at the time of the Sixth Amendment's ratification in 1791.<sup>2</sup> Drawing heavily on those common law sources, the Court has held that the Confrontation Clause forbids the admission of "testimonial"<sup>3</sup> hearsay statements against a criminal defendant, unless the person who uttered those statements appears for cross-examination at trial.<sup>4</sup> The Court has further explained that the English common law in 1791 recognized—and the Sixth Amendment thus incorporates—an overarching exception to that rule: a witness's testi-

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1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

2. See *Crawford v. Washington*, 541 U.S. 36, 42–69 (2004) (equating the Confrontation Clause with the English common law rules governing the confrontation of witnesses in the late eighteenth century and rejecting a line of nonconforming Supreme Court precedent); see also *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008) (framing the Court's Confrontation Clause analysis by identifying two classes of cases in which the English common law in the eighteenth century permitted the admission of unfronted testimonial statements); *Davis v. Washington*, 547 U.S. 813, 824–26 (2006) (drawing from founding-era cases to identify the features of "testimonial" statements).

3. A person makes a "testimonial" statement if he or she makes the statement under circumstances that "objectively indicate" the purpose of the statement is not to seek assistance in an ongoing emergency, but rather "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

4. See *Crawford*, 541 U.S. at 53–54 (articulating this rule); see also *id.* at 60 n.9 ("[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

monial hearsay statements may be admitted into evidence even if the witness does not appear at trial, so long as the defendant had an opportunity to cross-examine the witness prior to trial and the witness has since died or is otherwise unavailable to testify.<sup>5</sup> This Article focuses on that overarching exception and argues that, by tethering the Confrontation Clause to eighteenth-century common law authorities, the Court has laid the groundwork for a startling conclusion. A defendant's pretrial cross-examination of a witness who later becomes unavailable to testify is sufficient to vindicate the defendant's rights under the Confrontation Clause, even if the defendant must interrogate the witness on his or her own, without the aid of an attorney.

In its 2004 watershed ruling in *Crawford v. Washington*, the Court held that the Confrontation Clause embodies the centuries-old Anglo-American view that adversarial cross-examination is the best means of testing the reliability of a witness's testimony.<sup>6</sup> The Court thus abandoned the approach it had taken a quarter of a century earlier in *Ohio v. Roberts*,<sup>7</sup> under which an absent witness's hearsay statements could be offered against a criminal defendant—even though the defendant never had an opportunity to cross-examine the witness—if the trial judge concluded that the statements bore sufficient “indicia of reliability.”<sup>8</sup> The *Crawford* Court found that, by

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5. See *id.* at 54 (“[T]he common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.”). The Court has emphasized that the Sixth Amendment permits an exception to the ban on testimonial hearsay only if that exception was already in place “at the time of the founding.” *Id.* In addition to the exception noted above, the Court has acknowledged two others that were securely in place in 1791. See *Giles*, 128 S. Ct. at 2683–84 (identifying an eighteenth-century exception for instances when a criminal defendant—acting with the intent to prevent a particular witness from testifying—caused the witness's absence from the trial); *Crawford*, 541 U.S. at 56 n.6 (observing that the existence of an exception for “dying declarations” in the late eighteenth century “cannot be disputed,” but reserving judgment on whether the Sixth Amendment incorporates that exception).

6. See *Crawford*, 541 U.S. at 42–54 (examining English and American authorities).

7. 448 U.S. 56 (1980), overruled by *Crawford*, 541 U.S. at 42–68 (critiquing and rejecting the *Roberts* framework).

8. *Id.* at 66 (holding that when a declarant is not available to testify at trial, his or her hearsay statement may nevertheless be admitted into evidence “if it bears adequate ‘indicia of reliability,’” and explaining that a statement bears such indicia if it either “falls within a firmly rooted hearsay exception”

1791, authorities both in England and in the United States had concluded that judicial assessments of hearsay statements' reliability were no substitute for the rigors of cross-examination:

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.<sup>9</sup>

The Court declared that testimonial hearsay statements are inadmissible against a criminal defendant unless the defendant has been given an opportunity to cross-examine the declarant either at or prior to trial.<sup>10</sup>

When discussing the constitutional sufficiency of pretrial opportunities to cross-examine witnesses, neither *Crawford* nor its emerging progeny directly address the question of whether such opportunities satisfy the Confrontation Clause if the defendant has to conduct that cross-examination on his or her own, without the assistance of counsel. If a defendant is unaccompanied by an attorney but is nevertheless given a chance to cross-examine an adverse witness, does the Confrontation Clause permit the admission of that witness's testimonial statements into evidence at trial if the witness has since become unavailable to testify?

One need not look far to find scenarios in which that issue arises. Consider, for example, the facts that were recently presented to the Court in *Davis v. Washington*.<sup>11</sup> Responding to a report of a domestic disturbance, two police officers arrived at the home of Hershel and Amy Hammon.<sup>12</sup> The police separated Hershel and Amy and questioned them in different areas—Hershel in the kitchen, and Amy first outside, and then in the living room.<sup>13</sup> During that period of interrogation, Amy told the

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or was made under circumstances marked by "particularized guarantees of trustworthiness").

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

10. *See id.* at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

11. 547 U.S. 813 (2006) (issuing a consolidated opinion for both *Davis v. Washington* and *Hammon v. Indiana*).

12. *See id.* at 819.

13. *See id.*

officers that Hershel had attacked her.<sup>14</sup> The Court noted that "Hershel made several attempts to participate in Amy's conversation with the police, but was rebuffed."<sup>15</sup> When the officers refused to allow Hershel to join their conversation with Amy he became angry, but the officers insisted that Amy be questioned in private.<sup>16</sup> The Court recited these facts in its written opinion because they lent weight to the determination that Amy's statements were testimonial in nature.<sup>17</sup> Because the officers had the two individuals well under control, the Court reasoned, Amy's statements were not made for the purpose of helping the police respond to an ongoing emergency, but rather were made to help establish facts that might later prove relevant in a criminal prosecution.<sup>18</sup> Because Amy eventually refused to testify at trial, and because Hershel never had an opportunity to cross-examine Amy at any point along the way, the Court held that the Confrontation Clause barred the admission of Amy's statements to the police.<sup>19</sup>

Suppose, however, that the police had acceded to Hershel's demands and—while continuing to maintain control of the situation—had allowed Hershel to be present while Amy responded to the officers' questions. Indeed, suppose the police had acceded to Herschel's demands precisely because they feared that Amy might refuse to testify against her husband by the time his trial date arrived. By giving Hershel a chance to question Amy at the scene of the alleged crime, could they have ensured that her statements to the police would be admissible at trial? Would that opportunity to cross-examine Amy have been sufficient to satisfy Hershel's rights under the Confrontation Clause?

The facts in *Crawford* can easily be modified to raise the same question. Police officers separately questioned Michael and Sylvia Crawford at the stationhouse concerning an alleged

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14. See *id.* at 820.

15. *Id.* at 819–20 (citation omitted).

16. See *id.* at 820.

17. See *id.* at 829–30; see also *supra* note 3 (defining "testimonial" statements).

18. See *Davis*, 547 U.S. at 829 ("It is entirely clear from the circumstances that the interrogation was part of an investigation into possible criminal past conduct . . . . There was no emergency in progress . . . ."); *id.* at 830 (noting that Amy had been "actively separated from the defendant—officers forcibly prevented Hershel from participating in the interrogation").

19. See *id.* at 829–34 (summarizing the Court's reasoning).

assault.<sup>20</sup> Sylvia's statements to the police tended to incriminate her husband, but she refused to testify against him at trial.<sup>21</sup> The trial court admitted Sylvia's statements into evidence, and the jury found Michael guilty of assault.<sup>22</sup> The Supreme Court reversed, holding that Michael had been deprived of an opportunity to cross-examine his wife.<sup>23</sup> Suppose, however, that the police had given Michael a pro se opportunity to question Sylvia at the stationhouse, fearing that Sylvia would eventually refuse to testify against her husband and wishing to ensure that her statements would nevertheless be admissible. Would that opportunity have been sufficient to vindicate Michael's rights under the Confrontation Clause, when Sylvia did indeed later refuse to testify?

Our instincts today might quickly tell us that the question is an easy one, and that, unless a person has waived his or her right to an attorney's assistance, pro se opportunities to cross-examine witnesses are plainly insufficient. If the Confrontation Clause's primary concern is ensuring that testimonial statements are tested "in the crucible of cross-examination,"<sup>24</sup> then we might reason that a cross-examination opportunity is constitutionally adequate only if it is offered to a defendant who is assisted by someone trained in the law and in the art of examining witnesses. Indeed, we might even believe that those instincts are safely vindicated by a Supreme Court decision handed down nearly half a century ago.

In *Pointer v. Texas*,<sup>25</sup> decided in 1965, Bob Pointer was arrested on suspicion of robbery and was brought before a state judge for a pre-indictment hearing at which Pointer was unrepresented by counsel.<sup>26</sup> The prosecuting attorney called and questioned witnesses, including Kenneth Phillips, the alleged victim, but Pointer declined to direct any questions of his own to Phillips.<sup>27</sup> When Phillips proved to be unavailable to testify at trial, the presiding judge permitted the transcript of Phillips'

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20. See *Crawford v. Washington*, 541 U.S. 36, 38 (2004) (discussing the police's questioning of the couple); *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002) (en banc) (explicitly stating that the police "questioned the Crawfords independently"), *rev'd*, 541 U.S. 36 (2004).

21. *Crawford*, 541 U.S. at 39–40.

22. See *id.* at 40–41.

23. See *id.* at 65–69.

24. *Id.* at 61.

25. 380 U.S. 400 (1965).

26. See *id.* at 401.

27. See *id.*

earlier testimony to be read to the jury, concluding that Pointer had been given an opportunity to cross-examine Phillips and had declined to take advantage of it.<sup>28</sup> Rejecting that line of reasoning, the Supreme Court held that, "[b]ecause the transcript of Phillips' statement . . . had not been taken at a time and under circumstances affording petitioner *through counsel* an adequate opportunity to cross-examine Phillips," the Confrontation Clause barred the admission of the transcript.<sup>29</sup>

This Article argues that *Crawford's* recent refocusing of the Court's confrontation jurisprudence provides strong reason to believe that pro se opportunities to cross-examine witnesses prior to trial are indeed now sufficient to satisfy the Confrontation Clause's requirements when those witnesses later become unavailable to testify. To the extent they are inconsistent with that conclusion, *Pointer* and its progeny are thus poised to join *Ohio v. Roberts* among the ranks of cases judged to be unwarranted deviations from the nation's founding-era convictions about criminal defendants' right to confront the witnesses against them. Approaching the issue from the vantage point of one who believes that the loss of *Pointer* would be deeply lamentable but that *Crawford's* mode of analysis is not a mere passing fancy, the Article examines other constitutional provisions to determine whether they might ameliorate the Confrontation Clause's shortcomings. The Article argues that, in certain circumstances, the Sixth Amendment right to counsel and the Fifth and Fourteenth Amendment right to due process will guarantee defendants an attorney's aid when cross-examining

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28. See *id.* at 401–02.

29. *Id.* at 407 (emphasis added); see also *id.* ("The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine."). The Court mirrored this reasoning five years later in *California v. Green*, 399 U.S. 149 (1970), another case involving testimony given at a preliminary hearing, though this time the defendant was represented by counsel. *Id.* at 151. The defendant's attorney extensively cross-examined the witness. See *id.* When the witness, Melvin Porter, refused to cooperate at trial, the trial court read into evidence portions of the transcript of Porter's testimony. See *id.* at 152. The Court ruled that the admission of the transcript did not violate the Confrontation Clause:

Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.

*Id.* at 165.

witnesses prior to trial. In other instances, however, the Constitution leaves unrepresented defendants responsible for cross-examining witnesses on their own.

Part I examines the early English and American common law authorities on which *Crawford* instructs us to rely when interpreting the Confrontation Clause. It argues that, at the time of the Confrontation Clause's ratification in 1791, authorities both in England and in the United States held that affording an unrepresented defendant a pretrial opportunity to cross-examine a hearsay declarant was sufficient to pave the way for admitting that declarant's statements into evidence if he or she later died or became otherwise unavailable to testify at trial.

Part II examines the Court's Sixth Amendment right-to-counsel jurisprudence. If authorities offer a suspect a pretrial opportunity to cross-examine a hearsay declarant *after* the suspect's right to counsel has attached, the suspect is constitutionally entitled to rely upon an attorney to conduct the cross-examination. But if the cross-examination opportunity is afforded to an unrepresented suspect *before* his or her right to counsel has attached, and if the witness has already become unavailable to testify by the time attachment does occur, the Sixth Amendment poses no obstacle to admitting the witness's hearsay statements into evidence at trial.

Part III examines the Due Process Clauses of the Fifth and Fourteenth Amendments<sup>30</sup> to determine whether they might fill the gaps left by the Sixth Amendment's Confrontation and Right to Counsel Clauses. In matters of criminal procedure, the Due Process Clauses' free-standing significance is quite narrow. The Court has said that most matters of criminal procedure are to be adjudicated under the particular provisions of the Bill of Rights that specifically address the matter at issue (such as, in our case, the Sixth Amendment's provisions concerning the confrontation of witnesses and the assistance of counsel). The Court does, however, permit judges to examine historical and contemporary Anglo-American materials in order to identify any procedural requirements that, although not prescribed by a more specific constitutional provision, are nevertheless deeply rooted in our traditions and in our historically grounded sense of fundamental fairness. Examining Anglo-American materials

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30. See U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); *id.* amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").



ranging from the founding era to England's recent efforts to bring its laws into alignment with the European Convention on Human Rights, Part III concludes that there is a surprisingly robust body of evidence indicating that, in many cases, it would not violate the Fifth or Fourteenth Amendment to permit a jury to rely upon the hearsay statements of an unavailable witness whom only the unrepresented defendant was given a pretrial opportunity to cross-examine.

This Article concludes with a summary of the new constitutional landscape and with the suggestion that legislative reform may now be appropriate to ameliorate that landscape's deficiencies.

## I. THE RIGHT TO CONFRONT HEARSAY DECLARANTS IN EARLY ENGLISH AND AMERICAN HISTORY

The Court today insists that criminal defendants' Sixth Amendment confrontation rights be equated with those that existed under the English common law as it was received in the United States at the time of the Confrontation Clause's ratification.<sup>31</sup> Both in England and in the United States, authorities in the late eighteenth century concluded that affording an unrepresented defendant a pretrial opportunity to cross-examine a hearsay declarant was sufficient to permit admitting that declarant's testimonial statements into evidence if he or she became unavailable to testify at trial.<sup>32</sup>

### A. COUNSEL AND CONFRONTATION UNDER THE ENGLISH COMMON LAW

To tell the story of English defendants' confrontation rights in the late eighteenth century, one may begin two centuries earlier under the reign of Queen Mary, when Parliament enacted a pair of bail and committal statutes concerning preliminary hearings held before justices of the peace.<sup>33</sup> In Eng-

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31. See *supra* notes 1–5 and accompanying text (noting this development).

32. Authorities' insistence upon giving defendants an opportunity to confront adverse witnesses was not, however, invariable. See *Giles v. California*, 128 S. Ct. 2678, 2682–83 (2008) (identifying two eighteenth-century exceptions to the usual requirement of confrontation).

33. See *An Act to Take Examination of Prisoners Suspected of Any Manslaughter or Felony*, 1555, 2 & 3 Phil. & M., c. 10 (Eng.); *An Act Touching Bailment of Persons*, 1554, 1 & 2 Phil. & M., c. 13 (Eng.). Of course, the notion of a right to confront adverse witnesses extends back much further. See Frank R. Herrmann & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval*

land at that time, a justice of the peace had only two options when an accused felon was brought before him: pending trial, he could either release the suspect on bail or commit the suspect to prison.<sup>34</sup> Parliament grew concerned that justices of the peace were sometimes colluding with dangerous suspects by releasing them on bail, only to have them disappear and escape punishment entirely, "to the high displeasure of Almighty God, the great peril of the King and Queen's true subjects, and encouragement of all thieves and evil-doers."<sup>35</sup> To curb that problem, Parliament declared in 1554 that, before a justice of the peace could order an accused felon released on bail, he had to interrogate the suspect and the witnesses who had hauled the suspect in, and then make a written record of what the suspect and witnesses had said regarding "the fact[s] and circumstances" of the alleged crime.<sup>36</sup> That way, Parliament reasoned, the justices' supervising authorities would have a basis for determining whether a justice ought to be punished for inappropriately releasing a dangerous suspect on bail, should the suspect fail to appear for trial.<sup>37</sup>

The following year, Parliament extended the justices' interrogation and documentation duties to *all* cases in which accused felons were brought before them.<sup>38</sup> It is not clear why Parliament imposed those duties in cases where accused felons were committed to prison pending trial, and where collusive bailing thus was not a concern. John Langbein posits that the statute marked an early effort to prod justices of the peace to assume the role of public prosecutors,<sup>39</sup> while others hypothesize that Parliament hoped trial juries would rely upon the justices' written records as evidence.<sup>40</sup> Regardless of Parliament's intentions, courts and others eventually did come to appreciate

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*Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 482 (1994) (tracing the right to ancient Roman law).

34. See 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 233 (London, MacMillan 1883). Justices of the peace had greater powers when dealing with persons accused of misdemeanors, including the power to preside over a jury trial or, in some instances, to adjudicate the case on their own. See JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE* 66, 75 (1974).

35. An Act Touching Bailment of Persons § 1.

36. *Id.* § 4.

37. See LANGBEIN, *supra* note 34, at 11.

38. See An Act to Take Examination of Prisoners Suspected of Any Manslaughter or Felony § 2.

39. See LANGBEIN, *supra* note 34, at 24.

40. See *id.* at 21-22.

the potential evidentiary value of pretrial interrogations conducted by justices of the peace and others. William Holdsworth reports that by the late sixteenth and early seventeenth centuries, depositions taken by justices of the peace, trial judges, and other public officials frequently were admitted into evidence against criminal defendants.<sup>41</sup>

In the seventeenth and eighteenth centuries, the English common law gradually responded to growing concerns regarding juries' reliance upon pretrial depositions in lieu of live testimony at trial. Those concerns were heightened by the fact that, in many instances, the depositions were given *ex parte*, with no opportunity for the defendants to cross-examine the deponents.<sup>42</sup> English authorities responded in two primary ways. First, they began to move toward a rule of unavailability, admitting hearsay statements in lieu of live testimony only if the witness was unavailable to attend the trial.<sup>43</sup> While preparing to try their peer Lord Morley on charges of murder in 1666,<sup>44</sup> for example, the House of Lords declared that depositions taken by the coroner could be read into evidence only if the witnesses "were dead, or unable to travel," or absent "by the means or procurement of the prisoner."<sup>45</sup> If the prosecutors merely reported that they had "used all their endeavours to find" a deponent and did not know where he or she was, the

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41. See 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 218 (1926).

42. The most infamous such instance, of course, is *Raleigh's Case*, 2 How. St. Tr. 1 (1603), in which Sir Walter Raleigh was convicted of treason—and eventually beheaded—on the strength of Lord Cobham's *ex parte* written accusations. See generally 1 DAVID JARDINE, CRIMINAL TRIALS 389–99 (1847) (describing the political intrigue surrounding the treason accusations leveled against Raleigh).

43. See 9 HOLDSWORTH, *supra* note 41, at 218 (tracing the origins of the unavailability requirement to the late sixteenth and early seventeenth centuries); see also 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 592 (London, 8th ed. 1894) (observing that it "seems agreed" that depositions taken by justices of the peace pursuant to the 1554 and 1555 statutes are admissible if the witness "is dead, or unable to travel, or kept away by the means or procurement of the prisoner" (citations omitted)); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 61–62 (Philadelphia, P. Byrne 1812) (writing that, when a witness is living and can "be found," his or her deposition is inadmissible); 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 21 (3d ed. 1940) (stating that, by the mid-1600s, a consensus was emerging in both civil and criminal cases in England "that even an extra-judicial statement under oath should not be used if the deponent can be personally had in court").

44. Lord Morley's Case, 6 How. St. Tr. 769, 769 (H.L. 1666).

45. *Id.* at 770–71.

Lords would refuse to consider the witness's hearsay statements.<sup>46</sup>

Second, English courts constructed the common law rule that a witness's hearsay statements would be admissible at trial only if they were made in the defendant's presence and the defendant had been given an opportunity to cross-examine the witness. In the 1696 case of *King v. Paine*,<sup>47</sup> for example, a witness gave a deposition before the town mayor, accusing Samuel Paine of libel.<sup>48</sup> Although the witness died prior to trial and thus met the rule of unavailability, the Court of King's Bench ruled that the deposition "should not be given in evidence, the defendant not being present when [it was] taken before the mayor, and so had lost the benefit of a cross-examination."<sup>49</sup> Dying declarations were set aside by the English courts as the only species of hearsay statement that could be admitted into evidence even though the defendant was not present when the statement was made and never was given a chance to cross-examine the declarant.<sup>50</sup>

English authorities debated for a time whether the common law's insistence upon an opportunity to cross-examine hearsay declarants applied even to statements made to justices of the peace pursuant to the sixteenth-century bail and committal statutes.<sup>51</sup> By the time the Americans were drafting and ratifying the Sixth Amendment, however, English authorities were answering the question in the affirmative.<sup>52</sup> In the 1789 case of *King v. Woodcock*,<sup>53</sup> for example, a justice of the peace

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46. *Id.* at 771.

47. *King v. Paine*, (1696) 87 Eng. Rep. 584 (K.B.).

48. *See id.* at 584.

49. *Id.* at 585.

50. *See* FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 105 (1951) (identifying dying declarations as the English common law's only exception to the rule that, either prior to or at trial, criminal defendants must be given an opportunity to cross-examine those who testify against them).

51. *See King v. Westbeer*, (1739) 168 Eng. Rep. 108, 109 (K.B.) (reporting that, at trial, the parties debated the admissibility of the unconfrosted witness's statement and that the trial court admitted the statement with a caution to the jury that the evidence "would not be conclusive unless it were strongly corroborated by other testimony," but declining to address the statement's admissibility on appeal); *see also Crawford v. Washington*, 541 U.S. 36, 46 (2004) (citing *Westbeer* and noting the debate); *supra* notes 33–41 and accompanying text (discussing the bail and committal statutes which required justices to take witness statements).

52. *See Crawford*, 541 U.S. at 46.

53. *King v. Woodcock*, (1789) 168 Eng. Rep. 352 (K.B.).

took the deposition of Silvia Woodcock, who had been found badly injured by the side of a road.<sup>54</sup> Silvia gave a statement implicating her husband William, who subsequently was charged with murder after Silvia died from her injuries.<sup>55</sup> The trial judge instructed the jury that admissible evidence ordinarily consisted of testimony given "before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give."<sup>56</sup> The judge explained that exceptions to that rule were made for two kinds of pretrial statements: a "dying declaration of a person who has received a fatal blow" and who believed he or she was about to die, and a statement made to a magistrate or justice of the peace pursuant to the 1554 and 1555 bail and committal statutes.<sup>57</sup> The judge told the jury that, while Silvia's statement was admissible as a dying declaration, it was doubtful that the latter exception applied because Silvia had made the statement outside William's presence and "the prisoner therefore had no opportunity of contradicting the facts [her statement] contains."<sup>58</sup>

The same court reached the same conclusion on comparable facts two years later in *King v. Dingler*.<sup>59</sup> While receiving care at a local infirmary prior to her death, Jane Dingler gave a sworn deposition to a local magistrate accusing her husband George of causing her injuries.<sup>60</sup> At George's murder trial, the court ruled that the deposition was inadmissible because it did not qualify as a dying declaration and because George had not been present when Jane made the statement, and so "he could not have the benefit of cross-examination."<sup>61</sup>

The common law rules reflected in *Woodcock* and *Dingler* continued to predominate after the turn of the century. In the 1817 case of *Rex v. Smith*,<sup>62</sup> for example, two magistrates took the deposition of Charles Stewart, who would later die from

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54. See *id.* at 352.

55. See *id.*

56. *Id.*

57. *Id.* at 353.

58. *Id.*

59. *King v. Dingler*, (1791) 168 Eng. Rep. 383, 384 (K.B.).

60. See *id.* at 383.

61. See *id.* at 384.

62. CROWN CASES RESERVED FOR CONSIDERATION; AND DECIDED BY THE TWELVE JUDGES OF ENGLAND, FROM THE YEAR 1799 TO THE YEAR 1824, at 339 (London 1825).

various injuries he had suffered.<sup>63</sup> Charles Smith—the man who would be charged with Stewart's murder—was present when the deposition was taken.<sup>64</sup> At the conclusion of the deposition, the magistrates asked Smith “whether he chose to put any questions to the deceased; he did not ask any question, but only said, ‘God forgive you, Charles.’”<sup>65</sup> The trial court ruled that the deposition transcript was admissible, and Smith was convicted.<sup>66</sup> The Twelve Judges of England upheld the ruling on appeal.<sup>67</sup>

Nineteenth-century commentators confirmed the English common law rule that hearsay statements were generally inadmissible against a criminal defendant if they were made outside the defendant's presence with no opportunity for cross-examination. Thomas Peake wrote in 1813, for example, that an unavailable witness's deposition was admissible in a criminal trial only if it was given under oath and in the defendant's presence, such that the witness was “liable to cross-examination by the party against whom his deposition is offered.”<sup>68</sup> Thomas Starkie observed that, to be admissible in a criminal case, a hearsay statement must be made in the presence of the prisoner, since otherwise “he would lose the benefit of cross-examination.”<sup>69</sup> Edmund Powell made the same point, writing that, under the English common law, unavailable witnesses' “depositions taken in the presence of a prisoner before a magistrate, and signed by the latter, were generally evidence against the prisoner on his trial if it appeared that he had had an opportunity of cross-examining the witness.”<sup>70</sup>

Conspicuously absent in all of these authorities' discussions is any mention of the necessity of counsel's assistance when cross-examining hearsay declarants prior to trial. That absence will not come as a surprise to those familiar with the

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63. *See id.*

64. *See id.* Though Smith was absent for the initial portion of the deposition, the magistrates readministered the oath to Stewart, “distinctly and slowly” read the transcript that had been prepared thus far, and continued with their questioning. *Id.*

65. *Id.*

66. *See id.* at 340.

67. *See id.*

68. PEAKE, *supra* note 43, at 62.

69. 2 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE, AND DIGEST OF PROOFS IN CIVIL AND CRIMINAL PROCEEDINGS 277 (London, J. & W.T. Clarke 2d ed. 1833).

70. EDMUND POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 166 (Philadelphia, T. & J.W. Johnson & Co. 1858).

history of criminal defendants' right to counsel under English law. Parliament did not authorize those accused of felonies to retain the full services of defense counsel *even at trial* until 1836.<sup>71</sup> Prior to that date, Parliament had permitted full legal representation only for those accused of treason or misdemeanors.<sup>72</sup> Parliament left accused felons to their own devices, based in part on the view that, in high-stakes felony cases, "it was particularly important to restrain counsel from interfering with the court's access to the accused as an informational resource."<sup>73</sup> If felony defendants were not entitled to the assistance of counsel at trial prior to 1836, they certainly were not going to win the right to the assistance of counsel at the kinds of pretrial investigative proceedings in which hearsay declarants made their testimonial statements.

Admittedly, not all felony defendants were left to fend for themselves prior to 1836. Acting on their own initiative, English judges in the eighteenth and early nineteenth centuries sometimes permitted felony defendants to hire counsel for limited purposes.<sup>74</sup> When allowed by the court, defense counsel in felony cases could examine and cross-examine witnesses at trial and could make arguments about the law to the presiding

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71. See *An Act for Enabling Persons Indicted of Felony to Make Their Defence by Counsel or Attorney*, 1836, 6 & 7 Will. 4, c. 114 (Eng.) (establishing that people charged with felonies can use attorneys at trial).

72. See *An Act for Regulating of Trials in Cases of Treason and Misprision of Treason*, 1695, 7 Will. 3, c. 3, § 1 (Eng.) (authorizing representation by counsel for only those charged with treason, and even going so far as to require the appointment of counsel for those treason defendants who were unable to afford an attorney); see also JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 36 (2003) (stating that, "[a]t least as far back as the early decades of the seventeenth century," those charged with misdemeanors were permitted to be represented by counsel, and that there are no accounts from that era explaining why counsel was permitted to those charged with misdemeanors but not to those charged with more serious crimes). Blackstone was mystified by England's practice of denying counsel to those charged with felonies. See 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 349 (photo. reprint 1979) (1769) (asking what rationale could possibly justify denying counsel to those facing the prospect of execution while permitting legal representation for those charged with "every petty trespass"). In all quotations from Blackstone and other early printed sources, modern *s* is substituted for an archaic *j* symbol.

73. LANGBEIN, *supra* note 72, at 39.

74. See BLACKSTONE, *supra* note 72, at 349–50 (acknowledging that English judges sometimes allowed defendants to rely upon the assistance of counsel for examining witnesses and arguing points of law, but arguing that "this is a matter of too much importance to be left to the good pleasure of any judge").

judge, but counsel was not permitted to make arguments directly to the jury—defendants had to carry out that task on their own.<sup>75</sup> Finding their professional opportunities cabined, English attorneys in the late eighteenth century came to see cross-examination as the trial task for which they could provide the most valuable assistance.<sup>76</sup> Trial judges previously had assumed the duty of helping defendants question adverse witnesses, but their questions were often perfunctory.<sup>77</sup> When permitted to appear, defense counsel approached cross-examination with far greater vigor, provoking “a good deal of anxiety among those who had to face up to it in such a public arena as the Old Bailey, the main criminal court of London whose business was regularly reported for public consumption in the *Old Bailey Session Papers*.”<sup>78</sup> Indeed, the perceived effectiveness of counsel’s cross-examinations helped launch the hearsay rule to a position of even greater prominence, as defense attorneys began to insist upon an opportunity to question the prosecution’s witnesses.<sup>79</sup>

Prior to Parliament’s intervention in 1836, however, defense counsel’s participation in felony cases remained far from the norm; the great majority of defendants went before juries

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75. See J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 230–31 (1991) (stating that, between the 1730s and 1836, defense counsel in felony cases were permitted to “examine and cross-examine witnesses and to speak to rules of law,” but were not permitted to speak directly to the jury); see also LANGBEIN, *supra* note 72, at 5 (stating that “[t]he purpose of this restriction was to maintain the pressure on the accused to speak about the events in question, hence to continue to serve as an informational resource for the court”).

76. See Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 535 (1990) (“Because defense counsel’s role was limited in other regards, it is not surprising that barristers defending those accused of felonies focused their attention on cross-examination, a mechanism that offered the broadest latitude for the development of persuasive proof with a minimum of restrictions.”).

77. See Beattie, *supra* note 75, at 233 (“Judges went out of their way on occasion—before and after 1730—to cross-examine witnesses at length, especially when they suspected the evidence being given, or when they had some other reason to discredit the witness. Judges were only occasionally moved to engage in vigorous cross-examinations however.”).

78. *Id.* at 234; see also 5 WIGMORE, *supra* note 43, at 26 (stating that, in the mid-1700s, judges were under increasing pressure to permit “trained counsel” to conduct cross-examinations at trial).

79. See Landsman, *supra* note 76, at 572 (stating that there was an effort to avoid the “dangers of hearsay” by enforcing the rule).



and fought for acquittals entirely on their own.<sup>80</sup> For those defendants who desired and could afford representation, the decision whether to permit counsel to appear was left entirely to “the good pleasure” of the judge.<sup>81</sup> Defendants who could not afford an attorney were especially likely to be unrepresented at trial, because it was not until Parliament’s enactment of the Poor Prisoners’ Defence Act in 1903 that they were assured of “legal aid in the preparation and conduct of [their] defence.”<sup>82</sup> And regardless of what an English judge might have said in the late eighteenth century about a particular defendant’s ability to hire counsel for assistance at trial, neither Parliament nor the courts ever even hinted that counsel’s pretrial assistance with the cross-examination of a witness was necessary in order to render that witness’s hearsay statements admissible if he or she later became unavailable to testify.

Parliament made explicit the nonnecessity of counsel’s assistance during pretrial cross-examination of hearsay declarants in legislation enacted in 1848<sup>83</sup>—legislation that our own Supreme Court has said codified the prevailing common law rules on the subject of prior opportunities to cross-examine hearsay declarants.<sup>84</sup> In the Indictable Offenses Act,<sup>85</sup> Parlia-

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80. See LANGBEIN, *supra* note 72, at 170 n.302 (providing statistics, such as the presence of “defense counsel in 12.8% of trials in the year 1782”); Beattie, *supra* note 75, at 227 (providing a table of the percentages of cases with counsel from 1740–1800); Landsman, *supra* note 76, at 533–34 (describing the trend from “a very low level of legal participation” to a rapid change in the 1730s where the “number of appearances by counsel noted in the records tripled twice in ten years”).

81. See 4 BLACKSTONE, *supra* note 72, at 350.

82. Poor Prisoners’ Defence Act, 1903, 3 Edw. 7, c. 38, § 1 (Eng.). Even under the 1903 Act, however, the appointment of counsel was not guaranteed since the presiding judge had to make a preliminary finding that the appointment of counsel would be “in the interests of justice.” *Id.*; see also Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 861–62 (2004) (discussing the limits of the 1903 Act, such as inadequate attorney payments and the “interest of justice” standard).

83. See An Act to Facilitate the Performance of the Duties of Justices of the Peace out of the Sessions within *England* and *Wales* with Respect to Persons Charged with Indictable Offenses, 1848, 11 & 12 Vict., c. 42, § 17 (Eng.) [hereinafter Indictable Offenses Act] (dealing with the defendant’s right to cross-examination).

84. See *Crawford v. Washington*, 541 U.S. 36, 47 (2004) (stating that the statute codified the common law recognition that defendants need an opportunity to cross-examine witnesses); see also *R v. Beeston*, (1854) 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App.) (Jervis, C.J.) (noting that the 1848 legislation “introduced in terms the principle that the prisoner should have the full opportunity of cross-examination, which he formerly had only by the equitable con-

ment returned to the territory it had covered three centuries earlier in the bail and committal statutes.<sup>86</sup> Parliament declared that, when a person "charged with any indictable Offence" was brought before a justice of the peace, the justice "shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement . . . on oath or affirmation of those who shall know the facts and circumstances of the case."<sup>87</sup> Parliament then codified the common law rule that, if such a witness later died or became too ill to travel, the deposition could be read into evidence if it were "proved that such deposition was taken in the presence of the person so accused, and that *he or his counsel or attorney* had a full opportunity of cross-examining the witness."<sup>88</sup>

With respect to all cases in which the prosecution wished to rely upon an unavailable witness's hearsay statements, Parliament's use of the tiny word "or" in the italicized phrase reflected the conclusion that the English common law had long since reached: pretrial cross-examinations conducted by unrepresented criminal defendants were sufficient to vindicate those defendants' confrontation rights. If a defendant had the good fortune of being represented by counsel at a proceeding in which a witness's deposition was being taken, the defendant could rely upon the attorney to interrogate the witness.<sup>89</sup> But if the defendant was unrepresented, the witness's statements would be admissible at trial if he or she became unavailable to

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struction of the law"); JOHN JERVIS, *ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES* 209-10 (London, Sweet, Stevens & Norton 12th ed. 1853) (stating that, with respect to the prior cross-examination of hearsay declarants, the Indictable Offenses Act simply codified the common law rules).

85. See Indictable Offenses Act, *supra* note 83, § 17.

86. See *supra* notes 33-41 and accompanying text (discussing the 1554 and 1555 bail and committal statutes).

87. Indictable Offenses Act, *supra* note 83, § 17.

88. *Id.* (emphasis added); cf. MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 345 (London, 6th ed. 1820) (drawing no distinction between questioning by "parties[] or their counsel or attornies" when asserting that cross-examination "beats and boulds out the truth much better, than when the witness only delivers a formal series of his knowledge, without being interrogated"(footnote omitted)).

89. See THOMAS WILLIAM SAUNDERS, *THE PRACTICE OF MAGISTRATES' COURTS* 219-20 (Horace Cox 6th ed. 1902) ("[Under the Indictable Offenses Act] the accused should be informed by the Bench that he may put any questions touching the matter he thinks proper. If the party charged has the assistance of a professional adviser, such adviser should be permitted to conduct the cross-examination . . .").

testify, so long as the official taking the deposition afforded the defendant an opportunity to interrogate the witness on his or her own.<sup>90</sup>

## B. COUNSEL AND CONFRONTATION IN EARLY AMERICA

Although Americans in the late eighteenth century rejected a portion of their English legal heritage when they granted all criminal defendants the right to hire an attorney to provide assistance at trial,<sup>91</sup> they adopted virtually wholesale England's common law rules regarding confrontation and the admissibility of unavailable witnesses' hearsay statements.<sup>92</sup> Like their predecessors in England, the early Americans deemed testimonial hearsay statements admissible, so long as the statements were made in the defendant's presence and the defendant was given an opportunity—even if unrepresented by counsel—to cross-examine the witness.

Because federal courts were not frequently called upon to adjudicate confrontation claims until much later in the nation's history—after federal crimes had begun to grow in number<sup>93</sup>

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90. See EDMUND POWELL, *THE PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE* 303 (London, John Crockford 2d ed. 1859) (stating that, under the Indictable Offenses Act, "when the prisoner is not attended by counsel or attorney, it ought also to appear that the magistrate had asked him whether he would like to cross-examine, and that he had allowed the prisoner sufficient time to consider what questions he would put"); see also *R v. Peacock*, (1870) 12 Cox Crim. Cas. 21, 22 (N. Cir.) (noting a common law presumption that if a defendant is personally present at a deposition then he or she has been afforded an adequate opportunity to cross-examine the deponent, but noting that the presumption can be overcome, such as by evidence that the defendant was not mentally fit to interrogate the witness); ROSCOE'S DIGEST OF THE LAW OF EVIDENCE AND THE PRACTICE IN CRIMINAL CASES IN ENGLAND AND WALES 67 (Anthony Hawke ed., 15th ed. 1928) (citing *Peacock* and other authorities for the proposition that "[t]here is a presumption that if defendant was present he had a full opportunity of cross-examination, but it may be rebutted").

91. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."); *HELLER*, *supra* note 50, at 109–10 (noting that the Sixth Amendment "affirmed the rejection by American practice of the English common law rule on the subject"); see also WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 18–21 (1955) (observing that the early state constitutions reflected a consensus that criminal defendants should be permitted to retain counsel, but that most states in the founding era did not grant indigent defendants the right to the appointment of counsel).

92. See generally U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

93. Cf. Brandon L. Bigelow, Note, *The Commerce Clause and Criminal Law*, 41 B.C. L. REV. 913, 944 (2000) (stating that more than ninety percent of

and after the Confrontation Clause had been held applicable to the states<sup>94</sup>—one must rely primarily on state courts' rulings to discern defendants' confrontation rights at the time of the nation's founding. Those rulings indicate that, when American prosecutors in the late eighteenth and early nineteenth centuries sought to rely upon the hearsay statements of unavailable witnesses, courts looked directly to the English common law for guidance.<sup>95</sup> In *State v. Webb*,<sup>96</sup> for example, the Supreme Court of North Carolina held in 1794 that a witness's deposition could not be used as evidence against the defendant in his trial for horse stealing, because the defendant had not been present when the deposition was taken.<sup>97</sup> "[I]t is a rule of common law, founded on natural justice," the court wrote, "that no man shall be prejudiced by evidence which he had not the liberty to cross examine."<sup>98</sup>

In *Johnston v. State*<sup>99</sup>—another case involving horse stealing—the Supreme Court of Tennessee looked to the same common law authorities for direction when confronted with the proffer of an unavailable witness's hearsay statements.<sup>100</sup> The defendant and a witness had been brought to a justice of the peace for questioning, where the witness gave a sworn state-

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the nation's federal criminal statutes were enacted after 1909); Colin V. Ram, Note, *Regulating Intrastate Crime: How the Federal Kidnapping Act Blurs the Distinction Between What Is Truly National and What Is Truly Local*, 65 WASH. & LEE L. REV. 767, 774 (2008) (noting the increased demand for federal criminal legislation as the twentieth century dawned because "criminal activity was no longer restrained within the bounds of state borders").

94. The Court did not hold that the Fourteenth Amendment incorporated the Confrontation Clause until 1965. See *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) ("We decide today that the Confrontation Clause of the Sixth Amendment is applicable to the States.").

95. See, e.g., 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 687 (Boston, Little, Brown, & Co. 2d ed. 1872) (stating that England's sixteenth-century bail and committal statutes and the common law surrounding them "are early enough in date to be common law with us; and they are regarded as such in Pennsylvania, in Maryland, and probably in the other States generally"). The U.S. Supreme Court was still following the same pattern when the nineteenth century neared its close. See *Mattox v. United States*, 156 U.S. 237, 240–41 (1895) (examining "[t]he rule in England" and "the practice in [the United States]" for guidance concerning the meaning of the Confrontation Clause).

96. 2 N.C. 120, 1 Hayw. 104 (1794).

97. *Id.* at 120, 1 Hayw. at 104.

98. *Id.* at 120, 1 Hayw. at 104.

99. 10 Tenn. (2 Yer.) 58 (1821).

100. *Id.* at 59.

ment in the defendant's presence.<sup>101</sup> Citing *Webb* and the common law rules that had grown up around England's sixteenth-century bail and committal statutes,<sup>102</sup> the court held that the witness's statements were properly admitted.<sup>103</sup> The defendant had been personally present when the witness gave his account of the relevant events, the court concluded, and the defendant could have cross-examined the witness if he had liked.<sup>104</sup>

In *State v. Hill*,<sup>105</sup> the South Carolina Court of Appeals followed the same analysis in a case in which the defendant was charged with sexually abusing a child.<sup>106</sup> Although the child died prior to trial and so was unavailable to testify, the court held that the child's pretrial deposition was inadmissible because the defendant had not been present when the deposition was taken and so he had no opportunity to cross-examine his accuser.<sup>107</sup>

Like their English counterparts, these early authorities give no indication that a defendant's opportunity to cross-examine a hearsay declarant was sufficient only if the defendant was assisted by counsel.<sup>108</sup> The Supreme Court of Tennessee's 1842 ruling in *Bostick v. State*<sup>109</sup> illustrates the way in which courts focused squarely on pretrial cross-examination opportunities that were afforded to defendants themselves.<sup>110</sup> After being arrested for assault, Bostick was taken to the home of a person named Lowe, where magistrates and Bostick's alleged victim were waiting.<sup>111</sup> When the magistrates indicated

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101. *Id.* at 58.

102. *See supra* notes 33–70 and accompanying text (discussing the bail and committal statutes, and the common law rules they provoked).

103. *Johnston*, 10 Tenn. at 59–60.

104. *See id.* at 59 (concluding that the statutory requirements that the defendant be present at the deposition and have an opportunity to cross-examine the witness were met); *cf.* *Commonwealth v. Richards*, 35 Mass. (18 Pick.) 434, 437–40 (1836) (stating that a since-deceased witness's statements to a magistrate would have been admissible because the defendant was present when the statements were made and he could have cross-examined the witness if he had liked, but ultimately excluding the statements because other witnesses' descriptions of the decedent's statements were imprecise).

105. 20 S.C.L. 272, 2 Hill. 607 (S.C. Ct. App. 1835).

106. *Id.* at 272–73, 2 Hill. at 607–09.

107. *Id.* at 272–74, 2 Hill. at 608–11.

108. *E.g., id.* at 272, 2 Hill. at 608 (requiring only that the deposition be “taken in the presence of the prisoner, who is allowed the right to cross examine” and not discussing a right to counsel).

109. 22 Tenn. (3 Hum.) 344 (1842).

110. *Id.* at 345–46.

111. *Id.* at 344.

that they intended to take the victim's deposition, Bostick said that he did not want to be in the same room, or even in the same building, "where the wounded man lay."<sup>112</sup> The magistrates proceeded with the deposition after Bostick left the house, and the victim later died.<sup>113</sup> At Bostick's ensuing murder trial, the court admitted the victim's deposition into evidence.<sup>114</sup> After speculating that Bostick might have left Lowe's home because he would have found it "painful to his feelings to have been in the presence of the wounded man, and to have heard a recapitulation of the circumstances from his lips,"<sup>115</sup> the Supreme Court of Tennessee upheld the ruling:

[H]e knew the deposition was being taken; he might have been immediately present if he would; he was asked, but declined to be so. His constitutional right, therefore, of meeting his witnesses face to face was not infringed, and it would be most dangerous to permit persons to exclude such testimony by refusing to go into the immediate presence of the injured party testifying. We think, therefore, that this deposition was properly admitted . . . .<sup>116</sup>

The court said nothing about the possibility that Bostick could have relied upon an attorney to conduct the cross-examination on his behalf.<sup>117</sup>

The absence of any reference to attorneys in these early authorities reflects two beliefs: that the right to counsel did not attach at preliminary investigative proceedings (a matter addressed in Part II of this article), and that the value of confrontation lay primarily in forcing a witness to make his or her accusations in a public, face-to-face exchange with the defendant rather than in exposing a witness to a professional trained in the art of cross-examining witnesses.<sup>118</sup> It was not until well into the nineteenth century that authorities began to link defendants' right of confrontation to the skills wielded by defendants' attorneys.<sup>119</sup> Far more prevalent in the late eighteenth and ear-

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 345-46.

116. *Id.* at 346.

117. *Cf. id.* at 344-46 (lacking any discussion of counsel).

118. *See id.* (declaring that the "intent of the State" was to ensure the defendant himself be present at the taking of a deposition, and not an attorney).

119. *See* William David Evans, *On the Law of Evidence*, in 2 M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS 110, 178 (Philadelphia, Robert H. Small 1839) (observing that when a witness is deposed by a magistrate in the defendant's presence pursuant to the Marian bail and committal statutes, the defendant "has not those assistances for analysing the proofs which are adduced against him, which exist upon a solemn trial, where

ly nineteenth centuries was the view that confrontation's primary value lay in forcing a witness to accuse a defendant to his or her face, and to force the witness to endure any adversarial exchange with the defendant which might ensue.<sup>120</sup>

By conceiving of confrontation's chief value in that way, authorities in early America were continuing to emphasize the same point that Sir Walter Raleigh famously articulated in his 1603 trial for treason.<sup>121</sup> Raleigh did not demand assistance in cross-examining his accuser, Lord Cobham; rather, he insisted upon an opportunity for a face-to-face confrontation with Cobham in the presence of the judges: "Call my Accuser before my Face, and I have done . . . I beseech you, my lords, let Cobham be sent for, charm him on his soul, on his Allegiance to the King; if he affirm it, I am guilty."<sup>122</sup> Raleigh expressed no doubts about his own cross-examination skills; rather, he was driven by the belief that Cobham would find it easier to lie in a private conversation with the Crown's representatives than in a public, face-to-face exchange with Raleigh himself.<sup>123</sup>

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he can call in aid the exertions of judicious advocates"); *see also* Landsman, *supra* note 76, at 599 (stating that, prior to Evans, scholars devoted little attention to the need to enlist counsel's assistance when cross-examining witnesses, and arguing that "Evans's work embodied a new conception of the legal process, one in which the cross-examination of witnesses by *skilled counsel* was of such importance that the process was rendered suspect without it").

120. *See* LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 360 (Dublin, H. Fitzpatrick 1802) (stating that "[n]o evidence can be received against a prisoner but in his presence" and that this rule ensures that a witness can be cross-examined by "the party who would be affected by such evidence"); S.M. PHILLIPPS, *A TREATISE ON THE LAW OF EVIDENCE* 173 (New York, Gould, Banks, & Gould 1816) (calling it "a general principle in the law of evidence" that "if any fact is to be substantiated against a person, it ought to be proved in his presence by the testimony of a witness sworn to speak the truth; . . . [so] that the person, who is to be affected by the evidence, may have an opportunity of interrogating the witness"); Landsman, *supra* note 76, at 599 (stating that courts and scholars in that era focused on the desirability of ensuring that there was a "physical confrontation between witness and accused"); Donald Dripps, *Sixth-Amendment Originalism's Collision Course with the Right to Counsel: What's Titanic, What's Iceberg?* 31 (Univ. of San Diego Sch. of Law, Research Paper No. 07-79, 2006), available at <http://ssrn.com/abstract=952508> ("The historical evidence shows that throughout the first half of the nineteenth century, American lawyers regarded the confrontation required for prosecution hearsay to be admissible at trial to be the confrontation of the witness, under oath, by the suspect personally.").

121. *See* Raleigh's Case, 2 How. St. Tr. 1 (1603); *see also supra* note 42 (noting Raleigh's trial and commentary upon it).

122. *Raleigh*, 2 How. St. Tr. at 15–16.

123. *See id.* (quoting Raleigh as requesting Cobham's public appearance).

Well into the nineteenth century, many people continued to share Raleigh's beliefs about human nature and its relation to the value of confrontation. In its 1844 ruling in *State v. Campbell*,<sup>124</sup> for example, the South Carolina Court of Appeals ruled that a deposition was inadmissible because it had been taken outside the defendant's presence with no opportunity for cross-examination.<sup>125</sup> Echoes of Raleigh are unmistakable in the court's reasoning:

The practical good sense of such examination of witnesses, confronted by the accused, is readily understood. Any man of experience who has heard tales told by one man against his neighbor, behind his back, and again told, when placed face to face, and new views are suggested by the man he had accused, and possibly belied—any one [sic] that [sic] has known such occurrences, will readily conceive [the importance of demanding that a witness be confronted by the person he accuses]. Experience has proved that it is, of all others, the most effective, the most satisfactory, and the most indispensable test of the evidence narrated on the witness's stand.<sup>126</sup>

Even today, the Supreme Court continues to reiterate Raleigh's core concern,<sup>127</sup> while seventeen state constitutions frame the confrontation right in Raleigh's language, assuring criminal defendants of the right to meet their accusers "face to face."<sup>128</sup>

Like their English contemporaries, American courts in the mid-nineteenth century certainly recognized that defendants could rely upon an attorney to conduct a cross-examination, if fortunate enough to be accompanied by one when confronting a hearsay declarant prior to trial. In a pair of rulings from the 1850s, for example, the U.S. Circuit Court for the District of Illinois and the Supreme Court of Missouri held that the depositions of unavailable witnesses were admissible because those

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124. 30 S.C.L. (1 Rich.) 124 (S.C. Ct. App. 1844).

125. *Id.* at 125–26 ("[The witness] must be subjected, personally, to the examination of the man he accuses.").

126. *Id.* at 126.

127. See *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965))); *id.* at 1019 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"); cf. *Maryland v. Craig*, 497 U.S. 836, 847 (1990) ("Although face-to-face confrontation forms the core of the values furthered by the Confrontation Clause, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right." (internal quotation marks omitted)).

128. See Katherine W. Grearson, Note, *Proposed Uniform Child Witness Testimony Act: An Impermissible Abridgment of Criminal Defendants' Rights*, 45 B.C. L. REV. 467, 480 (2004) (noting that seventeen state constitutions contain the "face to face" language).



depositions had been taken in the defendants' presence and the witnesses had been cross-examined by the defendants' attorneys.<sup>129</sup> But the assistance of counsel in those cases was a fortuitous luxury, rather than a constitutional necessity: the historical record provides no indication that eighteenth- and nineteenth-century courts deemed counsel's pretrial assistance with cross-examinations essential.<sup>130</sup>

It was not until the Supreme Court's ruling in *Pointer v. Texas*<sup>131</sup>—nearly two centuries after the nation's founding, and without the benefit of any briefing on the meaning of the Confrontation Clause<sup>132</sup>—that a defendant's pretrial opportunity to cross-examine a hearsay declarant was deemed insufficient to satisfy the Confrontation Clause due to the lack of attorney aid.<sup>133</sup> The *Crawford* Court's rejection of *Ohio v. Roberts* suggests that *Pointer* and its progeny now stand on perilous ground.<sup>134</sup> The *Roberts* decision had allowed trial judges to admit hearsay that they believed possessed "indicia of reliability."<sup>135</sup> The *Crawford* Court held this to be a misconstruction of the protection that the Confrontation Clause affords criminal defendants: "[I]t is a procedural guarantee rather than a substantive guarantee . . . . It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."<sup>136</sup> Like *Roberts*,

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129. See *United States v. Macomb*, 26 F. Cas. 1132, 1132–34 (C.C.D. Ill. 1851) (No. 15,702) (arguing that the law of evidence is "quite stringent enough in excluding testimony"); *State v. McO'Brien*, 24 Mo. 402, 418 (Mo. 1857) (Ryland, J., dissenting) (noting that the defendant had been represented by counsel and that counsel had cross-examined the witness).

130. See, e.g., *McO'Brien*, 24 Mo. at 418 (lacking any indication that counsel was considered a necessity).

131. 380 U.S. 400 (1965).

132. The parties' briefs in *Pointer* focused entirely on whether *Pointer* had a right under the Sixth Amendment's Assistance of Counsel Clause to the benefit of an attorney's aid when cross-examining an adverse witness at a preliminary hearing. Neither brief specifically addressed the meaning of the Confrontation Clause. See Brief for Petitioner at 6–12, *Pointer*, 380 U.S. 400 (No. 577) (focusing entirely on the Assistance of Counsel Clause and its applicability to the states under the Fourteenth Amendment's Due Process Clause); Brief for Respondent at 7–14, *Pointer*, 380 U.S. 400 (No. 577) (focusing entirely on the Assistance of Counsel Clause and whether the petitioner had waived his right to an attorney's assistance).

133. See *supra* notes 25–29 and accompanying text (discussing *Pointer*).

134. See *supra* notes 6–9 and accompanying text (discussing *Crawford*'s rejection of *Roberts*).

135. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

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

*Pointer* is aimed at trying to ensure a hearsay statement's reliability; it presumes (surely correctly) that a cross-examination conducted by a skilled attorney is ordinarily more likely than a cross-examination conducted by a defendant to ferret out all of the reasons why a witness's statements should not be trusted.<sup>137</sup> But if the Confrontation Clause's chief concern is not that statements be reliable, but rather that statements' reliability be assessed in a particular way, then by *Crawford's* logic the question is not whether one procedure is more likely than another to expose unreliable statements.<sup>138</sup> Instead, the question is what specific procedure the Confrontation Clause demands.<sup>139</sup>

Although we now believe that the most rigorous way to test a hearsay statement's trustworthiness is to force the declarant to endure questioning by a professionally trained attorney, the historical record is quite clear about what late-eighteenth-century authorities believed was sufficient to protect defendants' rights.<sup>140</sup> Under the eighteenth-century common law principles that the Court today says the Sixth Amendment incorporates, a defendant's confrontation rights are vindicated by a pretrial opportunity to cross-examine a hearsay declarant who later becomes unavailable to testify, even if the defendant has to conduct that cross-examination on his or her own, without the assistance of counsel.<sup>141</sup>

If a defendant faced with the task of cross-examining a hearsay declarant prior to trial is going to make a persuasive showing of entitlement to counsel's assistance, therefore, he or she is going to have to rely upon constitutional provisions other than the Confrontation Clause. The two leading candidates are the Assistance of Counsel Clause of the Sixth Amendment<sup>142</sup> and the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>143</sup> Those constitutional texts provide relief in certain circumstances, but in others they leave defendants responsible for conducting cross-examinations on their own.

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137. See *Pointer v. Texas*, 380 U.S. 400, 407 (1964) ("The case before us would be quite a different one had [the witness's] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine.").

138. See *Crawford*, 541 U.S. at 61.

139. *Id.*

140. See *supra* notes 95–107 and accompanying text.

141. See *supra* notes 108–18 and accompanying text.

142. U.S. CONST. amend. VI.

143. *Id.* amends. V & XIV.

## II. THE SIXTH AMENDMENT RIGHT TO COUNSEL

One might assume that the Sixth Amendment's Assistance of Counsel Clause<sup>144</sup> always guarantees defendants the right to an attorney's aid when cross-examining hearsay declarants prior to trial, thereby fully covering the gaps left by the recently refocused Confrontation Clause. The Sixth Amendment right to counsel, however, does not immediately attach upon the launching of a criminal investigation.<sup>145</sup> As a result, law-enforcement officers routinely secure testimonial statements before the time at which a suspect is constitutionally entitled to an attorney's help.<sup>146</sup> Moreover, even after the right to counsel has attached, defendants and their attorneys ordinarily are not entitled to be present when government officials interview witnesses in preparation for trial.<sup>147</sup> Questions concerning the intersection of the Confrontation and Assistance of Counsel Clauses are thus more complicated than they might first appear. The primary question is this: when a defendant is afforded a pretrial opportunity to cross-examine a witness pursuant to the Confrontation Clause, does the Assistance of Counsel Clause ever grant the defendant the right to the aid of an attorney?

This Part makes two principal arguments. If the government wishes to ensure that a hearsay declarant's testimonial statements will be admissible in the event that the witness becomes unavailable to testify at trial, the government must afford the defendant an opportunity to cross-examine the declarant with counsel's assistance, provided the witness is available to testify when the defendant's right to counsel attaches. But if the witness has already become unavailable by the time the defendant's right to counsel has attached, then the Assistance of Counsel Clause poses no obstacle to admitting the witness's statements into evidence.

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144. *Id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

145. *See infra* notes 148–56 and accompanying text (discussing when the right to counsel attaches).

146. *Cf. infra* Part II.B.2 (examining a defendant's own statement made before the right to counsel attached).

147. *See infra* notes 164–66 and accompanying text (discussing when defendants and attorneys are entitled to be present at pretrial interrogations).

#### A. THE ATTACHMENT OF THE RIGHT TO COUNSEL AND THE IDENTIFICATION OF "CRITICAL STAGES"

A criminal suspect's Sixth Amendment right to counsel attaches when the government commences adversarial judicial proceedings against him or her, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."<sup>148</sup> The right to counsel does not attach prior to that point because, until "the government has used the judicial machinery to signal a commitment to prosecute,"<sup>149</sup> there is no need to ensure "that the prosecution's case [encounters] the crucible of meaningful adversarial testing,"<sup>150</sup> and thus the suspect need not yet worry about mastering legal intricacies or about withstanding "trial-type confrontations with the prosecutor."<sup>151</sup> As Justice Stewart wrote in 1972,

[t]he initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.<sup>152</sup>

After the government has initiated adversarial judicial proceedings, the defendant is entitled to counsel's assistance at each "critical stage" of the ensuing prosecutorial process.<sup>153</sup> A

148. *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (internal quotation marks omitted); *see also id.* at 2581 (stating that the right to counsel "applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty"); *id.* (holding that the attachment of the right does not depend upon whether the prosecutor is "aware of that initial proceeding or involved in its conduct"); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (stating that a defendant's Sixth Amendment right to counsel does not attach until the government's activities with respect to that defendant have "shift[ed] from investigation to accusation").

149. *Rothgery*, 128 S. Ct. at 2591 (internal quotation marks omitted).

150. *United States v. Cronin*, 466 U.S. 648, 656 (1984).

151. *United States v. Gouveia*, 467 U.S. 180, 188–90 (1984).

152. *Kirby v. Illinois*, 406 U.S. 682, 689–90 (1972) (plurality opinion); *see also Brewer v. Williams*, 430 U.S. 387, 398 (1977) (adopting the *Kirby* plurality's analysis).

153. *See Iowa v. Tovar*, 541 U.S. 77, 87 (2004) ("The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all 'critical stages' of the criminal process.").

stage is "critical" if it entails a "trial-like"<sup>154</sup> encounter between the defendant and the government, such that the defendant might need professional assistance "in coping with legal problems or . . . in meeting his adversary."<sup>155</sup> The right to legal representation during these encounters is essential, the Court has explained, because what transpires on these occasions "might well settle the accused's fate and reduce the trial itself to a mere formality."<sup>156</sup> If defense counsel's ability to protect the defendant's interests at trial would not be significantly harmed by defense counsel's absence at the pretrial encounter, then the encounter is not critical and defense counsel's presence there is not constitutionally required. But if defense counsel's best efforts at trial likely could not remedy any deficiencies abetted by his or her absence at the pretrial encounter, then the encounter is critical and the defendant is entitled to have his or her attorney present.

Using these tests and rationales, the Court has sifted through a variety of pretrial events, distinguishing between those that are critical and those that are not. The Court has concluded, for example, that after the government has launched judicial proceedings against a defendant, he or she has a Sixth Amendment right to be represented by counsel whenever he or she is interrogated by government officials or by those acting on government officials' behalf.<sup>157</sup> Given the irreparable damage that an unrepresented defendant might self-inflict during pretrial questioning, the Court's designation of defendants' interrogations as "critical" is hardly surprising. Perhaps less obviously, the Court has held that defendants are constitutionally entitled to have their attorneys present when they are placed in a postattachment physical lineup for viewing

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154. *United States v. Ash*, 413 U.S. 300, 312 (1973).

155. *Id.* at 313; *see also id.* at 310 (stating that the right to counsel extends to "pretrial events that might appropriately be considered to be parts of the trial itself" because "[a]t these . . . events, the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both").

156. *United States v. Wade*, 388 U.S. 218, 224 (1967).

157. *See Moran v. Burbine*, 475 U.S. 412, 428 (1986) ("[A]bsent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding . . ."); *Masiah v. United States*, 377 U.S. 201, 206 (1964) (holding that *Masiah's* right to counsel had been violated "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him [through a surrogate] after he had been indicted and in the absence of his counsel").

and identification by witnesses.<sup>158</sup> The Court has explained that “the accused’s inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness’s courtroom identification.”<sup>159</sup>

A defendant is not entitled to an attorney’s presence, however, when witnesses are asked merely to view photo arrays in which the defendant’s picture appears.<sup>160</sup> The Court has concluded that, because the defendant is not personally present on those occasions, “no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.”<sup>161</sup> The same ordinarily is true of the government’s pretrial examination of “the accused’s fingerprints, blood sample, clothing, hair, and the like.”<sup>162</sup> Aided by his or her attorney, the defendant can simply confront the results of those pretrial analyses when they are offered into evidence at trial:

Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government’s case at trial through the ordinary processes of cross-examination of the Government’s expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel’s absence at such stages might derogate from his right to a fair trial.<sup>163</sup>

The Court has placed the government’s pretrial interrogations of witnesses into the category of noncritical events—neither the defendant nor his or her attorney is ordinarily entitled to be present.<sup>164</sup> “The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself,” the Court has said.<sup>165</sup> Because the defendant ordinarily is not present at the interrogation, the situation is similar to the government’s presentation of photo arrays to witnesses: there is no risk that the defendant will “be misled by

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158. *See Wade*, 388 U.S. at 231–32.

159. *Id.*

160. *United States v. Ash*, 413 U.S. 300, 317 (1973).

161. *Id.*

162. *Wade*, 388 U.S. at 227.

163. *Id.* at 227–28.

164. *See Ash*, 413 U.S. at 317–18 (discussing witness interviews).

165. *Id.* at 318.

his lack of familiarity with the law or overpowered by his professional adversary."<sup>166</sup> Moreover, what a witness says in a pretrial interview with government investigators is usually peripheral to determining the defendant's fate at trial; it is what a witness says to the jury that matters. An attorney's opportunity to cross-examine a witness at trial is ordinarily thus far superior to an opportunity to cross-examine a witness during a pretrial interview. Indeed, rather than unleash a blistering cross-examination in a pretrial setting, a defense attorney might very well want to reserve her most devastating questions for the actual trial, so that the witness's first encounter with those questions takes place under the watchful eye of the jury.

That line of reasoning is obviously thwarted, however, when a witness whom government officials have interviewed *ex parte* later dies or becomes otherwise unavailable to testify. As discussed in Part I, the Confrontation Clause's chief function in that circumstance is to bar the admission of the unavailable witness's testimonial pretrial statements unless the defendant was given an opportunity to cross-examine the witness.<sup>167</sup> Before *Crawford* realigned the Court's confrontation jurisprudence to focus solely on eighteenth-century common law principles, *Pointer* safely assured the defendant in that scenario that the unavailable witness's statements would be inadmissible unless the defendant was given the chance to enlist the aid of an attorney when conducting the pretrial cross-examination.<sup>168</sup> Given the peril in which *Pointer* now stands, defendants desiring an attorney's assistance with pretrial cross-examinations must turn to the Sixth Amendment right to counsel to see whether it affords relief. Does it bridge the gaps that the Confrontation Clause now creates?

#### B. THE LIMITS AND BREADTH OF THE RIGHT TO AN ATTORNEY'S ASSISTANCE WITH PRETRIAL CROSS-EXAMINATIONS

If prosecutors fear that a witness will be unavailable to testify by the time the defendant's trial date arrives, and they want to ensure that the witness's testimonial hearsay statements can nevertheless be admitted into evidence, the Confrontation Clause demands that they afford the defendant a pretrial opportunity to cross-examine the witness.<sup>169</sup> For purposes of

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166. *Id.* at 317 (discussing photo arrays).

167. *See supra* notes 5–9, 91–120 and accompanying text.

168. *See supra* notes 25–29 and accompanying text.

169. *See supra* notes 5–9, 91–107 and accompanying text.

conducting the Sixth Amendment right-to-counsel analysis, those pretrial cross-examination opportunities may be divided into two categories: those in which the opportunity is afforded after the defendant's right to counsel has attached and those in which the opportunity is afforded before attachment occurs.

### 1. Cross-Examination Opportunities Afforded *After* Attachment

An opportunity to cross-examine a witness after a defendant's Sixth Amendment right to counsel has attached plainly bears the hallmarks of a "critical stage" necessitating defense counsel's participation. By its very design it is a trial-like encounter, aimed at approximating the confrontation that would occur at trial between the defendant on the one hand, and the prosecution's witness and the law's complexities on the other.<sup>170</sup> To cross-examine a witness effectively—whether at trial or before—one generally must be familiar with the nuances of the law under which the defendant has been charged, so that one can identify the points on which the government's case is most vulnerable and then question the witness with an eye toward exploiting those weaknesses. An effective cross-examination thus often requires the kind of legal knowledge that the Court has said makes the assistance of defense counsel appropriate.<sup>171</sup> Moreover, if the defendant's attorney was not permitted to assist with the pretrial cross-examination and the witness later became unavailable to testify, the attorney's ability to protect the defendant's interests at trial would be compromised—the attorney would have no opportunity to fill any gaps left by the defendant's questioning.<sup>172</sup> A defendant is therefore entitled to have an attorney's assistance when cross-examining witnesses prior to trial, so long as the defendant's Sixth Amendment right to counsel has already attached.<sup>173</sup> In both

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170. See *supra* notes 148–56 and accompanying text (discussing the fact that "critical stages" are those that involve trial-like encounters between the defendant and the government).

171. See *supra* notes 148–56 and accompanying text (discussing the fact that occasions requiring detailed legal knowledge are likely to be judged "critical occasions" warranting defense counsel's presence).

172. See *supra* note 156 and accompanying text (discussing the test that asks whether defense counsel's participation at trial is an adequate substitute for defense counsel's participation at a pretrial event, and that designates a pretrial event as a "critical stage" if that question is answered in the negative).

173. Cf. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality opinion) (concluding that a preliminary hearing was a "critical stage" requiring defense counsel's participation because it was an opportunity for the defendant's at-



trial and pretrial situations, the defendant needs counsel's help "in coping with legal problems [and] in meeting his adversary."<sup>174</sup>

Of course, the mere fact that a pretrial cross-examination opportunity is offered to a defendant and his or her attorney does not necessarily mean that it is an offer they will accept. Upon being given that opportunity, the defense must make difficult tactical decisions, based on its assessment of the likelihood that the witness actually will be available to testify at trial and based on how willing the defense is to wait until trial to see how the witness will respond to particular lines of questioning. For example, a defendant and his or her attorney might opt to decline the pretrial cross-examination opportunity in the hope that the witness will still be available to testify when the defendant's trial date arrives. After all, if the witness remains available to testify at the time of trial, the prosecutors will be obligated by the Confrontation Clause to call the witness to the stand if they wish to introduce that witness's testimonial hearsay statements into evidence,<sup>175</sup> and the witness will have to respond to the defense's tough questions for the first time in the presence of the jury. These are difficult decisions, to be sure, but they are the kinds of decisions that attorneys are trained to make, and a defendant is entitled to rely upon his or her attorney when making them.

## 2. Cross-Examination Opportunities Afforded *Before* Attachment

When a defendant has the opportunity to cross-examine a witness before his or her Sixth Amendment right to counsel has attached, the Assistance of Counsel Clause does not grant the defendant any relief.<sup>176</sup> If adversarial judicial proceedings have not yet commenced, then the defendant has no claim to the Sixth Amendment's protection, no matter how vitally important, or "critical," the cross-examination opportunity might be.<sup>177</sup>

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torney to cross-examine the prosecution's witnesses and thereby "expose fatal weaknesses in the State's case").

174. *United States v. Ash*, 413 U.S. 300, 313 (1973).

175. *See supra* notes 4–5 and accompanying text (discussing the rule of unavailability).

176. *See Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2591 (2008).

177. *See id.* ("*Once attachment occurs*, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings . . . ." (emphasis added)).

The Court's 1986 ruling in *Moran v. Burbine*<sup>178</sup> is instructive on this point. In that case, police were questioning Brian Burbine, a murder suspect, at the stationhouse prior to the commencement of judicial proceedings against him.<sup>179</sup> Unbeknownst to Burbine, an attorney wishing to represent him had telephoned the stationhouse and was assured that Burbine would not be questioned further until the following day.<sup>180</sup> The police nevertheless continued to press ahead with their interrogation that same evening, and secured Burbine's confession.<sup>181</sup> The Court held that the Sixth Amendment posed no obstacle to the confession's admission at trial:

Because confessions elicited during the course of police questioning often seal a suspect's fate, [Burbine] argues, the need for an advocate . . . is at its zenith, regardless of whether the State has initiated the first adversarial judicial proceeding. We do not doubt that a lawyer's presence could be of value to the suspect; and we readily agree that if a suspect confesses, his attorney's case at trial will be that much more difficult. But these concerns are no[t] decisive in this context . . . For an interrogation, no more or less than for any other "critical" pretrial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel.<sup>182</sup>

Under *Moran*'s logic, it is clear that, when given a pre-attachment opportunity to cross-examine a hearsay declarant, a defendant lacks a Sixth Amendment right to an attorney's assistance. The witness's hearsay statements to the authorities might be critically important—even tantamount to the defendant's own confession of guilt—and an effective cross-examination might thus be crucial to the defense's success. But if the defendant's right to counsel has not yet attached, it affords him or her no relief.

There is, however, one argument that defendants should make, in appropriate cases, once their Sixth Amendment right to counsel does attach. By the time of attachment, the government may have already given the defendant an opportunity to cross-examine a witness without the aid of his or her attorney. The government may therefore have laid the groundwork for arguing that the Confrontation Clause would not bar the admission of that witness's statements if the witness became unavailable to testify. In that circumstance, the defendant's at-

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178. 475 U.S. 412 (1986).

179. *See id.* at 416–18.

180. *See id.* at 417.

181. *See id.* at 417–18.

182. *Id.* at 431–32.

torney ought to have the power to demand that he or she be given a pretrial opportunity to cross-examine the witness, if he or she fears that the witness will be unavailable to testify by the time the defendant's trial date arrives. If that demand is refused and the witness does indeed become unavailable, the Assistance of Counsel Clause ought to render the hearsay statements inadmissible.

When confronting a hearsay declarant at trial, the defendant is fully entitled to rely upon his or her attorney to conduct the cross-examination, regardless of any cross-examination that the defendant might previously have tried to conduct on his or her own.<sup>183</sup> Let us assume that the defendant was given an early opportunity to cross-examine the declarant on his or her own, that the defendant's right to counsel has since attached, that the declarant remains available to testify, and that the defendant's trial date has not yet arrived. If the defendant perceives ways in which an attorney's cross-examination would likely be more effective than his or her own preattachment cross-examination effort, there is no reason why defense counsel's ability to cross-examine the declarant must be forestalled until trial, with the defendant bearing the risk that the declarant will become unavailable to testify in the meantime. Indeed, were the rule otherwise, the government would have a perverse incentive to offer unrepresented defendants a preattachment opportunity to cross-examine *all* of the witnesses who have supplied the government with testimonial statements, and then claim that each of those witnesses is somehow shielded from exposure to the defendant's attorney unless their availability extends to the time of trial. Of course, defense counsel might opt not to take advantage of the pretrial cross-examination opportunity, hoping the witness will remain available until trial and thus will have to endure cross-examination for the first time in the presence of the jury.<sup>184</sup> But if the pretrial cross-examination opportunity is demanded and denied, and the witness ultimately proves to be unavailable to testify at trial, the Assistance of Counsel Clause ought to render the witness's testimonial hearsay statements inadmissible.

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183. See *supra* notes 170–74 and accompanying text.

184. See *supra* text accompanying note 166 (acknowledging this possible line of reasoning). If the witness has already become unavailable by the time the right to counsel attaches, then the defendant will be out of luck—for purposes of the Sixth Amendment, his or her *pro se*, preattachment opportunity to cross-examine the witness will have to suffice.

Even if that line of argument prevails, there still will be occasions when neither the Confrontation Clause nor the Assistance of Counsel Clause will stand in the way of admitting the testimonial hearsay statements of an unavailable witness whom only the defendant himself or herself has had a chance to cross-examine. Neither Clause forbids the admission of a witness's statements if the defendant was given an opportunity to cross-examine the witness prior to the time the defendant's Sixth Amendment right to counsel attached and the witness has already become unavailable to testify by the time attachment does occur. Might due process principles cover that remaining gap?

### III. THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

Wholly apart from the requirements of the Confrontation Clause and the Assistance of Counsel Clause, the Due Process Clauses—which will be referred to in the singular from this point forward<sup>185</sup>—ensure in certain circumstances that the hearsay statements of an unavailable witness are inadmissible in a criminal trial unless the defendant was given a pretrial opportunity to cross-examine the witness with the assistance of counsel. Those circumstances are much narrower in scope, however, than one might initially imagine. There are many occasions when the Constitution leaves criminal defendants responsible for conducting pretrial cross-examinations on their own.

#### A. THE DUE PROCESS CLAUSE'S NARROW FREESTANDING SIGNIFICANCE

The Due Process Clause's overarching function in criminal cases is to ensure that convictions are not secured by means that are fundamentally unfair.<sup>186</sup> Many of the provisions of the

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185. There are, of course, two such clauses—one covering the federal government in the Fifth Amendment and the other covering the states in the Fourteenth Amendment. See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”); *id.* amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”).

186. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 355 (2001) (noting the “common description of due process rulings in criminal procedure cases as applying a ‘fundamental fairness’ standard”); see, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (“Due

Bill of Rights are aimed at achieving the same objective, but speak in more specific terms to particular issues. The Sixth Amendment's Confrontation Clause and Assistance of Counsel Clause, for example, focus on matters relating to the cross-examination of witnesses<sup>187</sup> and a defendant's right to legal representation,<sup>188</sup> respectively. Recognizing that "the specific guarantees enumerated in the Bill of Rights" address numerous aspects of criminal investigations and trials, the Supreme Court has said that, in criminal cases, the territory committed wholly to the Due Process Clause is "very narrow[]" and the Due Process Clause thus "has limited operation."<sup>189</sup> If judges were to ascribe broad free-standing significance to the Due Process Clause, the Court has warned, they would threaten both to encroach upon elected leaders' lawmaking prerogatives and to undermine the Constitution's effort to balance defendants' and society's divergent interests.<sup>190</sup> "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure," the Court has explained, "and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order."<sup>191</sup>

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process guarantees that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice." (internal quotation marks omitted)).

187. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

188. *Id.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

189. *Medina v. California*, 505 U.S. 437, 443 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)); *cf.* *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) ("[R]ecent decisions suggest that when faced with multiple, potentially relevant constitutional provisions, courts should invoke the provision that treats most directly the right asserted."). The Court has reached a comparable conclusion with respect to *substantive* due process claims. *See United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (stating that, when there is "an explicit textual source of constitutional protection against" a particular form of governmental conduct, that specific textual provision, "not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims").

190. *Medina*, 505 U.S. at 443.

191. *Id.*

With respect to criminal investigations and prosecutions, therefore, the Court has said that it will declare a state or federal practice unconstitutional under the Due Process Clause only if that practice “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”<sup>192</sup> or “transgresses any recognized principle of ‘fundamental fairness’ in operation.”<sup>193</sup> Put another way, a practice does not violate due process unless it “violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community’s sense of fair play and decency.”<sup>194</sup> The question in any given case is not whether a given procedure is essential to every imaginable form of civilized government; rather, the question is whether the “procedure is necessary to an Anglo-American regime of ordered liberty.”<sup>195</sup>

When conducting the due process analysis, the Court has instructed judges to focus especially on “the relevant common-law traditions of England and this country.”<sup>196</sup> To aid in understanding the content and import of those traditions, judges may consider the way in which those traditions are understood by modern English courts.<sup>197</sup> Although the due process analysis is primarily tradition focused, the Court has said that, to a more limited degree, judges also should consider contemporary prac-

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192. *Id.* at 445 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)) (internal quotation marks omitted); see also *Adamson v. California*, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting) (“Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.”).

193. *Medina*, 505 U.S. at 448 (citing *Dowling*, 493 U.S. at 352); see also 1 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 600–01 (2d ed. 1999) (stating that, when determining whether the government’s implementation of a challenged practice violated due process in a particular case, the Court uses broad principles of our adversarial system as a benchmark); *id.* at 603 (“[T]he focus must be on the operation of the practice in the individual case, and a state practice therefore should not be deemed to violate due process unless it conflicts with a structural prerequisite of fairness in a manner that actually causes substantial prejudice to the particular defendant.”).

194. *Dowling*, 493 U.S. at 353 (internal quotation marks omitted).

195. *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968); see also *id.* (“A criminal process which was fair and equitable but used no juries is easy to imagine. . . . Yet no American State has undertaken to construct such a system.”).

196. *Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996).

197. *Id.* at 358 (examining contemporary English authorities for confirmation of the Court’s interpretation of early common law authorities).

tices in the United States.<sup>198</sup> But when a defendant complains that his or her jurisdiction is continuing to employ a common law procedure that most other jurisdictions have abandoned, the Court generally ascribes greater weight to the common law than to the apparent contemporary consensus when trying to determine the Constitution's due process demands.<sup>199</sup> For example, in an opinion upholding an Ohio rule requiring murder defendants to carry the burden of proving self-defense by a preponderance of the evidence, the Court reasoned:

[T]he common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. . . . Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense. . . . We are aware that all but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant. But the question remains whether those States are in violation of the Constitution; and . . . that question is not answered by cataloging the practices of other States.<sup>200</sup>

As daunting as these hurdles are for criminal defendants making freestanding due process claims, they are not always insurmountable. As one commentator observes, it is the freestanding significance of the Due Process Clause "that grants the defendant such central protections as the right to an unbiased judge, the right to a presumption of innocence, the right to have the government prove its case beyond a reasonable doubt, and the right to obtain exculpatory evidence in the government's possession."<sup>201</sup> When holding that the Due Process

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198. See *id.* at 360 (examining the states' contemporary practices with respect to a particular burden of proof); *Medina*, 505 U.S. at 447 (stating that the states' contemporary practices are "of limited relevance to the due process inquiry," given the Court's primary focus on historical practices, but that they nonetheless do carry some probative weight).

199. See 1 LAFAVE, *supra* note 193, at 598–99 (making this point, but stating that when the challenged practice is *representative* of the contemporary consensus, yet conflicts with the common law's approach, the Court is more likely to ascribe greater weight to the contemporary consensus and thus uphold the practice).

200. *Martin v. Ohio*, 480 U.S. 228, 235–36 (1987); accord *Patterson v. New York*, 432 U.S. 197, 211 (1977) ("Nor does the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those States that strike a different balance are in violation of the Constitution.").

201. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 18–19 (2006); see also Israel, *supra* note 186, at 389–95 (providing numerous examples of the work done by the free-standing Due Process Clause). In fact, Israel argues that the frequency of the Court's reliance on the

Clause requires that a criminal defendant's guilt be proven beyond a reasonable doubt, for example, the Court in *In re Winship*<sup>202</sup> reasoned that the reasonable-doubt standard "dates at least from our early years as a nation,"<sup>203</sup> that the Court's prior opinions had long appeared to presume that "proof of a criminal charge beyond a reasonable doubt is constitutionally required,"<sup>204</sup> that the standard "plays a vital role in the American scheme of criminal procedure,"<sup>205</sup> and that "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law."<sup>206</sup>

#### B. THE LIMITS AND BREADTH OF THE RIGHT TO AN ATTORNEY'S ASSISTANCE WITH PRETRIAL CROSS-EXAMINATIONS

In a far greater number of cases than one might initially suppose, the freestanding Due Process Clause does not guarantee criminal defendants the right to an attorney's aid when cross-examining witnesses prior to trial. Absent a change in the Court's analytic framework, the due process argument is likely to succeed only when a defendant's case is marked by unusual circumstances that render the demands of fundamental fairness especially acute.

##### 1. Two Initial Obstacles

There are two potentially fatal problems with the argument that the freestanding Due Process Clause invariably entitles a defendant to the assistance of counsel when cross-examining witnesses prior to trial. First, the Bill of Rights contains two provisions—the Confrontation Clause and the Assistance of Counsel Clause—that are tailored to speak directly to the matter at issue and that stop short of always guaranteeing defendants the assistance of counsel for pretrial cross-examinations.<sup>207</sup> Many courts thus would likely regard the due process argument as an illegitimate attempt to secure specific

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free-standing Due Process Clause belies the notion that the Due Process Clause has only limited significance. *See id.* at 398.

202. 397 U.S. 358 (1970).

203. *Id.* at 361.

204. *Id.* at 362.

205. *Id.* at 363.

206. *Id.* at 364.

207. *See supra* Part I (discussing the Confrontation Clause); *supra* Part II (discussing the Assistance of Counsel Clause).



rights that the Constitution has intentionally been designed to withhold.<sup>208</sup> After all, the Supreme Court has urged judges to be cautious about finding *any* criminal procedure mandated by the freestanding Due Process Clause, given the large number of other constitutional provisions that speak to the investigation and prosecution of criminal defendants.<sup>209</sup> When one or more of those other constitutional provisions speak directly to the merits of the issue that a defendant has raised, and those provisions do not grant the defendant the relief that he or she seeks, many courts would be disposed against resurrecting the claim by dressing it in the garb of the Due Process Clause.

Second, due process analysis turns to a great degree on a court's assessment of our Anglo-American common law traditions.<sup>210</sup> Because the Court has held that the Confrontation Clause incorporates the English common law as it was received in the United States in the late eighteenth century,<sup>211</sup> the same common law traditions that doom a Confrontation Clause claim of entitlement to the assistance of counsel for the pretrial cross-examination of a witness also undercut that claim when it is advanced under the banner of due process. The Court's ruling in *Pointer v. Texas*<sup>212</sup>—holding that a defendant's pretrial cross-examination opportunity is insufficient for Confrontation Clause purposes unless the defendant has counsel's assistance<sup>213</sup>—is at risk today precisely because it deviates from the common law traditions that the Confrontation Clause now incorporates.<sup>214</sup> The content of those traditions does not change when one examines them through the lens of due process.

There is a great likelihood, therefore, that many courts today would reject a defendant's argument that the Due Process Clause automatically renders an unavailable witness's hearsay

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208. Cf. *McCorkle v. United States*, No. 6:06CV950, 2008 WL 114943, at \*15 (M.D. Fla. Jan. 9, 2008) ("Petitioner cannot use a baseless due process violation claim to resuscitate a failed ineffective assistance of counsel claim."); *Wallace v. Price*, No. 99-231, 2002 WL 31180963, at \*57 (W.D. Pa. Oct. 1, 2002) ("I am not even sure that this is a separate constitutional claim at all, rather than just a rehash of his Sixth Amendment fair-cross section claim. The Supreme Court has repeatedly cautioned courts about creating new constitutional rights under the guise of the due process clause of the Fourteenth Amendment.").

209. See *supra* notes 189–95 and accompanying text.

210. See *supra* notes 192–96 and accompanying text.

211. See *supra* notes 1–5 and accompanying text.

212. 380 U.S. 400 (1965).

213. *Id.* at 407.

214. See *supra* notes 25–29 and accompanying text (discussing *Pointer*).

statements inadmissible at trial unless the defendant was given a pretrial opportunity to cross-examine the witness with the assistance of counsel. Before declaring the matter wholly resolved, however, one must consider two additional analytic touchstones—contemporary practices in the United States and modern English courts' interpretations of the common law traditions that England bequeathed to America.<sup>215</sup> Neither of those sources provides defendants with the ammunition they need.

## 2. Contemporary Practices in the United States

Contemporary practices in the United States say very little about whether the nation invariably regards it as fundamentally unfair to require defendants to proceed on their own when given an opportunity to cross-examine witnesses prior to the attachment of the Sixth Amendment right to counsel. For more than forty years, *Pointer v. Texas* has given state and federal authorities no choice on the matter: they have been told that, absent a defendant's valid waiver of counsel's assistance, the Confrontation Clause does not permit them to rely upon pro se cross-examination opportunities to justify the admission of an unavailable witness's hearsay statements.<sup>216</sup> It thus has not been since the pre-*Pointer* era that the nation's various jurisdictions have been free to take divergent approaches. Because the Court has only recently realigned the Confrontation Clause with eighteenth-century common law principles,<sup>217</sup> and because state and federal officials likely have not yet realized the peril in which that realignment places *Pointer*, it is far too soon to look for legislative or adjudicative trends that might meaningfully inform a court's due process analysis.

If one were to go back to the pre-*Pointer* period and conduct the due process analysis under the state of affairs that existed at that time, defendants' due process argument would probably fail. To cast that argument in its most flattering light, suppose that, at the time *Pointer* was decided, there was only one American jurisdiction that believed pro se cross-examination opportunities were sufficient: the state of Texas, from which *Pointer* itself arose. As already indicated, when a jurisdiction flouts a

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215. See *supra* notes 197–200 and accompanying text (identifying these touchstones).

216. See *Pointer*, 380 U.S. at 407; *supra* notes 25–29 and accompanying text (discussing *Pointer*).

217. See *supra* notes 7–9 and accompanying text.

modern trend by continuing to adhere to a common law tradition, the Court's due process analysis places greater weight on the common law tradition than on the apparent contemporary consensus.<sup>218</sup> Even if Texas were the nation's only jurisdiction to regard pro se cross-examination opportunities as adequate, therefore, a court in the pre-*Pointer* era presumably would have been reluctant to hold that Texas's practice violated the Due Process Clause. Texas's judgment on the matter fully accorded with the nation's common law traditions, and it is those traditions that carry the greatest weight with the courts.<sup>219</sup>

Courts today thus lack a solid basis for concluding that, in the eyes of the American people, practices akin to those that Texas employed prior to *Pointer* always violate a "recognized principle of 'fundamental fairness' in operation"<sup>220</sup> or violate the "fundamental conceptions of justice . . . which define the community's sense of fair play and decency."<sup>221</sup>

### 3. Modern English Authorities

In determining whether the Due Process Clause always assures criminal defendants of the right to counsel's assistance when conducting pretrial cross-examinations, the final step is to consider modern English authorities' understanding of the relevant common law traditions.<sup>222</sup> Defendants seeking to bolster their due process argument will find no support among those transatlantic authorities. To this day, neither Parliament nor England's judges have imposed a blanket requirement of counsel's assistance comparable to what *Pointer* prescribed for the United States in 1965. England has *never* regarded counsel's assistance with pretrial cross-examinations as invariably essential.<sup>223</sup> Indeed, England's traditions have evolved to the point today where there are many instances in which testimonial hearsay statements are admissible in criminal cases

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218. See *supra* notes 199–200 and accompanying text (discussing *Martin* and *Patterson*).

219. See *supra* Part I.B (describing the traditions); *supra* notes 196–97 and accompanying text.

220. *Medina v. California*, 505 U.S. 437, 448 (1992) (citing *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

221. *Dowling*, 493 U.S. at 353 (internal quotation marks and citations omitted) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

222. See *supra* notes 196–97 and accompanying text.

223. See *supra* Part I.A (outlining early English common law); *infra* notes 225–36, 256–62 and accompanying text (describing modern English hearsay doctrine).

even though the declarant has never been cross-examined by anyone at all.<sup>224</sup> In light of our shared heritage, an examination of England's approach to issues of counsel, confrontation, and due process thus can serve as a provocative check on the assumptions that many in the United States today might quickly make concerning the invariable necessity of counsel's assistance with pretrial cross-examinations.

As noted in Part I, Parliament's 1848 Indictable Offenses Act<sup>225</sup> codified the common law rule that pretrial cross-examinations conducted by unrepresented defendants were sufficient to vindicate those defendants' confrontation rights when hearsay declarants were unavailable to testify at trial.<sup>226</sup> Although a defendant could rely upon an attorney to cross-examine a witness at a pretrial deposition if he or she was fortunate enough to be represented by counsel, counsel's presence and participation were not essential. If the defendant was unrepresented, the witness's statements would be admissible at trial, so long as the witness had become unavailable to testify and the official taking the deposition gave the defendant an opportunity to interrogate the witness on his or her own.

The same rule was still very much alive more than a half-century later. In its 1925 Criminal Justice Act,<sup>227</sup> Parliament again authorized the admission of depositions taken by magistrates at preliminary hearings, if two requirements were met: (1) the deponent was found to be "dead or insane, or so ill as not to be able to travel, or to be kept out of the way by means of the procurement of the accused"; and (2) "the deposition was taken in the presence of the accused and . . . the accused or his counsel or solicitor had full opportunity of cross-examining the witness."<sup>228</sup> As was true under the 1848 Act, cross-examinations by defendants' attorneys were permitted, but cross-examinations by unrepresented defendants were sufficient.

Parliament significantly broadened the admissibility of certain forms of hearsay in its 1967 Criminal Justice Act.<sup>229</sup> In that legislation, Parliament declared that, if a witness fell with-

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224. See, e.g., *infra* note 259 and accompanying text.

225. Indictable Offenses Act, *supra* note 83.

226. See *supra* notes 83–90 and accompanying text (describing the Indictable Offenses Act).

227. Criminal Justice Act, 1925, 15 & 16 Geo. 5, c. 86 (Eng.).

228. *Id.* § 13(3) (emphasis added); see also JR SPENCER, HEARSAY EVIDENCE IN CRIMINAL PROCEEDINGS 99–100 & n.2 (2008) (stating that the 1925 Act codified the then-existing practice).

229. See Criminal Justice Act, 1967, c. 80, § 2(7) (Eng.).

in one of the 1925 Act's categories of unavailability, limited forms of written hearsay statements could be admitted into evidence at trial, even if neither the defendant nor his or her attorney had ever been given an opportunity to cross-examine the witness who wrote them.<sup>230</sup> As a result, when prosecutors offered an authorized form of written hearsay into evidence in the absence of any prior cross-examination opportunity, the defendant could only hope that the trial court would agree to exercise its common law discretion to exclude the hearsay on grounds of fairness.<sup>231</sup>

In its 1988 Criminal Justice Act, Parliament loosened the restrictions on the admissibility of unavailable witnesses' written hearsay still further, both by authorizing the admission of a broader range of written pretrial statements and by expanding the ways in which a witness could be deemed unavailable to testify live at trial.<sup>232</sup> Parliament declared that *all* documentary hearsay was admissible in criminal trials—regardless of how the written statements were produced—so long as the declarant was unavailable to testify at trial due to death, bodily or mental illness, absence from the United Kingdom, or disappearance despite the proponent's reasonable efforts to locate him or her.<sup>233</sup> Just as in the 1967 Act, Parliament declined to

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230. *See id.* To qualify for admission under this provision, the statement had to have been tendered for admission in the earlier committal proceedings before a magistrate; the statement could not have drawn an objection from any party when it was tendered in the earlier committal proceedings; the statement had to be signed by the declarant; and the declarant had to attest in writing that the statement was "true to the best of his knowledge and belief" and that he or she knew that he or she could be prosecuted if the statement asserted matters that the declarant "knew to be false or did not believe to be true." *Id.* §§ 2(2), 2(7).

231. *See* Scott v. R, [1989] 2 All E.R. 305, 310–12 (P.C. 1989) (appeal taken from Jam.) (citing instances of discretionary exclusion both prior to and after the 1967 Act). In a 1983 ruling concerning a defendant's conviction for theft, for example, an appellate panel ruled that the trial court had abused its common law discretion when it admitted the nonconfronted written statement of a witness who had died prior to trial. *See* Blithing, (1983) 77 Crim. App. 86, 89–90. The panel held that the witness's statements were central to the prosecution, and that there were numerous important matters on which the defendant would have liked to question him. *See id.*

232. *See* Criminal Justice Act, 1988, c. 33, § 23 (Eng.).

233. *See id.*; *see also* SPENCER, *supra* note 228, at 100 (noting that the 1988 Act broadened the ways in which a witness would be deemed unavailable). If the documentary hearsay was prepared for the purpose of aiding a criminal investigation or prosecution, leave of court was required for admission. *See* Criminal Justice Act, 1988, § 26. Courts were to grant leave for admission only if they believed admission would be "in the interests of justice." *Id.*

make the admissibility of an unavailable witness's documentary hearsay contingent upon whether the defendant or his or her attorney had been given a chance to cross-examine the declarant prior to trial. Indeed, although the Act acknowledged trial courts' power to refuse to admit documentary hearsay when necessary to serve "the interests of justice,"<sup>234</sup> the Court of Appeal explained in 1989 that a cross-examination opportunity was not invariably essential.<sup>235</sup> If a trial judge concluded that the defendant could controvert the unavailable witness's account by means other than cross-examination, that the documentary hearsay provided evidence of an apparently high quality, and that the jury would respond appropriately to a reminder that the defendant had never been given an opportunity to cross-examine the declarant, then the documentary hearsay was to be admitted, despite the fact that the declarant had never been exposed to adverse questioning.<sup>236</sup>

Parliament entirely abolished the hearsay rule for civil cases in 1995.<sup>237</sup> England's Law Commission soon thereafter undertook a review of the hearsay rule's application in criminal cases, to see whether further changes were appropriate in that domain as well.<sup>238</sup> In 1997, the Law Commission issued its report.<sup>239</sup> The Law Commission had contemplated recommending that Parliament abolish the hearsay rule entirely for criminal cases, but feared that, among other things, the change would bring England into conflict with the European Convention on

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234. Criminal Justice Act, 1988, § 25(1); *see also id.* § 25(2) (listing discretionary factors for courts to consider).

235. *See R v. Cole*, [1990] 2 All E.R. 108, 115–17 (1989); *see also* JENNY MCEWAN, EVIDENCE AND THE ADVERSARIAL PROCESS 261 (2d ed. 1998) (stating that, under the 1988 Act, "judges must be wary of the argument that the defence is disadvantaged by the inability to cross-examine the absent witness" and that the prejudice resulting from the inability to cross-examine the witness must be especially strong in order to warrant excluding the documentary hearsay).

236. *See Cole*, 2 All E.R. at 116–17.

237. *See* Civil Evidence Act, 1995, c. 38, § 1(1) (Eng.) ("In civil proceedings evidence shall not be excluded on the ground that it is hearsay.").

238. *See* LAW COMM'N FOR ENG. & WALES, EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS, 1997, LAW COM NO. 245 [hereinafter LAW COMMISSION]; *see also* PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 581 (2004) ("Prior to the advent of the Criminal Justice Act 2003, criticism of the law of hearsay had become so widespread and incessant that one might doubt whether the rule against hearsay would, or should, survive in any form in English criminal proceedings.").

239. *See* LAW COMMISSION, *supra* note 238.

Human Rights (the ECHR),<sup>240</sup> the substantive provisions of which were slated to become enforceable in English courts in October 2000.<sup>241</sup>

The ECHR provision about which the Law Commission was concerned is Article 6(3)(d), which states that every person charged with a crime in one of the member nations has the right "to examine or have examined witnesses against him."<sup>242</sup> The right to examine witnesses is among numerous rights that Article 6 identifies; others include the right to be promptly informed of prosecutors' formal allegations, the right to have ample time to prepare a defense, the right to compel witnesses to appear at trial, the right to be presumed innocent until proven guilty, and the right to be given free legal representation if one cannot afford to retain counsel and a court finds that "the interests of justice" make counsel's assistance necessary.<sup>243</sup> When reviewing claims under Article 6(3)(d), the European Court of Human Rights (also known as the Strasbourg Court) has emphasized that it does not sit to pass judgment on the individual evidentiary rulings of member nations' courts.<sup>244</sup> Rather, its task is to ensure that, taken as a whole, each petitioner's criminal proceeding was fair.<sup>245</sup>

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240. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; I.H. DENNIS, *THE LAW OF EVIDENCE* 695 (3d ed. 2007) (recounting this concern).

241. The ECHR became enforceable in English courts pursuant to the Human Rights Act, 1998, c. 42 (Eng.), though its actual implementation was delayed. See *id.* § 22 (declaring that the relevant provisions of the 1998 Act would come into force on a date designated by the Secretary of State); RICHARD MAY & STEVEN POWLES, *CRIMINAL EVIDENCE* 369 (5th ed. 2004) (stating that the relevant provisions became effective on October 2, 2000). Prior to 1998, English courts used the ECHR only for the purpose of helping to resolve ambiguities in Parliament's legislation. Those persons in England who believed their ECHR rights had been violated had "to take the long and arduous route of petitioning the European Court of Human Rights in Strasbourg." MARTIN HANNIBAL & LISA MOUNTFORD, *THE LAW OF CRIMINAL AND CIVIL EVIDENCE* 18 (2002). As a result of the 1998 Act, an English trial court today must rule evidence inadmissible if its admission would violate the ECHR. See MAY & POWLES, *supra*, at 369.

242. ECHR, *supra* note 240, § 6(3)(d).

243. See *id.* §§ 6(2)–(3).

244. See, e.g., *Kostovski v. Netherlands*, 12 Eur. Ct. H.R. 434, 447 (1989) ("It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law. Again, as a general rule it is for the national courts to assess the evidence before them."); see also MAY & POWLES, *supra* note 241, at 381 (noting that the ECHR leaves to member nations the task of identifying and adopting appropriate rules of evidence).

245. See, e.g., *Kostovski*, 12 Eur. Ct. H.R. at 447 (stating that the European Court's job is "to ascertain whether the proceedings considered as a whole, in-

As construed by the Strasbourg Court, the opportunity to cross-examine adverse witnesses is not invariably mandated by Article 6, although it is one of the factors that a reviewing court must consider when determining whether a defendant has received a fair trial. When hearsay statements uttered by an unavailable witness were central to the prosecution's case and the petitioner was never given an opportunity to cross-examine the witness prior to trial, the court is likely to rule that the petitioner's trial was unfair and thus violated Article 6.<sup>246</sup> The court has said that prosecutors' reliance on hearsay uttered by an unavailable witness is also problematic when the witness's identity has been concealed from the petitioner, thus making it more difficult for the petitioner to attack the witness's credibility by means other than cross-examination.<sup>247</sup> If an unavailable witness's hearsay statements were corroborated by other evidence and the witness's identity was known to the petitioner at the time of trial, however, the Strasbourg Court would be likely to hold that the petitioner's trial met the fairness requirements of Article 6.<sup>248</sup>

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cluding the way in which evidence was taken, were fair").

246. See, e.g., *Lucà v. Italy*, 36 Eur. Ct. H.R. 807, 816 (2001) ("[W]here a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined . . . the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Art. 6."); *Saidi v. France*, 17 Eur. Ct. H.R. 251, 269–70 (1993) (holding that the petitioner's trial was unfair because "neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned," despite the fact that those witnesses' statements were the prosecution's sole evidence); *Delta v. France*, 16 Eur. Ct. H.R. 574, 587 (1990) (holding that the petitioner's trial was unfair because "neither the applicant nor his counsel ever had an adequate opportunity to examine witnesses whose" statements were the sole evidence on which the prosecution relied); *Bricmont v. Belgium*, 12 Eur. H.R. Rep. 217, 240–41 (1989) (holding that the petitioner's trial was unfair because the petitioner never had an opportunity to cross-examine the declarant on whose testimony the prosecution primarily relied); *Unterpertinger v. Austria*, 13 Eur. Ct. H.R. 175, 184 (1986) (holding that the petitioner's trial was unfair because the conviction was based "mainly" on statements by declarants whom the petitioner had never been given an opportunity to cross-examine).

247. See, e.g., *Kostovski*, 12 Eur. Ct. H.R. at 448 ("If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. . . . The dangers inherent in such a situation are obvious.").

248. See, e.g., *Ferrantelli v. Italy*, 1996-III Eur. Ct. H.R. 937, 950–51 (finding no violation of Article 6 because the declarant's statements were corroborated by other evidence and because the prosecution was not responsible for the fact that the declarant had died prior to trial); *Asch v. Austria*, 15 Eur. Ct. H.R. 597, 606–07 (1991) (distinguishing prior cases on similar grounds and



Perhaps most interesting for our purposes here is the Strasbourg Court's conclusion that pro se cross-examination opportunities can be sufficient to satisfy Article 6—a conclusion that is not surprising, given that the court is sometimes willing to deem trials fair when there has been no cross-examination opportunity at all. The court's leading case on the matter is *Isgrò v. Italy*.<sup>249</sup> After Salvatore Isgrò was arrested for kidnapping and murder, Isgrò and his primary accuser (a witness identified by the court as Mr. D.) were brought before an investigating judge for questioning.<sup>250</sup> During that proceeding—at which Isgrò was unrepresented by counsel—Isgrò and Mr. D. engaged in a verbal exchange, challenging one another's accounts and accusing one another of lying.<sup>251</sup> When Mr. D. could not be located to testify at trial, the trial court admitted into evidence a transcript of Mr. D.'s statements before the investigating judge.<sup>252</sup> Following his conviction, Isgrò appealed to the Strasbourg Court, arguing that the transcript's admission rendered his trial unfair in violation of Article 6. He argued that, although he had been given a pro se opportunity to question Mr. D., *his attorney* had never been given that same opportunity.<sup>253</sup> The court unanimously rejected Isgrò's argument and upheld his conviction.<sup>254</sup> The court found that Mr. D.'s identity was known and so Isgrò was able to attack his credibility at trial; Mr. D.'s statements were not the prosecution's sole evidence of guilt; Isgrò himself had been given an opportunity to question Mr. D.; and the absence of Isgrò's attorney at the pre-trial proceeding was counterbalanced by the fact that the prosecuting attorney was also absent at that proceeding and by the fact that Isgrò's attorney had an opportunity to criticize Mr. D.'s statements and credibility at trial.<sup>255</sup>

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holding that the petitioner's trial comported with the requirements of Article 6).

249. 194 Eur. Ct. H.R. (ser. A) at 2 (1991).

250. *See id.* at 7.

251. *See id.* at 8.

252. *See id.* at 9.

253. *See id.* at 11.

254. *See id.* at 13.

255. *See id.* The Strasbourg Court's conclusion is buttressed by the language of Article 6(3)(d), which speaks of a defendant's opportunity "to examine or have examined witnesses against him." *See supra* note 242 and accompanying text. That phrasing is aimed at encompassing questioning by the defendant himself or herself, by the defendant's attorney, or by a judicial officer. *See SPENCER, supra* note 228, at 45 (discussing the wording of Article 6(3)(d)).

After studying its obligations under Article 6 of the ECHR, England's Law Commission sent proposed legislation to Parliament, which in turn responded with the 2003 Criminal Justice Act.<sup>256</sup> The 2003 Act took the core provisions of the 1988 Act regarding documentary hearsay from unavailable witnesses and expanded them to include *all* hearsay, whether written or oral.<sup>257</sup> Parliament also broadened still further the circumstances in which a witness may be deemed unavailable to testify at trial.<sup>258</sup> In England today, oral and written hearsay statements made by an unavailable witness are admissible in a criminal trial—regardless of whether the defendant or his or her attorney ever had an opportunity to cross-examine the witness—if the witness is unavailable to testify at trial due to death, physical or mental illness, absence from the United Kingdom under conditions making it impracticable to return, disappearance despite reasonable efforts to locate the witness, or fear of recrimination that might flow from testifying against the defendant.<sup>259</sup>

Parliament aimed to reconcile those provisions with Article 6 of the ECHR in two ways. First, Parliament reiterated that a trial judge has the discretion to exclude the absent witness's hearsay statements if the judge believes that admitting the evidence would render the defendant's trial unfair.<sup>260</sup> The Law Commission had indicated that an exercise of such discretion

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256. See Criminal Justice Act, 2003, c. 44 (Eng.); see also SPENCER, *supra* note 228, at 28–34 (discussing the relationship between the Law Commission's 1997 report and Parliament's enactment of the 2003 Act).

257. See Criminal Justice Act, 2003, § 116(1); Criminal Justice Act, 1988, c. 35, § 23(1) (Eng).

258. See Criminal Justice Act, 2003, § 116(2); Criminal Justice Act, 1988, § 23(2).

259. See Criminal Justice Act, 2003, § 116(1)–(2). If the witness is unavailable due to his or her fear of testifying against the defendant, admission of the witness's hearsay statements is not automatic—leave of the court is required. See *id.* § 116(2)(e)–(4). For all other varieties of unavailability, leave of the court is not required for admission. See DENNIS, *supra* note 240, at 705–06, 708.

260. See Criminal Justice Act, 2003, § 126(2) (incorporating by reference provisions of the Police and Criminal Evidence Act 1984); Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng.) (allowing a court to exclude evidence proffered by the prosecution after considering “all the circumstances, including the circumstances in which the evidence was obtained, . . . [if] the admission of the evidence would have . . . an adverse effect on the fairness of the proceeding”). A judge may also exclude an unavailable witness's hearsay statements under the 2003 Act if the judge believes that the evidence's minimal probative value would render admission an “undue waste of time.” Criminal Justice Act, 2003, § 126(1).

would be appropriate if, for example, the absent witness's hearsay statements were the prosecution's primary evidence of the defendant's guilt.<sup>261</sup> Second, Parliament authorized the admission of hearsay statements under the 2003 Act only in those instances in which the declarant "is identified to the court's satisfaction," thereby enabling the defendant to attack the declarant's credibility at trial.<sup>262</sup>

When American judges look to modern English courts for guidance about the common law traditions that England bequeathed to the United States, therefore, they will find that their English counterparts have *never* regarded counsel's assistance with pretrial cross-examinations as invariably essential, and actually have evolved to a point where unavailable witnesses' oral and written hearsay statements often are admitted in the absence of any cross-examination whatsoever.<sup>263</sup> While criminal defendants in the United States surely will contend that pretrial cross-examination opportunities are constitutionally insufficient if the defendants are unrepresented by counsel, defendants in England may count themselves as fortunate if they are given any opportunity to question their accusers at all.

When defendants in the United States argue that the freestanding Due Process Clause always assures them of the right to an attorney's assistance with pretrial cross-examinations, they thus are likely to be disappointed by the courts' response. The Confrontation Clause and the Assistance of Counsel Clause speak far more directly to defendants' concerns, yet stop short of invariably guaranteeing them the right to an attorney's aid; the Supreme Court's due process analysis places great weight on Anglo-American traditions that plainly regarded pro se cross-examination opportunities as sufficient; contemporary practices in the United States shed little light on the matter, given that it has been nearly half a century since American jurisdictions enjoyed any flexibility; and English courts have never construed their common law traditions as demanding that criminal defendants always be guaranteed the

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261. See LAW COMMISSION, *supra* note 238, at 65 (noting that evidence from an unidentified source "should not found a conviction if it stands alone").

262. Criminal Justice Act, 2003, § 116(1)(b); see also LAW COMMISSION, *supra* note 238, at 95 (explaining that this requirement was deemed appropriate in order to ensure compliance with the ECHR).

263. See *supra* Part I.A (outlining early English common law); *supra* notes 225–36, 256–62 and accompanying text (describing modern English hearsay doctrine).

assistance of counsel when cross-examining witnesses prior to trial.

#### 4. Promising Lines of Argument That Remain

Although the Due Process Clause does not invariably demand that defendants be aided by attorneys when questioning witnesses in advance of trial, a defendant still may argue that, given the unique features of his or her case, counsel's assistance is constitutionally required. There may be occasions, in other words, when a defendant's special circumstances are such that admitting the hearsay statements of an unavailable witness whom only the defendant himself or herself has had an opportunity to cross-examine would "violate[] those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency."<sup>264</sup> Of course, it is not possible to catalogue all of those circumstances in advance—the analysis is too fact intensive to permit one to describe *ex ante* all of the instances in which relying on *pro se* cross-examination opportunities might be deemed fundamentally unfair under the Court's due process framework. Consider, however, the following illustrative examples.

##### *a. Mental Incompetence*

A pretrial cross-examination opportunity ought to satisfy the Due Process Clause's requirements only if, at the time the opportunity is afforded, the defendant would be deemed mentally competent to represent himself or herself at trial.

The degree of mental competence required merely to stand trial when represented by counsel is well established. More than thirty years ago, in *Drope v. Missouri*,<sup>265</sup> the Court observed that "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial."<sup>266</sup> Insisting that this standard be

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264. *Dowling v. United States*, 493 U.S. 342, 353 (1990) (internal quotation marks and citations omitted) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

265. 420 U.S. 162 (1975).

266. *Id.* at 171; *accord* *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*) ("[T]he test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational

met, wrote the Court, "is fundamental to an adversary system of justice."<sup>267</sup> In its 1993 decision in *Godinez v. Moran*,<sup>268</sup> the Court held that the Constitution prescribes the same competence standard for determining whether a person is mentally fit to enter a plea of guilty or waive his or her right to counsel.<sup>269</sup> Deciding whether to plead guilty or waive one's right to legal representation, the Court found, does not require "an appreciably higher level of mental functioning" than making the decisions one ordinarily must make in consultation with one's attorney during the course of a criminal trial.<sup>270</sup> The Court emphasized, however, that "the competence that is required of a defendant seeking to waive his right to counsel is the competence to *wave the right*, not the competence to represent himself."<sup>271</sup> After all, when deciding whether to waive his or her right to counsel, a defendant can speak with an attorney about the pros and cons of going to trial pro se, and then make an informed decision—a scenario quite different from the scenarios that defendants encounter when they appear at trial without counsel and have to make important decisions on their own.

The *Godinez* Court did not need to consider how a state could proceed when it concludes that a defendant is fit to stand trial if represented by counsel, but is not fit to go to trial pro se. The Court recently addressed that question in *Indiana v. Edwards*,<sup>272</sup> where it distinguished between the degree of mental competence required for a defendant to stand trial when represented by counsel and the degree of mental competence required for a defendant to proceed to trial pro se.<sup>273</sup> The Court noted that, although defendants do have a Sixth Amendment right to represent themselves at trial,<sup>274</sup> that right is not abso-

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understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (internal quotation marks omitted)).

267. *Drope*, 420 U.S. at 172; *see also* *Pate v. Robinson*, 383 U.S. 375, 378 (1966) ("[T]he conviction of an accused person while he is legally incompetent violates due process . . .").

268. 509 U.S. 389 (1993).

269. *See id.* at 391 ("This case presents the question whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. We hold that it is not.").

270. *Id.* at 399.

271. *Id.*

272. 128 S. Ct. 2379 (2008).

273. *See id.* at 2385–88.

274. *See* *Faretta v. California*, 422 U.S. 806, 820 (1975) ("To thrust counsel upon the accused, against his considered wish . . . violates the logic of the [Sixth] Amendment."); *see also id.* ("The counsel provision . . . speaks of the

lute.<sup>275</sup> The fact that a defendant is mentally competent to stand trial when assisted by an attorney does not mean that he or she is mentally fit to take on the burden of defending himself or herself.<sup>276</sup> As the American Psychiatric Association pointed out in its amicus brief, “[a]n individual can be competent for one purpose and not another.”<sup>277</sup> The Court thus held that “the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under [*Drope*], but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”<sup>278</sup>

The *Edwards* Court did not identify the precise standard that state and federal authorities should use when assessing a defendant’s mental competence to go to trial alone.<sup>279</sup> Instead, the Court gave the nation’s legislators and judges—at least for the time being—the freedom to fashion appropriate standards on their own.<sup>280</sup> Whatever those standards prove to be, it is clear that they must measure a defendant’s mental capacity to

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‘assistance’ of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel . . . shall be an aid to a willing defendant . . . .”; *Adams v. United States*, 317 U.S. 269, 279 (1942) (“[T]he Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.”).

275. See *Edwards*, 128 S. Ct. at 2384 (“[T]he right of self-representation is not absolute.”).

276. See *id.* at 2386–88 (detailing the precedential, practical, and ethical reasons for differentiating between these types of fitness).

277. Brief for The American Psychiatric Ass’n & American Academy of Psychiatry and the Law as Amici Curiae in Support of Neither Party at 18, *Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208) [hereinafter Brief for Am. Psychiatric Ass’n]; see also *id.* at 20 (“Greater capabilities are generally required to play the role of lawyer than of represented defendant. . . . [A] *pro se* defendant is generally called on to do significantly more than a represented defendant.”); *id.* at 26 (“Disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant’s ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant.”).

278. *Edwards*, 128 S. Ct. at 2388.

279. See *id.* (declining Indiana’s request for the Court to declare a federal constitutional standard for determining mental competence to represent oneself); see also *id.* at 2394 (Scalia, J., dissenting) (“Today’s holding is extraordinarily vague. . . . We will presumably give some meaning to this holding in the future, but the indeterminacy makes a bad holding worse.”).

280. Cf. *id.* at 2388 (majority opinion) (noting constitutional permission for states to require representation, presumably according to standards determined by the states).

perform numerous different functions. As the Court has previously acknowledged, a pro se defendant ordinarily must try "to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial."<sup>281</sup> With respect to interrogating adverse witnesses, the American Psychiatric Association has pointed out that an unrepresented defendant must be able "to define and then pursue lines of cross-examination that show genuine weaknesses or gaps in particular prosecution witnesses' testimony; to see difficulties in the prosecution's evidence and then ask the right questions."<sup>282</sup>

The time at which a defendant is given an opportunity to interrogate a witness—whether at trial or before—has no bearing on the degree of mental competence required to interrogate the witness in a meaningful fashion. It is the nature of the task that determines the degree of mental competence required to perform it, not the date on which the task must be performed. If it offends our historically grounded sense of fundamental fairness to permit defendants to cross-examine witnesses on their own at trial when they lack the mental competence necessary for the task, then it undoubtedly offends those same sensibilities to admit into evidence the testimonial statements of an unavailable witness whom only an incompetent defendant was given a pretrial opportunity to cross-examine.<sup>283</sup>

*b. Language Barriers*

Like mental incompetence, language barriers can preclude meaningful communication between an unrepresented defendant and a witness whom he or she is attempting to confront. It thus would surely violate our "fundamental conceptions of justice"<sup>284</sup> to admit into evidence the hearsay statements of an unavailable witness, whom only the defendant has had an opportunity to cross-examine, if the defendant was not capable of

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281. *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984).

282. Brief for American Psychiatric Ass'n, *supra* note 277, at 24.

283. *Cf. R v. Peacock*, (1870) 12 Cox Crim. Cas. 21, 22 (N. Cir.) (noting a common law presumption that if a defendant is personally present at a deposition then he or she has been afforded an adequate opportunity to cross-examine the deponent, but noting that the presumption can be overcome, such as by evidence that the defendant was not mentally fit to interrogate the witness).

284. *Dowling v. United States*, 493 U.S. 342, 352 (1990) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)).

competently communicating in the language spoken by the witness and no interpreter was provided to facilitate the communication.

The Supreme Court has not yet determined whether the Due Process Clause demands that state and federal authorities provide interpreters in order to enable non-English-speaking criminal defendants to participate meaningfully in their trials.<sup>285</sup> Lower federal courts have held, however, that it does. In *Negron v. New York*,<sup>286</sup> the seminal case on the matter, the U.S. Court of Appeals for the Second Circuit held that the trial of a non-English-speaking defendant "lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment," because no interpreter was provided and the language barrier rendered the defendant unable "to participate effectively in his own defense."<sup>287</sup> While noting that the absence of an interpreter also impinged upon the defendant's Sixth Amendment right to participate in his attorney's cross-examination of adverse witnesses, the court concluded that the due process concerns were "even more consequential."<sup>288</sup> "[A]s a matter of simple humaneness," wrote the court, the defendant "deserved more than to sit in total incomprehension as the trial proceeded."<sup>289</sup> In the judgment of the Second Circuit, the defendant's inability to speak English was just "as debilitating to his

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285. See *United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001) ("The United States Supreme Court has yet to recognize the right to a court-appointed interpreter as a constitutional one."). *But cf.* *The Japanese Immigrant Case*, 189 U.S. 86, 101-02 (1903) (holding that the Due Process Clause does not require that an interpreter be provided to aliens in civil immigration proceedings); *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1986) (stating that the Court's holding in the *Japanese Immigrant Case* is not dispositive in criminal cases). The Court's silence on the constitutional issue in recent years is due in part to Congress's enactment in 1978 of the Court Interpreters Act, which eased some of the pressure to address the constitutional implications of denying defendants the use of interpreters. See Pub. L. No. 95-539, 92 Stat. 2040 (1978) (codified as amended at 28 U.S.C. §§ 1827-28 (2006)). In that legislation, Congress declared that an interpreter should be made available in both civil and criminal cases when a party or witness "speaks only or primarily a language other than the English language." 28 U.S.C. § 1827(d)(1)(A). Although § 1827 has made the use of interpreters commonplace in judicial proceedings, it does not purport to reach interviews by law enforcement officials in the early stages of a criminal investigation.

286. 434 F.2d 386 (2d Cir. 1970).

287. *Id.* at 389.

288. *Id.*

289. *Id.* at 390.



ability to participate in the trial as a mental disease or defect.”<sup>290</sup>

Other courts have reached comparable conclusions. The First Circuit has explained, for example, that “[t]he right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”<sup>291</sup> The Seventh Circuit has held that “a defendant in a criminal proceeding is denied due process when . . . what is told him is incomprehensible . . . or . . . a credible claim of incapacity to understand due to language difficulty is made and the district court fails to [respond appropriately].”<sup>292</sup> The Ninth Circuit has acknowledged that, “[i]n a judicial proceeding where a defendant lacks the ability to speak or understand English, an interpreter can be essential for ensuring a fair trial.”<sup>293</sup> Because deciding whether an interpreter is warranted involves weighing a variety of factors—such as the sophistication of the vocabulary that the trial will entail, the ability of the defendant’s attorney to communicate in the defendant’s native language, and the economic and practical implications of retaining an interpreter’s services—appellate courts have said that trial judges enjoy broad discretion to determine whether an interpreter is essential in a particular case.<sup>294</sup> But when an interpreter is indeed necessary to facilitate essential communication between a defendant and those participating in his or her trial, the Due Process Clause requires that an interpreter be provided.

Precisely those same due process concerns arise when a non-English-speaking defendant is given an opportunity to

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290. *Id.*

291. *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974).

292. *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985); *accord* *United States v. Johnson*, 248 F.3d 655, 664 (7th Cir. 2001) (affirming that a defendant’s constitutional “right to communicate with his or her counsel” may necessitate the aid of an interpreter).

293. *United States v. Si*, 333 F.3d 1041, 1042 (9th Cir. 2003).

294. *See, e.g., id.* at 1043–44 & n.3 (noting that this is a matter generally committed to the discretion of the trial court); *United States v. Bennett*, 848 F.2d 1134, 1141 (11th Cir. 1988) (“As a constitutional matter the appointment of interpreters is within the district court’s discretion.”); *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981) (“The use of courtroom interpreters involves a balancing of the defendant’s constitutional rights to confrontation and due process against the public’s interest in the economical administration of criminal law.”); *Carrion*, 488 F.2d at 14 (noting some of the factors a trial court must consider in making this determination).

cross-examine a witness prior to trial. Just as the Due Process Clause is implicated when defendants' mental incompetence renders them unable to interrogate witnesses effectively,<sup>295</sup> so too can language impediments render a cross-examination opportunity meaningless, regardless of when that opportunity is afforded. It does not matter whether a defendant's incapacities are mental or linguistic in nature—both raise profound fairness concerns in our adversarial system of justice. It thus is constitutionally imperative either that the defendant be competent in the witness's language or that an interpreter be provided to assist. If neither of those requirements has been met, it would be fundamentally unfair to admit the witness's hearsay statements into evidence on the strength of the argument that the defendant was given a chance to interrogate the witness prior to trial.

*c. Perfect Storms*

Although the outcomes in such cases are difficult to predict with any measure of certainty, defendants ought to be alert to the possibility of persuading a court that particular groupings of factors render a pro se cross-examination opportunity constitutionally worthless. Even if each of those factors standing alone might be innocuous under the Court's due process framework, a court might nevertheless regard the accumulation of factors in a given case as akin to a "perfect storm"<sup>296</sup> sufficient to bring the Due Process Clause into play.

Consider, once again, our counterparts across the Atlantic. Modern English courts (when discussing judges' common law discretion to exclude hearsay on grounds of fairness) and the Strasbourg Court (when reviewing claims of unfairness under Article 6 of the ECHR) have identified numerous factors that bear on the fairness of admitting the hearsay statements of an unavailable witness who either has never been cross-examined by anyone at all or has only been cross-examined by an unrepresented defendant.<sup>297</sup> If one were to imagine an American case in which multiple such factors were at play, it might look

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295. See *supra* notes 265–83 and accompanying text (discussing mental incompetence).

296. See generally SEBASTIAN JUNGER, *THE PERFECT STORM* 149–50 (1997) (using the term to denote a tremendous storm caused by the confluence of meteorological events that, taken individually, would be far less consequential).

297. See *supra* notes 238–62 and accompanying text (discussing developments in England and Europe).

something like this: imagine a case in which the unavailable witness's hearsay statements are the sole evidence of the defendant's guilt, there are numerous important questions that defense counsel would have liked to ask the witness, and prosecuting attorneys were present when the unrepresented defendant was given his or her pretrial cross-examination opportunity (thereby skewing the psychological dynamics even more powerfully against the defendant). On grounds of fairness, the Strasbourg and English courts would likely hold that the witness's hearsay statements were inadmissible. There is no reason to believe that the result ought to be different in the United States.

Of course, line-drawing questions predictably arise. How many such factors must be present in order to render the hearsay statements inadmissible? What if the hearsay statements are not the *sole* evidence of the defendant's guilt, but they nevertheless rest at the heart of the prosecution's case? What if the defendant actually did quite a good job of cross-examining the witness prior to trial on his or her own, such that there are only a few additional matters that defense counsel would have liked to explore? These are challenging questions, to be sure, but their difficulty should not preclude courts from developing a due process regime that begins to answer them.

### CONCLUSION

Because the Supreme Court has securely yoked its confrontation jurisprudence to eighteenth-century common law authorities, the Confrontation Clause no longer assures a criminal defendant that an unavailable witness's testimonial hearsay statements will be inadmissible at trial unless the defendant was given a pretrial opportunity to cross-examine the witness with the aid of an attorney. Although a pretrial cross-examination opportunity is essential if the prosecution wishes to introduce the unavailable witness's testimonial statements into evidence, the Confrontation Clause is now satisfied if that opportunity is afforded to the unrepresented defendant alone.<sup>298</sup> Unless the Court shifts course yet again, defendants seeking an attorney's help with pretrial cross-examinations must now stake their hopes on the Sixth Amendment's Assistance of Counsel Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments.

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298. See *supra* Parts I & II.A.

Taking those provisions together, one can make the following claims concerning the nexus between defendants' confrontation and counsel rights in cases in which a hearsay declarant is unavailable to testify at trial. First, if the defendant was given an opportunity to cross-examine the witness after the defendant's Sixth Amendment right to counsel attached, then the witness's hearsay statements are inadmissible unless the defendant was permitted to conduct the cross-examination with counsel's assistance.<sup>299</sup> Second, if the cross-examination opportunity was afforded *before* the defendant's right to counsel attached, but the witness was still available to testify at the time attachment occurred, then the Constitution ought to be interpreted to allow the defendant's attorney to request an opportunity to cross-examine the witness, and the witness's hearsay statements ought to be inadmissible at trial if that request is refused.<sup>300</sup> Third, if the cross-examination opportunity was afforded before the defendant's right to counsel attached and the witness had already become unavailable to testify by the time attachment occurred, then the witness's hearsay statements are admissible at trial,<sup>301</sup> unless the defendant can raise a due process objection based upon the defendant's mental incompetence, the defendant's inability to speak the witness's language, or some other extraordinary state of affairs.<sup>302</sup>

In cases in which law enforcement officials fear that a witness will die or become otherwise unavailable to testify, therefore, those officials have a strong incentive to afford the defendant an early opportunity to interrogate the witness. Officials can thereby lay the groundwork for arguing that the Confrontation Clause poses no obstacle if the witness becomes unavailable to testify and prosecutors wish to introduce the witness's testimonial hearsay statements into evidence. Although there will be cases in which the Assistance of Counsel and Due Process Clauses will preclude the hearsay statements' admission unless the defendant was given an opportunity to question the witness with counsel's help, there will be many instances in which pro se cross-examination opportunities are constitutionally sufficient.

Those who regard pro se cross-examinations as an unacceptable proxy for cross-examinations by trained attorneys can

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299. See *supra* Part II.B.1.

300. See *supra* Part II.B.2.

301. See *supra* Part II.B.2.

302. See *supra* Part III.B.4.

proceed in either of two ways. First, they can try to persuade the Supreme Court to alter its confrontation, right-to-counsel, or due process jurisprudence, such that defendants will inevitably be guaranteed the assistance of an attorney when cross-examining witnesses prior to trial. It is difficult to be optimistic about that approach's success (at least in the short term), however, given the Court's clear and repeated insistence in recent years that the Confrontation Clause must be interpreted in conformance with eighteenth-century common law authorities, and given the well-established nature of the Court's frameworks for adjudicating right-to-counsel and due process claims.

Second, those troubled by the new constitutional state of affairs can focus on launching legislative initiatives at the state and federal levels aimed at compensating for the Constitution's gaps. If one believes that *pro se* cross-examination opportunities are inadequate to vindicate defendants' confrontation rights, then one can try to persuade the nation's lawmakers to enact laws embodying that judgment. After all, our evidentiary codes already declare numerous varieties of evidence inadmissible on the strength of fairness, reliability, or other public-policy concerns, even though the Constitution itself would pose no obstacle to the evidence's admission.<sup>303</sup> In light of the Court's recent reappraisal of the Confrontation Clause, it may be time for the nation's various jurisdictions to adopt evidentiary rules barring the admission of an unavailable witness's testimonial hearsay statements unless the defendant has been given the opportunity to cross-examine the witness with the assistance of counsel.

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303. See, e.g., FED. R. EVID. 403 (permitting the exclusion of relevant evidence when it poses a substantial risk of "unfair prejudice"); *id.* 407 (requiring, in specified circumstances, the exclusion of evidence of subsequent remedial measures); *id.* 412 (requiring, in specified circumstances, the exclusion of certain kinds of evidence of a victim's past sexual conduct).