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The Dignitary Confrontation Clause

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Abstract: For seventeen years, the Supreme Court's Confrontation Clause jurisprudence has been confused and confusing. In *Crawford v. Washington* (2004), the Court overruled prior precedent and held that "testimonial" out-of-court statements could not be admitted at trial unless the defendant had an opportunity to cross-examine the declarant, even when the statement would be otherwise admissible as particularly reliable under an exception to the rule against hearsay. In a series of contradictory opinions over the next several years, the Court proceeded to expand and then seemingly roll back this holding, leading to widespread chaos in common types of cases, particularly those involving statements to law enforcement officers and written affidavits of crime lab technicians. In these cases, for apparently pragmatic reasons, various pluralities of the Court appear to have redefined "testimonial" to mean, at least in part, "potentially unreliable," thereby contradicting the goal of Crawford.

To help courts resolve this confusion, this Article proposes an overlooked, residual constitutional value, distinct from reliability, implicated in cases where defendants cannot confront witnesses who testify against them. Integrating historical and narrative analysis of the confrontation right's origins in Anglo-American law with the psychological literature on guilt and deceit, it argues that a criminal defendant has a relational interest in asserting their moral presence against a potentially deceitful witness. It further argues that this interest harmonizes with the contemporary function of dignity in criminal constitutional jurisprudence. The Article concludes that criminal defendants have a distinct dignitary interest in confronting witnesses against them. It urges courts to untangle the contradictory web of Crawford and its progeny by considering the dignitary dimensions of the Confrontation Clause.

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INTRODUCTION

In 2018, the Supreme Court denied certiorari in *Stuart v. Alabama*,[1] a Sixth Amendment challenge to the State's introduction of a written blood alcohol report through the in-court testimony of a lab technician who did not prepare it.[2] In a dissent from denial of certiorari that received an unusual amount of media attention,[3] Justice Gorsuch argued that the Alabama procedures violated the Supreme Court's Confrontation Clause jurisprudence of the past decade, because they allowed Stuart to be convicted of driving under the influence based on the testimony of a lab technician other than the one who had personally conducted the blood alcohol test.[4] This outcome, Gorsuch said, broke the Sixth Amendment's "promise" that criminal defendants have the right to confront their accusers.[5]

The context of *Stuart* is a doctrinal mess familiar to all scholars and practitioners of criminal procedure, one which Gorsuch accurately described as a "problem . . . largely of [the Supreme Court's] creation."[6] With the 2004 decision in *Crawford v. Washington*,[7] authored by Justice Scalia, the Court untethered Confrontation Clause analysis from the

1. 586 U.S. __, 139 S. Ct. 36 (2018).
2. *Id.* at 36.
3. Jules Epstein, *Continuing* Crawford*/Confrontation "Confusion"*, 34 CRIM. JUST. 67 (2019).
4. *Stuart*, 139 S. Ct. at 36 (Gorsuch, J., dissenting from denial of certiorari).
5. *Id.*
6. *Id.*
7. 541 U.S. 36 (2004).

reliability tests created by the hearsay rules.[8] In *Crawford* the Court held that "testimonial" statements made outside the courtroom shall not be introduced if the defendant does not have an opportunity to cross-examine the declarant, even if the statement falls under a recognized exception to the rule against hearsay.[9] Subsequent cases, *Melendez-Diaz v. Massachusetts*[10] and *Bullcoming v. New Mexico*,[11] clarified that this rule applies even to the written testimony of crime lab technicians, whose signed affidavits confirming the results of their various tests had previously been routinely admitted by criminal courts under various hearsay exceptions.[12]

Crawford, *Melendez-Diaz*, and *Bullcoming* created a bright-line test, ostensibly grounded in an original understanding of the Sixth Amendment as preventing the state from using ex parte witness examinations against the accused.[13] Yet subsequent cases, still purporting to turn on whether a statement is "testimonial," have introduced mass confusion. In *Williams v. Illinois*,[14] multiple fractured pluralities searching for a coherent theory attempted to limit the application of *Crawford* in lab tech cases, for what seem to have been largely pragmatic reasons related to the efficiency of the criminal justice system.[15] And in *Michigan v. Bryant*,[16] authored by Justice Sotomayor over a strenuous dissent by Justice Scalia, the Court reversed course on clear language in *Crawford*, holding that the reliability tests embodied in well-recognized hearsay exceptions *are*, in fact, relevant to whether an out-of-court statement triggers the Confrontation Clause.[17]

The line of cases between *Crawford* and *Bryant* has generated a great deal of scholarly commentary and case law, centered in large part on the question of what scope courts should give *Crawford* to best protect the accuracy of trial results.[18] Some have contended that this amount of

8. *Id.* at 68–69.

9. *Id.* at 59–61.

10. 557 U.S. 305 (2009).

11. 564 U.S. 647 (2011).

12. *Melendez-Diaz*, 557 U.S. at 311; *Bullcoming*, 564 U.S. at 652.

13. *Crawford*, 541 U.S. at 50; *Melendez-Diaz*, 557 U.S. at 329; *Bullcoming*, 564 U.S. at 665.

14. 567 U.S. 50 (2012).

15. *Id.* at 84–85.

16. 562 U.S. 344 (2011).

17. *Id.* at 358–59. For a discussion of the varying role of reliability in hearsay exceptions, see FED. R. EVID. 807 advisory committee's note to 2019 amendment.

18. *See* Mark Spottswood, *Truth, Lies, and the Confrontation Clause*, 89 U. COLO. L. REV. 565, 566–67 (2018).

scholarly ink is not entirely justified by the problem's scope.[19] The confrontation right is purely a trial right, and in a criminal justice system where 90% to 95% of cases are resolved in plea bargains[20]—a key structural feature that drives the choices of indigent defendants, guilty and innocent alike—it may seem unwarranted for courts and criminal proceduralists to debate this particular doctrinal question so heavily.[21]

The *Crawford* debate is particularly important because the vast majority of criminal cases never go to trial and therefore the constitutional procedures governing the few trials that do occur impact defendants' incentives at plea bargaining. Plea bargains happen in part because defendants, even innocent defendants, face uncertain odds against the monolithic investigative and prosecutorial apparatus of the state.[22] In light of this reality, the relative scarcity of actual criminal trials only amplifies the importance of the rights that constrain them.

The paradox of *Crawford* and its progeny is that the Court announced a break from an accuracy-based Sixth Amendment analysis to one turning on whether an out-of-court statement is "testimonial"[23]—despite the fact that the word "testimonial" appears nowhere in the text of the Sixth Amendment.[24] The Court then, for apparently practical reasons and while continuing to describe the confrontation right as limited to "testimonial" statements, essentially redefined "testimonial" to mean, at least in part, *potentially inaccurate*.[25]

This Article is the first to propose a distinct constitutional value, *apart* from accuracy, that may be implicated in cases where defendants do not get to confront witnesses who give testimony against them. It asks, in short, whether there is a residual Sixth Amendment value that is not already captured by the accuracy-based limitations on hearsay evidence. Through historical and narrative analysis of the confrontation right's origins in Anglo-American law, it concludes that criminal defendants have a distinct *dignitary* interest in confronting witnesses against them. Courts seeking to untangle the web created by *Crawford*, *Williams*, and *Bryant* should look to the dignitary dimensions of the Confrontation

19. *Id.* at 567.

20. *See* LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, DEP'T OF JUST., PLEA AND CHARGE BARGAINING RESEARCH SUMMARY 1 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/5QHQ-AWCA].

21. *See* Spottswood, *supra* note 18, at 566–67.

22. *See generally* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

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

24. U.S. CONST. amend. VI.

25. *Crawford*, 541 U.S. at 51–53.

Clause as they set its limits.

As a methodological matter, this analysis starts with the premise that, in precedent-based common law systems, the historical justifications for a legal rule become part of the rule itself. Digging deeply into not only the history but also the rhetoric that produced the rule allows courts and practitioners to better understand it. This Article therefore draws upon what has been described as the "law-as-narrative trope," in which "law is merely a story, one subjective rendering among many."[26] Specifically, it considers the legal discourse originating in the influential treason trial of Sir Walter Raleigh to trace the original legal narrative giving rise to the idea that criminal defendants ought to have a right to confront witnesses against them.[27] Raleigh's trial has been widely regarded as one of the earliest inflection points in the development of both the confrontation right and hearsay law.[28] And yet the actual narratives Raleigh used to attack the Crown's use of an out-of-court statement against him reveal a dignitary core to confrontation that the Supreme Court has ignored in the recent Confrontation Clause cases.

This Article has four parts. Part I gives a history of the confrontation right up to and including the 2004 *Crawford* case, its progeny, and its many critics, illuminating the confusion around what sorts of out-of-court statements currently trigger Sixth Amendment protections. Part II argues for a dignitary view of the confrontation right. It first identifies the specific dignitary aspects of confrontation embodied in Sir Walter Raleigh's trial speeches in his defense. It then collects the psychological literature on guilt and deceit, demonstrating how confronting a defendant may produce emotional guilt on the part of a lying witness. It argues that the defendant's *relational* interest in producing such feelings in a witness advances not

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26. Guyora Binder, *The Law-as-Literature Trope*, *in* 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES 63, 72–73 (Michael Freeman & Andrew D.E. Lewis eds., 1999). Narrative has been used as an explanatory mechanism across a wide variety of legal fields. For a representative sample see *id.* at 72 n.7. As Peter Brooks argues:

> The study of the modalities of narrative presentation—use of points of view, verb tenses, flashbacks, and the like—induces a sense of the uneasy relations of telling and told, an awareness of how narrative discourse is never innocent, but always presentational, a way of working on story events that is also a way of working on the listener or reader.

Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 17 (Peter Brooks & Paul Gewirtz eds., 1996). The narratives courts use to present justifications for constitutional rules are no exception. Bernard S. Jackson has argued that legal rules derived from case law are "socially constructed narratives, accompanied by particular (and increasingly institutionalized) forms of approval or disapproval" where "'law' and 'fact' are reduced to the same level—of narrative structures—and the process of 'application' becomes one of comparison." BERNARD S. JACKSON, LAW, FACT, AND NARRATIVE COHERENCE 101–06 (1988).

27. *See* Harry L. Stephen, *The Trial of Sir Walter Raleigh: A Lecture Given in Connection with the Raleigh Tercentenary Commemoration*, *in* 2 TRANSACTIONS ROYAL HIST. SOC'Y 172, 176 (1919).

28. *See id.*

only accuracy but also dignitary values. Finally, it explores the additional dignitary interests a defendant may have in functioning as a human, embodied listener to the narrative that helps convict him, rather than being excluded from the declarant's out-of-court testimony to a representative of the state machinery that prosecutes the defendant. Part III introduces the philosophical and legal foundation for dignitary rights generally and discusses the specific dignitary rights of criminal defendants. It concludes that the dignitary values Part II identified as implicit in confrontation harmonize with other concepts of dignity already widely recognized by the Supreme Court. Part IV offers suggestions for how courts can use this dignitary conception of the Confrontation Clause more clearly to determine the limits of *Crawford.*

I. *CRAWFORD* AND ITS DISCONTENTS

This Part summarizes the history of the confrontation right prior to and at the Founding and explains why courts had generally assumed that the evidentiary laws governing hearsay protected that right. It then presents the sea change represented by *Crawford*, the contradictory subsequent case law, and its practical results.

A. History of the Confrontation Right

As Justice Harlan noted in 1970, "[h]istory seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause."[29] The hearsay affidavit famously admitted against Sir Walter Raleigh in 1603 came in under the "Marian statutes" (enacted during the reign of Queen Mary I),[30] which provided that witnesses in felony cases be questioned under oath by justices of the peace and allowed such out-of-court statements to be admitted at trial if a witness subsequently became unavailable.[31] Despite the outcry occasioned by Raleigh's trial, hearsay testimony was regularly admitted in English courts until at least 1675.[32] Wigmore said that the "fixing" of the doctrine of the law against hearsay appears to have taken place at some point between 1675 and 1690.[33] Yet some eighteenth-century authorities seem to retain conflicting

29. California v. Green, 399 U.S. 149, 174 (1970) (Harlan, J., concurring).

30. *See Crawford*, 541 U.S. at 44.

31. John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 82 (1983).

32. John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 444–45 (1904).

33. *See id.* at 445; *see also* King v. Paine (1696) 87 Eng. Rep. 584, 584; 5 Mod. 163, 163 (KB) (holding dead defendant's examination inadmissible because "the defendant, not being present before

views of the admissibility of hearsay evidence.[34]

Relevant to the development of the confrontation right is the fact that prior to the 1730s, lawyers played little or no role in English criminal trials.[35] During this period, defendants and defense witnesses were forbidden from testifying under oath in their own defense, due to the concern that they would have too great a temptation to violate their oaths by lying (thereby putting their immortal souls in danger).[36] In felony cases, the prosecution might have had counsel, but the defense did not.[37] As a result, these trials lacked most of the features we associate with the adversarial system today: there were no opening or closing statements, direct or cross-examinations of witnesses, or evidentiary or procedural motions.[38] The records from this era reveal that judges often played an important role in questioning witnesses and also that the accused, unassisted by counsel, conducted examinations of witnesses on their own behalf.[39] While the accused spoke unsworn, the records reveal that they would frequently reply to evidence that lay within their personal knowledge.[40]

Although sources disagree on the precise timing and consistency of the hearsay rule's adoption, what is clear is that the potential importance of a defendant confronting testifying witnesses became a matter of public outcry during the events of the so-called "Popish Plot" of 1678, in which disgruntled cleric Titus Oates falsely claimed knowledge of a Catholic conspiracy to assassinate King Charles II.[41] At the trials of the so-called Catholic conspirators, many defense witnesses testified that Oates could not have known of any assassination attempt, as he had been in France, not London, at the time the alleged events took place.[42] Yet the defense

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the magistrate when they were taken, had no opportunity to cross-examine them." (emphasis omitted)).

34. *See, e.g.*, Fenwick's Case (1696) 13 How. St. Tr. 537, 591–92 (H.C.); *see also* Spottswood, *supra* note 18, at 573–74 (discussing Sir Geoffrey Gilbert's 1754 treatise on evidence law, which at one point states that "mere Hearsay is no Evidence," while at others describes many circumstances in which hearsay is admissible, such as when it corroborates the testimony of a live witness, was given during a pre-trial examination, or was preserved as part of a recorded deposition in a prior dispute between the two parties).

35. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 272 (1978).

36. *See* GEOFFREY GILBERT, THE LAW OF EVIDENCE 122–28 (1756).

37. Langbein, *supra* note 35, at 282.

38. *Id.* at 282–83.

39. *Id.* at 283.

40. *Id.*

41. *See generally Popish Plot*, ENCYC. BRITANNICA (Oct. 24, 2016), https://www.britannica.com/event/Popish-Plot [https://perma.cc/CFB4-AQEW].

42. Spottswood, *supra* note 18, at 574.

witnesses were prevented from testifying under oath. Nonetheless, the court instructed the jury that it had to give greater weight to Oates' sworn statements before the Privy Council, which were not cross-examined by the defendants, than to the unsworn testimony of the defense witnesses at trial.[43] After twenty-two men were executed, and a mass anti-Catholic hysteria erupted, Oates' lies came to light and he himself was tried and pilloried for perjury.[44]

Of more direct relevance to the drafters of the Sixth Amendment, the Crown's enforcement of the Stamp Act of 1765[45] against the American colonies created a new flood of suspicion against processes that did not allow for confrontation.[46] To avoid jury nullification in cases brought under the highly unpopular act, the Crown tried them in admiralty court, which had civil-style procedures that regularly admitted ex parte depositions and denied the defendant's right to be present during cross-examination.[47]

The Founders' opposition to such a state of affairs is manifest in John Adams' arguments in defense of a merchant in admiralty court, which was quoted by the Supreme Court in *Crawford*: "[e]xaminations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them."[48] Likewise, George Mason, generally considered to be the principal author of the Bill of Rights, objected to the Stamp Act tribunals in a letter to the London Society of Merchants, written under the pseudonym "A Virginia Planter."[49] He decried how the Stamp Act trial processes:

> [M]ake an odious distinction between us and our fellow-subjects

43. *Id.*

44. *See* ENCYC. BRITANNICA, *supra* note 41.

45. Duties in America (Stamp) Act 1765, 5 Geo. 3 c. 12 (Eng.).

46. ENCYC. BRITANNICA, *supra* note 41. The objectionable processes created by the Stamp Act also became the basis for the right to a jury trial in both criminal cases (under the Sixth Amendment) and in civil cases (under the Seventh Amendment). *See* Thomas E. Carney & Susan Kolb, *The Legacy of* Forsey v. Cunningham*: Safeguarding the Integrity of the Right to Trial by Jury*, 69 HISTORIAN 663, 687 (2007). While the Seventh Amendment does not contain a parallel confrontation right in civil cases, the Supreme Court has held that, as a matter of due process, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *But see* Tucker v. Va. State Bar, 357 S.E.2d 525, 532 (Va. 1987) (holding that the right to confront and cross-examine does not apply in civil cases).

47. *See* Spottswood, *supra* note 18, at 576.

48. Draft of Argument in Sewall v. Hancock (1768–1769), *in* 2 LEGAL PAPERS OF JOHN ADAMS 194, 207 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

49. 1 KATE MASON ROWLAND, THE LIFE OF GEORGE MASON, 1725–1792, at 129 (Russell & Russell 1964) (1892).

> residing in Great Britain, by depriving us of the ancient trial, by a jury of our equals, and substituting in its place an arbitrary civil-law court—to put it in the power of every sycophant and informer . . . to drag a freeman a thousand miles from his own country (whereby he may be deprived of the benefit of evidence) to defend his property before a judge . . . .[50]

Despite this obvious concern over civil-style interrogatories, there is no record of debate over the Confrontation Clause from the First Congress.[51]

The upshot of this history is that the Sixth Amendment, insofar as it relates (as Mason indicates) to "evidence," unavoidably implicates some of the same concerns about accuracy that appear to have motivated common law courts to adopt hearsay rules throughout the late seventeenth and eighteenth centuries. If the tragedy of the "Popish Plot" brought public attention to the reliability problems created by hearsay evidence admitted without cross-examination, by the time of the debate over the Stamp Act tribunals, revolutionary rhetoric had come to link reliability questions to broader concerns over national identity. Mason describes interrogatories as creating an "odious distinction" between Englishmen and English colonists, while Adams makes a distinction between Englishmen generally and the continental Europeans whose justice systems allow such processes.[52]

Meanwhile, the Supreme Court did not consider a major Confrontation Clause case until 1895. In *Mattox v. United States*,[53] the Court declared that "[t]he primary object of [the clause] . . . was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness."[54] It is this definition that would form the basis for the modern revolution in Confrontation Clause jurisprudence.

B. Modern Cases

In the most recent pre-*Crawford* case to state a Confrontation Clause test, *Ohio v. Roberts*,[55] the Supreme Court held that a prior statement of a witness who did not testify at trial could be introduced if (1) the witness was "unavailable" to testify and (2) the prior statement bore adequate

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50. *Id.* at 383.

51. John G. Douglass, *Confrontation Clause*, HERITAGE FOUND., https://www.heritage.org/constitution/#!/amendments/6/essays/156/confrontation-clause [https://perma.cc/4D24-SGMZ].

52. ROWLAND, *supra* note 49, at 383.

53. 156 U.S. 237 (1895).

54. *Id.* at 242.

55. 448 U.S. 56 (1980).

"indicia of reliability" to substitute for the lack of cross-examination.[56] The Court held that "reliability" could be inferred if the prior statement fell within a "firmly rooted" hearsay exception or was otherwise supported by "particularized guarantees of trustworthiness."[57]

In 2004, however, *Crawford v. Washington* severed the hearsay analysis from the Confrontation Clause analysis.[58] In *Crawford*, the State of Washington had tried to introduce the tape-recorded statements of a wife who gave police an account of her husband stabbing a man who had tried to rape her.[59] The statements diverged from the defendant's own account and, as the wife ultimately asserted marital privilege and did not testify, the court admitted the tape-recorded statements on the grounds that they bore "particularized guarantees of trustworthiness" under *Roberts* (specifically because they interlocked in several respects with the defendant's statements).[60]

Finding that the Founders intended the Confrontation Clause to prohibit the use of ex parte examinations as in the civil law system, the Court explained that the Clause sometimes overlapped with hearsay rules, yet remained distinct:

> [N]ot all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.[61]

The Court went on to say that the Confrontation Clause is concerned specifically with "testimonial" hearsay.[62] This includes not only ex parte

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56. *Id.* at 66.

57. *Id.* This synthesis of common law hearsay and the Confrontation Clause mirrors the Supreme Court of Canada's interpretation of the confrontation right under section 7 of the Charter of Rights and Freedoms, which turns on whether the proponent of an out-of-court statement can meet twin prongs of "necessity" and "reliability." R. v Khelawon, [2006] 2 S.C.R. 787, paras. 48–60 (Can.) (holding that "the constitutional right guaranteed under s. 7 of the *Charter* is not the right to confront or cross-examine adverse witnesses in itself" and that "if the trial judge determines that the evidence falls within one of the traditional common law [hearsay] exceptions, this finding is conclusive and the evidence is ruled admissible, unless, in a rare case, the exception itself is challenged as described in both those decisions").

58. 541 U.S. 36 (2004).

59. *Id.* at 38–39.

60. *Id.* at 41.

61. *Id.* at 51 (emphasis omitted).

62. *Id.* at 53.

testimony at formal proceedings such as preliminary hearings, but also statements taken during interrogations by police, which "bear a striking resemblance to examinations by justices of the peace in England."[63] It concluded that, "where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[64] While "leav[ing] for another day any effort to spell out a comprehensive definition of 'testimonial,'" the Court held that where testimonial statements are at issue, the accused must have a right to confront the declarant and cross-examine them.[65]

The *Crawford* decision created substantial consternation among prosecutors. It quickly became clear that this ruling would make a particular difference to existing practice in two common scenarios. The first was domestic abuse prosecutions in which the reporting female victim had changed her mind about testifying against her abuser and her original reports had come in as excited utterances or under other, similar exceptions to the hearsay rule.[66] The second was cases involving forensic testing in which, hitherto, courts had routinely admitted lab reports under business records exceptions, without requiring the specific technician responsible for the testing to take the stand.[67] These are not, of course, the only scenarios in which the *Crawford* rule would make a difference, but they did each produce their own line of Supreme Court cases.

1. Domestic Violence Cases

A pair of cases, *Davis v. Washington*[68] and *Hammon v. Indiana*,[69] presented slightly different factual configurations of a common problem. In *Davis*, Michelle McCottry called 911 to report that her ex-boyfriend was "here jumpin' on me again."[70] She specified that he was "usin' his

63. *Id.* at 52; *see also id*. at 53 ("Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function.").

64. *Id.* at 61.

65. *Id.* at 68. It is worth noting that the *Crawford* Court did identify one historical exception to the rule that testimonial statements must be subject to cross-examination: the dying declaration. In a footnote the Court noted that "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are," but deferred consideration of this question. *Id.* at 56 n.6.

66. *See* discussion *infra* section I.B.1.

67. *See* discussion *infra* section I.B.2.

68. 547 U.S. 813 (2006).

69. 547 U.S. 813 (2006).

70. *Id.* at 817.

fists" and identified him by name to the 911 operator.[71] McCottry did not appear at trial and the trial court admitted the 911 call as an excited utterance for hearsay purposes.[72] The Supreme Court of Washington affirmed this decision, concluding that McCottry's identification of Davis to the 911 operator was not testimonial.[73] In *Hammon*, police responded to a report of domestic disturbance at the home of Hershel and Amy Hammon, the latter of whom gave permission for the officers to enter the home.[74] After some conversation with the officers, Ms. Hammon filled out and signed a battery affidavit in which she wrote: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."[75] Like McCottry, Ms. Hammon did not appear at trial, and the court admitted the affidavit under the present sense impression exception to the hearsay rule and her statements to officers as excited utterances.[76]

In considering these cases together, the Supreme Court declined again "to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial."[77] The Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[78]

Applying this standard to the cases under consideration, the Court concluded that the *Davis* 911 call was not testimonial, while the *Hammon* affidavit was.[79]

Of the *Davis* call, the Court said, "McCottry was speaking about events *as they were actually happening*, rather than 'describ[ing] past events,'" and that the 911 operator asked questions that were "necessary to be able

71. *Id.* at 818.
72. *Id.* at 819.
73. *Id.*
74. *Id.*
75. *Id.* at 820.
76. *Id.*
77. *Id.* at 822.
78. *Id.*
79. *Id.* at 829–32.

to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past."[80] By contrast, of the *Hammon* statements and affidavit, the Court said, "it is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged."[81] Thus, the two cases—factually similar in terms of the domestic violence victim's plight—had distinct outcomes under the *Crawford* test.

2. Lab Reports

In *Melendez-Diaz v. Massachusetts*, the Court extended its Confrontation Clause test into a new arena, considering a certificate from a state crime lab certifying the contents and quantity of a cocaine sample.[82] Speaking, again, through Justice Scalia for a five-person majority, the Court noted that the case "involves little more than the application of our holding in *Crawford*," and held that the certification from the crime lab was an "*ex parte* out-of-court affidavit" that triggered the defendant's Sixth Amendment right to cross-examine.[83] In a dissent, Justice Kennedy raised the practical problems with such an application, focusing on the technical complexities of forensic work in the real world:

> Consider how many people play a role in a routine test for the presence of illegal drugs. One person prepares a sample of the drug, places it in a testing machine, and retrieves the machine's printout—often, a graph showing the frequencies of radiation absorbed by the sample or the masses of the sample's molecular fragments . . . . A second person interprets the graph the machine prints out—perhaps by comparing that printout with published, standardized graphs of known drugs. Meanwhile a third person—perhaps an independent contractor—has calibrated the machine and, having done so, has certified that the machine is in good working order. Finally, a fourth person—perhaps the laboratory's director—certifies that his subordinates followed established procedures.[84]

(The authors of a major casebook seem to agree, referring to *Melendez-Diaz* as "an astonishing elevation of form over both substance and good

80. *Id.* at 827 (emphasis in original).

81. *Id.* at 829.

82. 557 U.S. 305 (2009).

83. *Id.* at 329.

84. *Id.* at 332 (Kennedy, J., dissenting).

sense."[85])

The organizational complexities of the laboratory setting became relevant in *Bullcoming v. New Mexico*, where the prosecution attempted to introduce a forensic lab report containing a testimonial certification of blood alcohol level (BAC) from one scientist through the in-court testimony of another scientist, who had not signed the original certification.[86] This variation on the *Melendez-Diaz* facts did not change the outcome; the Court (speaking this time through Justice Ginsburg, joined in full by Justice Scalia and in large part by Justices Thomas, Sotomayor, and Kagan) held that once a particular scientist had certified a test, that scientist became a witness the defendant had a right to confront.[87] In a notable concurrence, Justice Sotomayor set the stage for eventual limitation to the *Crawford* revolution, noting that four issues had not been decided in *Bullcoming.* Those issues were whether the outcome would have been different if: (1) the state suggested an alternate primary purpose, such as medical treatment, for the BAC report; (2) the state's witness had been a lab supervisor or reviewer; (3) the state had introduced an expert witness and asked for their independent opinion about the underlying testimonial reports (a common form of expert testimony permitted under the evidentiary rules governing experts); or (4) the state had introduced only machine-generated results.[88]

The qualifications in Justice Sotomayor's concurrence seemed to come to fruition a year later in *Williams v. Illinois*,[89] a fractured, 4–4–1 ruling that has introduced even further confusion to the constitutional standing of lab reports under the Sixth Amendment.[90] *Williams* considered a fairly specific factual scenario. In a rape trial, the State of Illinois called a forensic specialist who testified that a DNA profile—produced by an outside, private laboratory called Cellmark—matched a profile produced by the state crime lab using a sample of the defendant's blood.[91] The state expert testified that Cellmark was an accredited lab and had provided the police with a DNA profile.[92] The expert further testified that notations on

85. RONALD J. ALLEN, JOSEPH L. HOFFMANN, DEBRA A. LIVINGSTON, ANDREW D. LEIPOLD & TRACEY L. MEARES, COMPREHENSIVE CRIMINAL PROCEDURE 1416 (5th ed. 2020).

86. Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011).

87. *Id.* at 652.

88. *Id.* at 672–74 (Sotomayor, J., concurring).

89. 567 U.S. 50 (2012).

90. *See* Stuart v. Alabama, 586 U.S. __, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting) (explaining that the *Williams* decision "yielded no majority and its various opinions have sown confusion in courts across the country").

91. *Williams*, 567 U.S. at 62–63.

92. *Id.*

documents (admitted at trial as business records) stated that vaginal swabs taken from the victim were sent to and received back from Cellmark.[93] Essentially, the expert was able to testify to the fact that a sample taken from his own lab matched the profile taken from Cellmark.

The plurality (authored by Justice Alito and joined by Justices Breyer, Roberts, and Kennedy, with Justice Thomas concurring only in the judgment) held that the Cellmark report was not testimonial for *Crawford* purposes as it "plainly was not prepared for the primary purpose of accusing a targeted individual."[94] Rather, the Court found, "the primary purpose of the Cellmark report, viewed objectively, was not to accuse petitioner or to create evidence for use at trial" but to "catch a dangerous rapist who was still at large."[95] Relevant to the plurality's holding was the fact that "no one at Cellmark could have possibly known that the profile it produced would turn out to inculpate petitioner—or for that matter, anyone else whose DNA profile was in a law enforcement database."[96] Essentially, the Cellmark report's anonymity rendered it, from the perspective of the plurality, non-testimonial.

Furthermore, the plurality took up one of the potential issues raised by Justice Sotomayor in her *Bullcoming* concurrence: the fact that Rule 703 of the Federal Rules of Evidence, governing expert opinion testimony, permits experts to explain the facts on which their opinions are based without testifying to the truth of those facts.[97] The plurality found that the crime lab technician's testimony about the Cellmark report fell into this category.[98] It is important to note, however, that given the fractured opinions, five of the nine justices on the *Williams* court actually *disagreed* with the plurality's reasoning: Justice Thomas, in his concurrence, agreed with the four dissenters (Justices Kagan, Scalia, Ginsburg, and Sotomayor) that Rule 703 of the Federal Rules of Evidence would not allow "backdoor" use of a testimonial, expert report, as the expert's opinion would not be relevant unless the underlying assertions in the testimonial hearsay report were true.[99]

Nonetheless, observers have understood the *Williams* case as an attempt by some members of the Court to check the potential forward roll

93. *Id.*

94. *Id.* at 84.

95. *Id.*

96. *Id.* at 84–85.

97. *Id.* at 77–78 (citing FED. R. EVID. 703); *see also* Bullcoming v. New Mexico, 564 U.S. 647, 673 (2011) (Sotomayor, J., concurring).

98. *Williams*, 567 U.S. at 77–80.

99. *See id.* at 105–07 (Thomas, J., concurring); *id.* at 126–27 (Kagan, J., dissenting).

of *Crawford* over all forensic scientific evidence.[100] The consequences of such widespread exclusion would be particularly devastating in rape cases (like the case in *Williams*) in which the nationwide backlog of rape kit testing has left countless victims without justice.[101] Forensic investigation is often slow, and very frequently, the only way to catch rapists involves years-long gaps between comparisons like the one made between the Cellmark profile and the sample the State of Illinois took from the victim. The ways prosecutors have dealt with the impact of *Crawford* on forensic reports will be addressed in the next section. For now, it is sufficient to observe that *Williams* is difficult to reconcile with *Melendez-Diaz* and *Bullcoming*, which turned entirely on the reports' testimonial nature, as opposed to the ostensible reliability the Court identified in the *Williams* report, which was based on the anonymity of the *process* employed.

The last major addition to the *Crawford* line of cases managed to confuse the state of the law even further. In *Michigan v. Bryant*,[102] also decided in 2011, the Court considered a case in which police had questioned a victim who was dying of gunshot wounds. The victim stated that "Rick" shot him and explained that he had spoken with the defendant Bryant through the back door of the defendant's house.[103] The victim testified that Bryant shot him through the door after he turned to leave and that the victim then drove to a nearby gas station where he was later questioned by police.[104]

While *Bryant* arguably could have been resolved, consistent with *Crawford*, by applying the dying declaration exception (as noted in the *Crawford* footnote),[105] Justice Sotomayor, writing for the *Bryant* Court, announced what is in fact a very different test. The Court referred to the "ongoing emergency" language in *Davis*, suggesting that "implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."[106] The Court then compressed that idea back into the logic of common law exceptions to

100. *See* DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 740–41, 754–55 (5th ed. 2021).

101. *See* Gaby Lion, Note, *Bringing Untested Rape Kits out of Storage and into the Courtroom: Encouraging the Creation of Public-Private Partnerships to Eliminate the Rape Kit Backlog*, 69 HASTINGS L.J. 1009, 1033–34 (2018).

102. 562 U.S. 344, 348 (2011).

103. *Id.* at 349.

104. *Id.*

105. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

106. *Bryant*, 562 U.S. at 361.

hearsay, noting that "[t]his logic is not unlike that justifying the excited utterances exception in hearsay law."[107]

Holding that the victim's statements were not testimonial, the Court reformulated the "ongoing emergency" test to encompass not only the ongoing emergency for which the victim sought assistance, but also the broader ongoing emergency to which the police were responding (in this case, the possibility of a dangerous, armed criminal at large).[108] The *Bryant* Court described the relevant inquiry as incorporating *both* the purposes for which the declaration was made *and* the purposes for which it was received by the police officer.[109] Dissenting, Justice Scalia stated that only "the declarant's intent is what counts" and decried the majority's attempt to improperly use the officer's perspective to justify characterizing the declarant's statements about Bryant as made to resolve an ongoing emergency.[110]

Commentators have despaired of making sense of the morass left by *Crawford* and its progeny, especially since *Bryant.*[111] But one thing is clear: the *Crawford* path, which started as an attempt to vindicate a confrontation right that was not protected by common law hearsay rules, was largely unmade by *Bryant*, which refocused the analysis back on the general reliability of statements. As the next section summarizes, the tension between recognizing a specific confrontation right, distinct from background hearsay law, and ameliorating the pragmatic consequences of doing so, has occupied an inordinate amount of jurisprudential and scholarly thought in the years since *Crawford.*

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107. *Id.*

108. *Id.* at 364.

109. *Id.* at 367.

110. *Id.* at 381 (Scalia, J., dissenting).

111. *See generally* Epstein, *supra* note 3. There has, at least, been one unanimous Confrontation Clause decision since *Bryant*, in *Ohio v. Clark*. 576 U.S. 237 (2015). *Clark* considered the admissibility of a three-year-old child's statements to her teacher identifying her mother's boyfriend as the abuser of his infant sister and him. *Id.* at 242. Writing for a six-Justice majority, Justice Alito applied the "primary purpose" test and, while declining to adopt a categorical rule excluding all statements made to people other than law enforcement from the reach of the Sixth Amendment, held that "considering all the relevant circumstances" the child's statements were "not made with the primary purpose of creating evidence for Clark's prosecution" and, thus, there was no violation. *Id.* at 246. In a concurrence Justice Scalia, joined by Justice Ginsburg, attacked the majority's contention that the primary purpose test is "merely *one* of several heretofore unmentioned conditions . . . that must be satisfied before the Clause's protections apply" and emphasized, contrary to the majority, that it is the government's burden, not the defendant's, to prove a long-established practice at the time of the Founding of prosecutors introducing specific kinds of evidence, such as dying declarations. *Id.* at 253 (Scalia, J., concurring) (emphasis in original).

C. Scholarly Debate and Practice

In response to the sea change in forensic testimony created by *Crawford*, many states have introduced so-called "notice-and-demand" statutes, which require that the defendant be allowed to "demand" the presence of a particular expert at trial or otherwise waive that right.[112] In dicta in *Melendez-Diaz*, the Supreme Court seemed to endorse such statutes as constitutional.[113] Yet state courts have remained divided on the further question of whether an expert witness on the stand may rely upon an otherwise inadmissible testimonial report, as suggested by the plurality in *Williams*.[114] The soundness of such a potential justification has been heavily contested.[115] In a seeming violation of *Bullcoming*, the United States Court of Appeals for the Armed Forces allowed a laboratory scientist to testify about the contents of a report on a rape kit prepared by an absent colleague (which was not, itself, admitted as evidence) because the testifying expert conducted a sufficiently "independent analysis," as opposed to being merely a "conduit" for the report's contents.[116]

Some commentators suggest that *Bryant* has left the jurisprudence surrounding eyewitnesses even *less* clear than the jurisprudence surrounding lab reports, because the "primary purpose" test is so deeply fact-specific and therefore unpredictable.[117] As Michael Pardo notes, the strange effect of this is that, despite *Crawford's* grounding in originalism, the sorts of cases the Founders would have been most concerned about (accusatory statements from potential witnesses) may have more potential

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112. Ivana Deyrup, Note, *Causing the Sky to Fall: The Legal & Practical Implications of* Melendez-Diaz, HARV. L. & POL'Y REV. ONLINE, https://harvardlpr.com/online-articles/causing-the-sky-to-fall-the-legal-practical-implications-of-melendez-diaz/ [https://perma.cc/CPP9-2P4U].

113. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326–27 (2009) (noting "[i]n their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial" and that "[t]here is no conceivable reason why [the defendant] cannot . . . be compelled to exercise his Confrontation Clause rights before trial").

114. *See* People v. Sanchez, 374 P.3d 320, 333 (Cal. 2016) (holding that the Confrontation Clause bars the admission of testimonial hearsay through an expert); State v. Michaels, 95 A.3d 648, 666 (N.J. 2014) ("We find *Williams*'s force, as precedent, at best unclear."); Commonwealth v. Brown, 185 A.3d 316, 340 (Pa. 2018) (Donohue, J., concurring) (failing to resolve the question, in a 3–3 split); State v. Dotson, 450 S.W.3d 1, 68 (Tenn. 2014) ("The Supreme Court's fractured decision in *Williams* provides little guidance and is of uncertain precedential value."); United States v. James, 712 F.3d 79, 95 (2d Cir. 2013); United States v. Turner, 709 F.3d 1187, 1189 (7th Cir. 2013).

115. *See* Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 117–38.

116. United States v. Katso, 74 M.J. 273, 275–82 (C.A.A.F. 2015).

117. Michael S. Pardo, *Confrontation After Scalia and Kennedy*, 70 ALA. L. REV. 757, 780–81 (2019).

paths to admissibility than does the testimony of DNA analysts, unknown to the Founders.[118] The practice in the area, thus, remains uncertain, and the precise limitations of the Confrontation Clause remain foggy.[119]

Mark Spottswood has suggested a tiered, misconduct-based approach to the Confrontation Clause, which would allow for suppression of prior statements where the witness could have testified or where their unavailability was the fault of either the prosecution or the witness themselves. This approach would make it harder to falsely accuse others without facing perjury charges.[120] Spottswood has argued that suppression does more harm than good in cases where the witness becomes unavailable through no fault of their own, because there would be no misconduct to deter and we have no reason to believe that the jury would give radically greater credence to the out-of-court statement than to an in-court statement.[121] If those things are true, Spottswood argues, there is no reason to deprive jurors of potentially valuable information.[122]

With three new Justices—Gorsuch, Kavanaugh, and Barrett—replacing Scalia, Kennedy, and Ginsburg since the last of the *Crawford* cases, the next Confrontation Clause case the Court takes up will be an opportunity to provide much-needed clarity. In his dissent from the denial of certiorari in *Stuart v. Alabama*, Gorsuch criticized the plurality's reasoning in *Williams*.[123] *Stuart* was a drunk driving case in which the State of Alabama introduced a BAC report prepared by one analyst

118. *Id.* at 783.

119. With respect to expert reports, at least, Ronald Coleman and Paul Rothstein provide a useful distillation of the six possible ways forensic reports could come in without violating the Confrontation Clause under *Melendez-Diaz* and its progeny. *See* Ronald J. Coleman & Paul F. Rothstien, *A Game of* Katso *and Mouse: Current Theories for Getting Forensic Analysis Evidence Past the Confrontation Clause*, 57 AM. CRIM. L. REV. 27, 52–55 (2020). First, if the report were not testimonial (i.e., if it were a medical or psychiatric report not prepared for the prosecution). *Id.* at 52. Second, if it were used, as the *Williams* plurality suggests, as a foundation for expert testimony and not for the truth of the matter contained in it, a strategy which five justices in *Williams* rejected and Justice Gorsuch seemingly rejected in *Stuart. Id.* at 52–53. Third, where the report is not specifically accusatory (the other theory of the *Williams* plurality based on the anonymity of the Cellmark test, also a shaky theory given the views of the other justices at the time). *Id.* Fourth, where the report lacks sufficient formality, which were the grounds on which Justice Thomas concurred in *Williams* given the lack of certification on the Cellmark report. *Id.* at 54. Fifth, where the testifying witness is more than a mere "surrogate" or "conduit" for the report because, as in *Katso*, they had sufficient authority in the lab that the report's "entire analysis can be sufficiently tested by cross-examining the testifying expert." *Id.* Sixth, where a notice-and-demand statute exists and demand is not made, seemingly approved in dicta in *Melendez-Diaz*. *Id.* at 55.

120. Spottswood, *supra* note 18, at 569.

121. *Id.* at 569–70.

122. *Id.* at 570.

123. Stuart v. Alabama, 586 U.S. __, 139 S. Ct. 36, 36–37 (2018) (Gorsuch, J., dissenting).

through the testimony of a second.[124] The state argued that the report should be admissible on the grounds that it was not offered for the truth of what it said about the defendant's BAC at the time of the test, but rather to provide the testifying expert with a basis for estimating the BAC at the time the defendant was driving.[125] Gorsuch pointed out, approvingly, the five votes against this logic in *Williams* itself, and characterized the *Stuart* case as one where "[t]he engine of cross-examination was left unengaged, and the Sixth Amendment was violated."[126] Gorsuch suggested Alabama's position was illogical, noting that the sole point of offering the BAC report would be to show "*because of the report's truth* . . . a basis for the jury to credit the testifying expert's estimation of Ms. Stuart's blood-alcohol level hours earlier."[127] This seems to suggest that Gorsuch will replace Justice Scalia as a *Crawford* purist. What this means for the somewhat equivocal test introduced by *Bryant*—authored, as it was, by Justice Sotomayor, who joined Justice Gorsuch in his dissent from certiorari denial in *Stuart*—remains to be seen.

The Supreme Court has yet to adequately keep the promise it made in *Crawford* to provide a definition of "testimonial" on "another day." While *Crawford* itself provided mostly historical comparisons resulting in a vague, formalistic understanding of the Confrontation Clause, the later cases seem to focus again on the accuracy/reliability values ostensibly held inadequate in *Crawford*. To resolve this puzzle, the next Part identifies an important, overlooked constitutional value, beyond accuracy, that has been implicit in the confrontation right from the very start.

II. CONFRONTATION AS A DIGNITARY INTEREST

This Part considers the confrontation right as a potential dignitary interest of criminal defendants. In so doing, it turns to one of the foundational narratives behind Confrontation Clause discourse—the trial of Sir Walter Raleigh. In identifying the key features of Raleigh's influential attack on the absence of his accuser from the proceedings, it identifies the aspects of the episode that establish dignity as a basis for the confrontation right as it exists in Anglo-American criminal jurisprudence. This analysis will help courts identify the dignitary principles of justice embodied in the right of confrontation and untangle the thorny caselaw *Crawford* has generated.

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124. *Id.* at 36.

125. *Id.* at 37.

126. *Id.* at 36.

127. *Id.* at 37 (emphasis in original).

A. Sir Raleigh's Trial and the Rhetoric of Dignity

Although he is perhaps most famous to history as a favorite of Queen Elizabeth I, and for the failed English settlement he established off the coast of Virginia on Roanoke Island,[128] Sir Walter Raleigh was a major character in the development of common law hearsay. Both an asset to the treasury and a diplomatic liability for his repeated piracy of Spanish ships, Raleigh found himself on shaky ground at court during the reign of Elizabeth's successor, James I.[129] In 1603, he was arrested and charged with treason for his alleged involvement in a plot against King James.[130] The Crown's chief evidence against him was the signed and sworn confession of Raleigh's friend Henry Brooke, 11th Baron Cobham,[131] who at one point even recanted his allegations, though he eventually reasserted them.[132] Over Raleigh's numerous, eloquent protests, Cobham did not appear on the witness stand for cross-examination, and Raleigh was ultimately convicted and sentenced to death.[133]

Raleigh's trial has become a foundational narrative grounding the Anglo-American common law of hearsay and, in the United States, the Confrontation Clause. In a 1919 speech before the Royal Historical Society commemorating the Raleigh trial, Edwardian jurist Harry L. Stephen declared, "if I have to admit that English administration of justice grossly failed on this occasion there can be no doubt that the reaction was immediate and that . . . the essential features of what we consider justice in such matters were gradually developed on consistently progressive

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128. Agnes M.C. Latham, *Sir Walter Raleigh*, ENCYC. BRITANNICA (Oct. 25, 2021), https://www.britannica.com/biography/Walter-Raleigh-English-explorer [https://perma.cc/Q8FN-S3B7].

129. *Id.*

130. *Id.* The plot was an alleged conspiracy among Protestant English noblemen to remove the Catholic James I and replace him with his cousin Lady Arbella Stuart. *See* Sara Jayne Steen, *The Correspondence of Lady Arbella Stuart*, BODLEIAN LIBR., http://emlo-portal.bodleian.ox.ac.uk/collections/?catalogue=arbella-stuart [https://perma.cc/59Z8-9A4C].

131. *See* Latham, *supra* note 128; ANTHONY J.H. MORRIS, THE QUATERCENTENARY OF SIR WALTER RALEIGH'S TRIAL 13 (2003).

132. MORRIS, *supra* note 131. The prosecution also introduced additional hearsay evidence through the testimony of a boat pilot named Dyer, who asserted that in Lisbon a "Portugal gentleman" had told him "your King shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned." *Trial of Sir Walter Raleigh*, *reprinted in* 1 CRIMINAL TRIALS 400, 436 (David Jardine ed., 1832).

133. After his conviction, the silver-tongued Raleigh managed, at first, to talk his way out of the Tower on the argument that he could locate the mythological El Dorado (the "lost City of Gold") in South America. *See* Latham, *supra* note 128. Failing in that search, Raleigh did succeed, however, in angering the Spanish by raiding their South American settlements. This further raised the ire of the pacifist King James and the executioner's block finally awaited Raleigh upon his return. *Id.*

lines."[134] Perhaps due to the centrality of the Raleigh trial in the development of these "essential features" of common law justice, many American evidence and criminal procedure textbooks introduce these topics by discussing Raleigh's trial and contain excerpts from his speeches in his defense in which he decried Cobham's absence from the courtroom to provide face-to-face testimony.[135] The *Crawford* court devotes two paragraphs to the Raleigh trial, which it describes as one of "[t]he most notorious instances of civil-law examination."[136] A Lexis search of U.S. caselaw for the term "Raleigh" in the same sentence as "confrontation" yields 195 hits,[137] and in the same sentence as "hearsay," it yields ninety-two.[138] As such, this episode in legal history was relevant not only to the development of the confrontation right due to the actual legal reforms it encouraged in its own time, but to the shape it has given the discourse around confrontation to the present day.

Starting from the moment it concluded and stretching into the present day, then, Raleigh's trial became an important cultural narrative across time. Philosophers and literary scholars have theorized the process through which cultural narratives solidify into what can be termed the "mythology" of a culture.[139] Stories that become cultural mythology and, as such, endowed with particular demands on human obedience are at first necessarily products of particularized points of view and priorities. (One classic example of a legal story that has achieved mythic narrative

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134. Harry L. Stephen, *The Trial of Sir Walter Raleigh: A Lecture Given in Connection with the Raleigh Tercentenary Commemoration, in* 2 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 172, 176 (1919).

135. *See* GEORGE FISHER, EVIDENCE 360–62 (2d ed. 2008).

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

137. Case Results for "Raleigh w/s confrontation", LEXIS+, https://plus.lexis.com/search/?pdmfid=1530671&crid=2f51376a-2199-45c3-bca5-2897ba84be1c&pdsearchterms=raleigh+w%2Fs+confrontation&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=s8ttk&earg=pdsf&prid=23a554dc-3ec1-4f90-a6ea-088acf4d806a (type "Raleigh w/s confrontation"; then choose "Cases" from the Content dropdown; click "search") (last visited Jan. 20, 2022).

138. Case Results for "Raleigh w/s hearsay", LEXIS+, https://plus.lexis.com/search/?pdmfid=1530671&crid=28a3227e-579a-48d1-aa7d-29143e760916&pdsearchterms=Raleigh+w%2Fs+hearsay&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=fphg&earg=pdsf&prid=b2da6624-bb4f-4bc1-9b08-fe0b54c033d9 (type "Raleigh w/s hearsay"; then choose "Cases" from the Content dropdown; then click search") (last visited Feb. 3, 2022).

139. For example, Ernst Cassirer argues thoughts, at the time of emotional excitement, become concentrated and objectified into what the mind perceives as a god or demon; he notes that "the manner of this concentration always depends upon the direction of the subject's interest, and is determined not so much by the content of the experience as by the teleological perspective from which it is viewed." ERNST CASSIRER, LANGUAGE AND MYTH 44 (Susanne Langer trans., Dover Publications 1953) (1946).

standing in American jurisprudence is the familiar case of *Vosburg v. Putney*,[140] a tussle between two schoolboys that has become shorthand for the powerful idea that a tort or criminal defendant remains liable for the extent of damages even when the victim has a so-called "eggshell skull."[141] In the case of the Confrontation Clause, the impact of Raleigh's particular point of view, as memorialized in his oft-cited trial transcript, has developed cultural mythological force in the collective legal debate over what, precisely, is at stake in the right of confrontation. Common law's cumulative nature allows stories like Vosburg's and Raleigh's to retain power, throughout centuries of jurisprudence, as archetypes for the rules they represent.[142] By identifying the particulars of an archetype, we may discern more precisely the nature of the claims to justice it makes.

Most significantly, Raleigh's courtroom speeches focus on two interrelated values offended by the absence of Cobham: accuracy and dignity. Raleigh returns to both of these, individually and separately, throughout his trial. With respect to accuracy, he points out the obvious about his accuser: "Cobham is absolutely in the king's mercy; to excuse me cannot avail him. By accusing me he may hope for favour."[143] Cobham's motives for lying and Raleigh's inability to cross-examine him about them create the most important problem of accuracy in the proceeding. We would now say that a witness's sincerity (or lack thereof) counts as one of the four "testimonial capacities," which it is the purpose of in-person cross-examination to probe.[144] In the case of Baron Cobham, this capacity for sincerity would seem questionable under the shadow of Tower Hill.

Yet Raleigh repeatedly couches his concerns about accuracy in the

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140. 50 N.W. 403 (Wis. 1891).

141. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 6 (8th ed. 2004) (describing *Vosburg* as "one of the most storied cases of American law").

142. Northrop Frye, developing a system of literary archetypes, notes that "the search for archetypes is a kind of literary anthropology, concerned with the way that literature is informed by pre-literary categories such as ritual, myth and folk tale. We next realize that the relation between these categories and literature is by no means purely one of descent, as we find them reappearing in the greatest classics." Northrop Frye, *The Archetypes of Literature*, *in* THE MYTH AND RITUAL THEORY 223 (Robert A. Segal ed., 1998). While Frye focuses on religious mythology such as that of the Greek pagans, his basic point holds true for the full range of cultural mythology: once a mythological archetype has been established, it becomes iterative, validated, and replicated across a range of textual sources. Frye proposes that we can "see literature, not only as complicating itself in time, but as spread out in conceptual space from some unseen center." *Id.* Frye's "unseen center" supplies a theory for why Raleigh recurs so frequently as a jurisprudential and pedagogical archetype in Confrontation Clause discourse. *Id.*

143. *The Trial of Sir Walter Raleigh: A Transcript*, MATHEW LYONS, https://mathewlyons.co.uk/2011/11/18/the-trial-of-sir-walter-ralegh-a-transcript/ (last visited Jan. 7, 2022).

144. *See* FISHER, *supra* note 135, at 363 (noting that the four testimonial capacities include perception, memory, sincerity, and narrative).

language of dignity, a connection made most clear in his exclamation: "[b]y the law of God . . . the life of man is of such price and value, that no person, whatever his offence is, ought to die, unless he be condemned on the testimony of two or three witnesses."[145] In specifying "whatever his offence is," Raleigh seems to extend his criticism of the system even to cases where the defendant is in fact guilty, on the basis of the defendant's innate dignity measured against the light weight of a single testimony.[146] (Purely utilitarian accuracy concerns would, in theory, be triggered only if an innocent person were convicted due to unreliable testimony.) Raleigh seems to anticipate the Kantian conception of human dignity as an end rather than a means. In hypothetical cases with guilty defendants, the concern is, by definition, not accuracy. It is therefore relevant that Raleigh separately attacks the manner in which the ex parte system mobilized written testimony to operate upon a defendant's intrinsic human worth, even beyond accuracy concerns.

Throughout his trial speeches Raleigh reiterates the asymmetry between the dignitary value of his life and the comparative insubstantiality of words. At the start of the trial, he states, "[y]our words cannot condemn me; my innocency is my defence. I pray you go to your proofs."[147] He implies that Cobham's written words, alone, are not proof.[148] After being formally accused of treason, he responds, "[y]our phrases will not prove it."[149] And after the clerk reads Cobham's confession, Raleigh exhorts:

> gentlemen of the jury, I beseech you hear me. This is absolutely all the evidence that can be brought against me. Poor shifts! This is that which must either condemn me or give me life, which must free me or send my wife and children to beg their bread about the streets. This is that must prove whether I am a notorious traitor, or a true subject to the King. But first let me see my accusation, that I may make my answer.[150]

In all these instances, Raleigh deplores the flimsiness of the written word, which he reduces to its constituent, immaterial parts by describing it as "phrases" and "shifts." Against those he sets up an embodied, highly material image of himself in the context of marriage and fatherhood. Finally, in one of the most-quoted moments from the trial, he declares: "Good my lords, let my accuser come face to face and be deposed. Were

145. *The Trial of Sir Walter Raleigh*, *supra* note 143.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!"[151] Again he compares the value of his human life and the value of something materially transient: a tenure of land.[152] But he also renders Cobham as an embodied form—a human "accuser" who he wants to meet "face to face." He further emphasizes Cobham's human existence in declaring, "[i]f my accuser were dead or abroad, it were something. But he liveth, and is in this very house!"[153] By insisting on the shared living, human embodiment of both himself and Cobham, he underscores the fact that it is the lack of a human, face-to-face encounter that threatens his dignity in this proceeding for his own life.

Consistent with this trial's subsequent afterlife as a vehicle for procedural reform, Raleigh also continually emphasizes the systemic indignities to English justice created by the lack of confrontation. He refers to his own legal research of English law prior to the Marian statutes, which he says required at least two witnesses to convict someone of treason.[154] The change, he suggests, represents a sharp break from the traditions of English law, rendering England indistinguishable from its rival, Spain, and its brutal inquisitory practices:

> [I]f the wisdom of former times, the assemblies of all the three estates in several parliaments thought it just to have the accusers produced, surely you will not withhold my accuser? If you proceed to condemn me by bare inferences, without an oath, without a subscription, without witnesses, upon a paper accusation, you try me by the Spanish inquisition.[155]

He also links the prior, English common law to Biblical authority:

> Yet the equity and reason of those laws still remains, they are still kept to illustrate how the common law was then taken and ought to be expounded; but howsoever that may be, the law of God, I am sure, liveth for ever; and the canon of God sayeth, "At the mouth of two or three witnesses shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death."[156]

By making these comparisons, Raleigh situates the confrontation right

151. *Id.*

152. A copyhold is "a former tenure in land in England and Ireland by right of being recorded in the court of the manor." *Copyhold*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/copyhold [https://perma.cc/4RV6-Y6QH].

153. *The Trial of Sir Walter Raleigh*, *supra* note 143.

154. *Id.*

155. *Id.*

156. *Id.*

in a broader historical discourse about the "rights of Englishmen" as a form of exceptionalism, a discourse that traces its origins to the Magna Carta and would proceed well into the establishment of the English Constitutional Monarchy and the Age of Reason (legible, again, in John Adams' complaints about the Stamp Act courts, discussed in section I.A, *supra*).[157] Certainly his point about English legal dignity was not lost on at least one of his trial judges, Sir Francis Gawdy, who later observed, "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh."[158]

If the cultural-legal myth of Raleigh's famous trial did indeed emerge, at least in part, from his rhetorical focus on dignitary interests, it remains to consider how, specifically, face-to-face confrontation realizes those interests. In particular, we should be interested in the relationship between such interests and the interests in accuracy with which both Raleigh and our modern system of evidentiary and criminal procedural law associate confrontation. The following sections will consider these questions.

B. Emotional Guilt and Accuracy

At one point during his trial, Raleigh urged, "let Cobham be sent for; let him be charged upon his soul, upon his allegiance to the King, and if he will then maintain his accusation to my face, I will confess myself guilty."[159] Raleigh's demand makes the point, familiar to students of evidence law, that one way to test an in-court witness's testimonial capacity for sincerity is through the administration of an oath, the violation of which would result in damnation (or, at least, perjury charges).[160] The oath itself is one of several reasons why the laws of hearsay generally enforce a preference for live testimony over out-of-court statements.[161]

Yet Raleigh's words suggest another means of assuring accuracy *and* preserving dignity, flowing not from the oath itself but specifically from the embodied *confrontation* between accuser and accused: guilty conscience. Raleigh wants Cobham to maintain his accusations "to his face." It is not merely the formal setting, the king, and God who would ensure that Cobham would not lie on the stand. Raleigh's dignitary

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157. For a famous eighteenth-century example of this discourse, see EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 27 (1790), https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/burke/revfrance.pdf [https://perma.cc/LQ3U-D4A8].

158. *Trial of Sir Walter Raleigh*, *supra* note 132, at 487.

159. *The Trial of Sir Walter Raleigh*, *supra* note 143.

160. *See* FISHER, *supra* note 135, at 363–64.

161. *Id.*

interest in being treated as a human being by his accuser might also extract honesty through that accuser's own human tendencies. That, for Raleigh, dignity has distinct value from accuracy is clear in his purported willingness to confess *himself* guilty, should he only have the opportunity of face-to-face confrontation.

As to accuracy, there does seem to be psychological evidence that confrontation may encourage honesty through the mechanism of emotional guilt. First off, proximity and feelings of guilt appear correlated: test subjects are much less likely to administer supposed shocks to another party when that party is nearby as opposed to when they do not have to observe it.[162] More specifically relevant to a trial setting, Battigalli, Charness, and Dufwenberg have shown how simple guilt may provide a psycho-foundation for honesty in certain situations.[163] Generally, people have an aversion to lying, the more so the lower the costs to themselves and the higher the harms imposed on others.[164] Further research on parties playing games with high monetary payoffs suggests that a party feels guilty when their counterparty has in some way failed to meet their own expectation—meaning that they feel guilt when their counterparty is surprised by the game's outcome.[165] Battigalli et al. have integrated this research to apply guilt to the context of honesty, showing that the data supports the claim that people are more likely to lie when they are failing to meet the expectations of a listener.[166] While these are all controlled studies (with stakes far lower than Raleigh's trial, which implicated the potential execution of both parties), they suggest a mechanism by which a witness's proximity to the defendant could induce honesty through guilt, particularly in cases where the defendant knows the witness is lying.

There is another way in which the dignitary value of face-to-face confrontation could have simultaneous accuracy benefits, which were not relevant in the case of Raleigh himself. As discussed above, all criminal defendants have a right to assist in their defenses, a right which has both accuracy and dignity components. In cases where it is unclear even to the defendant whether the witness is lying, it becomes relevant whether a defendant's face-to-face confrontation with a witness adds accuracy to the

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162. *See generally* Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. RELS. 57 (1965).

163. Pierpaolo Battigalli, Gary Charness & Martin Dufwenberg, *Deception: The Role of Guilt*, 93 J. ECON. BEHAV. & ORG. 227, 231–32 (2013).

164. *See* Uri Gneezy, *Deception: The Role of Consequences*, 95 AM. ECON. REV. 384, 391 (2005).

165. *See* Pierpaolo Battigalli & Martin Dufwenberg, *Guilt in Games*, 97 AEA PAPERS & PROC. 170, 173–74 (2007).

166. *See* Battigalli et al., *supra* note 163, at 229.

defense. (This was not the case in Raleigh's trial where, presumably, whatever the truth to Cobham's testimony was, Raleigh already knew it.)

One of the specters the psychological literature raises for criminal trials generally is that people are not particularly good at telling when others are lying, a problem of great significance given the importance the common law system puts on jurors as arbiters of credibility.[167] For example, onlookers to bargaining processes are poor at detecting which party is lying.[168] Yet Frank, Gilovich, and Regan have found that players of prisoner's dilemma who meet face-to-face beforehand are much more likely to predict other parties' cooperative behavior and thus conclude that players involuntarily send one another truth signals.[169] This study suggests that there may be at least some basis for the belief that a defendant can better assist counsel by evaluating adverse witnesses face-to-face, at least where the defense does not already know whether the witness is lying. That said, the stakes of prisoner's dilemma, in which there is a chance of benefitting both parties through telling the truth, are very different from the typical criminal trial, particularly trials where the witness avoids punishment (like Cobham) by lying.

This literature review suggests that there may indeed be at least some accuracy value to a defendant's face-to-face confrontation of their accuser, above and beyond the enhanced protections of the oath and the fire of cross-examination. Yet these studies do not provide overwhelming evidence and do not specifically consider the judicial setting. It therefore remains fairly inconclusive whether the accuracy protections of face-to-face encounters guaranteed by the Confrontation Clause add enough to the existing accuracy protections of hearsay law to justify *Crawford*'s substantial costs. Furthermore, these accuracy benefits to face-to-face confrontation would seem to apply equally to any witness, not merely those whose out-of-court statements were specifically testimonial and thus governed by *Crawford*. Nonetheless, a lying witness's feelings of guilt may have yet further relevance to this analysis, beyond their role in increasing accuracy.

C. Confrontation as a Relational Right

The preceding section collected evidence of what may seem an

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167. *See* United States v. Scheffer, 523 U.S. 303, 313 (1998) (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)).

168. *See generally* Axel Ockenfels & Reinhard Selten, *An Experiment on the Hypothesis of Involuntary Truth-Signalling in Bargaining*, 33 GAMES & ECON. BEHAV. 90 (2000).

169. *See* Robert H. Frank, Thomas Gilovich & Dennis T. Regan, *The Evolution of One-Shot Cooperation: An Experiment*, 14 ETHOLOGY & SOCIOBIOLOGY 247, 255–56 (1993).

intuitive concept: dishonest witnesses may experience feelings of guilt after giving false testimony while face-to-face with the defendant. Thus, the confrontation right may mobilize those feelings to enhance the accuracy of a proceeding. This section will invert this proposition to consider whether the defendant should have an affirmative personal right to expose their accuser to such feelings of guilt. In other words, it takes seriously Raleigh's promise that he would confess himself guilty of crimes he emphatically denied committing, if only given the dignity of confronting Cobham face-to-face. I argue that, because a potentially innocent defendant's dignity is affronted by a witness's State-facilitated lies, such a defendant has a dignitary interest in imposing, through physical proximity, reciprocal costs on his false accuser, which is heightened in cases where the initial lie was made in a setting created or controlled by the State.

1. Dignity and Deception

According to Kant's Formula of Humanity, the use of force, coercion, and deception are morally wrong because they treat a human being as a means to an end, insofar as they render impossible the conditions of consent.[170] As will be discussed in greater detail in the broader discussion of dignity in Part III below, Kant viewed proportional punishment not as coercion but as a means of respecting the human dignity of a perpetrator—of treating a person "as an end in himself."[171] For the same reasons that he endorsed retributive punishment, he abhorred the punishment of the innocent, even through non-penal means such as war.[172] Furthermore, Kantian ethics forbid lying insofar as deception does not respect the rationality of the person lied to, a view which has been criticized as excessively absolutist under circumstances in which lies could be considered necessary to avoid a greater harm.[173]

If one takes Kant's claims about the relationship between dignity and lies at face value, however, they create an interesting ethical triangle in cases where an innocent defendant is threatened with punishment due to the dishonesty of a state's witness. In such a scenario, one could argue, the witness—in lying to the state (via the judicial tribunal)—unethically uses it as a means to a personal end, an outcome that would be forbidden

170. IMMANUEL KANT, *Fundamental Principles of the Metaphysics of Morals*, *reprinted in* BASIC WRITINGS OF KANT 143, 164–97 (Allen W. Wood ed., Thomas K. Abbott trans., 2001).

171. *Id.* at 185.

172. IMMANUEL KANT, *To Eternal Peace*, *reprinted in* BASIC WRITINGS OF KANT 433, 433–40 (Allen W. Wood ed., Carl J. Friedrich trans., 2001).

173. *See* Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFFS. 325, 325–26 (1986).

by Kant's ethics, in which a state is "a society of men, which no one but they themselves is called upon to command or to dispose of."[174] (To use George Mason's words in his attack on ex parte tribunals under the Stamp Act, the defendant would be treated as an end by the "sycophant[s] and informer[s]."[175]) The state, essentially, will have acted not through the reasoned deliberation of its constituents, but through the lying witness's coercive deception. At the same time, however, the innocent defendant's individual human dignity is affronted by the state action that, through the witness's lie, imposes unwarranted punishment on an innocent.

Of course, in designing legal rules, there is no way to tell, ex ante, who is guilty and who is innocent; indeed, it is an important American Constitutional value that both the guilty and the innocent retain absolute procedural rights against the state. In that sense, positive moral theories such as Kantian ethics, keyed as they are to substantive right and wrong, prove less than useful (though Kant himself was concerned with due process as well, as a buttress against unlimited state coercion.[176]) What the Kantian conception of deception highlights, however, is how a lie that weaponizes the state against an innocent (which is, of course, perjury as a legal matter) undermines that innocent's human dignity in a way that should subject the witness to proportional retribution. Yet in cases where the lie is successful, perjury charges are unlikely to follow.

In light of the essentially epistemological problem with relying on criminal sanctions for perjury as a punishment, the witness's potential guilt over lying—heightened, if psychology has it correctly, due to proximity to the defendant—could serve at least some sort of retributive function of its own. In this manner of thinking, the lying witness's guilt *serves* the innocent defendant's dignity, however imperfectly. (In the reverse situation, in which the witness is honest and the defendant is guilty, there is neither cause for guilt nor the need to restore dignity, so the case drops out.)

This retributive function matters more in cases where a potential out-of-court statement qualifies as "testimonial" because in those cases, the speaker deploys the apparatus of the state against the defendant for a personal motivation. An investigation and prosecution is, necessarily, a usurpation of a defendant's freedom and, therefore, an affront to inherent dignity, albeit an unavoidable one. A defendant's dignitary interest in confronting such accusers is, therefore, heightened relative to their interest in confronting a witness who lies to a private party.

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174. KANT, *supra* note 172, at 436.

175. *See* ROWLAND, *supra* note 49, at 383.

176. *See* JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY 82 (1979).

In short, while a witness's guilt over lying face-to-face with a defendant *may* have benefits for the accuracy of the proceeding, it seems even more clear that this potential for guilt serves the dignitary interest of the defendant, through their relation to the lying witness. Put another way, the possibility of guilt allows the defendant some form of agency through the mere embodied assertion of the defendant's own humanity and its potential effects on the lying witness. It is this embodied, human encounter that Raleigh—a nobleman well used to dignified treatment beyond what most of today's criminal defendants receive—repeatedly demanded in his famous courtroom rhetoric. This is a non-trivial value and benefit, given that the enormous, systemic resource imbalance between the defense and the prosecution generally leaves defendants with little or no agency.[177]

2. Lab Technicians as a Case Study

The testimony of lab technicians is particularly salient, not only due to the number of Supreme Court cases that deal with it, but because such cases provide a vivid example of the dignitary harms a defendant suffers when unable to confront lies told within the state-funded apparatus of a police investigation. Consider, for example, a defendant convicted on the strength of a lab report produced by an ill-run, prosecution-biased state crime lab. If lab technicians may "testify" impersonally by means of written affidavit, not only is it easier for mistakes to render the proceedings inaccurate without the benefits of defense cross-examination, but the dignitary harm to the defendant's personhood is even greater. Where the crime lab witnesses participate in the general, impersonalized apparatus of prosecution, the defendant's ability to personally encounter the human witness, susceptible to feeling guilt, at least somewhat enhances the defendant's personal agency in an otherwise largely impersonal, state-driven process.

As discussed in Part I, many critics of *Melendez-Diaz* and its progeny, with their widespread practical implications for the criminal justice system, share Justice Kennedy's "immediate systemic concern" that the *Melendez-Diaz* Court failed to "acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses."[178] For the *Melendez-Diaz* dissenters, it was dispositive that lab technicians, unlike the witnesses and victims in

177. *See generally* BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY (2019), https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf [https://perma.cc/9XNB-NZS2].

178. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

Crawford and *Davis*, did not attempt to testify to "personal knowledge of some aspect of the defendant's guilt," which should have—in the views of the dissent and other critics—created a convenient place to draw a line limiting the reach of *Crawford*.[179]

What this account leaves out, however, is that regardless of whether a technician possesses personal knowledge of the defendant's *actions*, their testimony is, like that of any other fact witness, nonetheless based on personal knowledge of the physical evidence of a crime which they have personally handled (unlike the paradigmatic expert witness who may testify about hypotheticals and background information). Furthermore, a lab technician's personal capacities for sincerity, accuracy, and so forth are no less relevant when their correct identification of a substance, DNA sequence, etc., make up the "words" (as Raleigh would have put it) upon which a citizen's life and freedom rest. Most importantly from a dignitary perspective, the State solicits and funds the reports of lab technicians—even those in private labs, like Cellmark in the *Williams* case. Lies in such reports therefore compound the dignitary harm the prosecution inflicts on a defendant, insofar as they allow private actors to deploy the artillery of the state to use the defendant for their personal ends.

Both the accuracy and dignitary implications of lab tech testimony became abundantly—and tragically—clear during the recent Massachusetts scandal in which the misconduct of two state crime lab chemists produced two of the largest mass exonerations in history.[180] One chemist in the Boston lab, Annie Dookhan, admitted that in order to meet the personal goal of being "the hardest working and most prolific and most productive chemist," she achieved three times the productivity of her colleagues by simply failing to test most of the samples she received, instead automatically concluding that they were controlled substances.[181] Dookhan's strategy emphasizes how even the best-run drug labs contain an inherent structural bias: they are run by the state and it is always in the state's interest that any given sample come up positive.[182] For dishonest

179. *Id.*

180. *See* Andrea Estes, *Almost a Decade After Annie Dookhan and the State Drug Lab Scandal, the Fallout Is Growing*, BOS. GLOBE (Jan. 2, 2021, 12:41 AM), https://www.bostonglobe.com/2021/01/01/metro/nearly-decade-after-annie-dookhan-state-drug-lab-scandal-fallout-is-growing/ [https://perma.cc/27MM-F5Z2].

181. *See* Katie Mettler, *How a Lab Chemist Went from "Superwoman" to Disgraced Saboteur of More Than 20,000 Drug Cases*, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/21/how-a-lab-chemist-went-from-superwoman-to-disgraced-saboteur-of-more-than-20000-drug-cases/ [https://perma.cc/X432-9S2K/].

182. *See* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY., NAT'L RSCH. COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 24 (2009).

lab techs looking for advancement, this creates a significant moral temptation.

Dookhan's email correspondence with prosecutors emphasizes how tightly her personal identity was bound up with being, rather than a neutral scientist, an arm of the prosecution. In one message, she tells the prosecutor to "[t]ell the defendant, he is getting an extra 5 years for p[issing]-off the chemist. :)"[183] In another, she responds to a prosecutor's expressed desire to process more drug offenders before summer by agreeing: "I have the same attitude. get them off the streets."[184] Dookhan would ask prosecutors for permission before responding to defense requests and once expressed her identification with the prosecution and police by quipping, "[g]reat business we all work in huh?"[185] Prosecutors seemed to appreciate Dookhan's efforts and made it clear that they regarded her as on their side. One Assistant District Attorney enthusiastically wrote her, "DREAM TEAM!!!!!!!!! It is time to kick some more buttocks!!!!"[186] Another, in asking that certain tests be run quickly, emphasized to her that the defendants are "VERY bad guys," thereby inappropriately assuming the defendants' guilt before Dookhan had even run her experiments.[187]

Perhaps even more disturbingly, Dookhan's self-conception as a hard-working arm of the state appears to have implicated not only her professional but her personal identity. Despite being married, she engaged in unprofessional communications with prosecutor George Papachristos. In their emails, Dookhan and Papachristos both used the context of how hard they were working to lament their respective needs for romantic attention. Papachristos noted that he needed to "meet[] the right girl,"[188] and Dookhan said that she wanted a man to "love me and make me laugh and smile."[189] Dookhan went so far as to fake and forward to Papachristos a phony email exchange with another colleague purporting to show that colleague telling Dookhan that she worked too hard and therefore "need[ed] a boyfriend," erroneously referring to Dookhan being recently divorced.[190]

It is irrelevant whether Dookhan was attempting to shore up her

183. *How to Fix a Drug Scandal: Episode 2*, NETFLIX, at 30:30–30:40 (2020), https://www.netflix.com/watch/80999612 (last visited Jan. 31, 2022).

184. *Id.* at 31:22.

185. *Id.* at 30:50.

186. *Id.* at 31:06.

187. *Id.* at 31:55.

188. *Id.* at 36:56.

189. *Id.* at 34:58.

190. *Id.* at 33:23.

professional standing with the District Attorney's office by appearing sexually available to a particular powerful prosecutor, or whether she was attempting to pursue an actual romantic attraction under the guise of playing up her (fraudulent) identity as hyper-productive chemist. The bottom line is that Dookhan was using the lives of the defendants whose cases she touched (or failed to touch) as a means to an end of a highly personal slate of benefits. There could be no greater affront to the dignity of these defendants than an individual citizen empowered to deploy the prosecutorial function of the state to make use of them in this manner.

The second big Massachusetts drug lab scandal involved Amherst tech Sonja Farak, who was arrested in 2013, a year after Dookhan.[191] Farak's case was rather different from Dookhan's, insofar as Farak does not appear to have intentionally produced positive results for the prosecution, nor did she simply fail to test samples.[192] She did, however, confess to having been regularly high on a number of controlled substances she obtained from the lab while doing her job between the years 2004 and 2013. These substances included methamphetamine, cocaine, LSD, and crack.[193]

Because Dookhan's and Farak's criminal official misconduct took place both before and after the *Melendez-Diaz* decision, there does not appear to be data readily available as to how many of the cases they were involved in were resolved through trials during which they "testified" via affidavit (as opposed to trials during which they testified in person or through plea agreements). What we do know, however, is that between Dookhan's and Farak's cases, 38,000 Massachusetts drug cases have been overturned in total.[194] The efforts to overturn these convictions offer specific victim narratives that couch the harm suffered by criminal defendants in dignitary terms.

The dignitary harm of Farak's misconduct was emphasized by Herschelle Reaves, a mental health care coordinator who had pled guilty to possession of a class B substance in 2008 while Farak worked in the relevant crime lab. When the ACLU sued the Massachusetts Attorney General on behalf of the Farak defendants, Reaves affirmed in an affidavit

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191. Estes, *supra* note 180.

192. Kelly Wynne, *Here's What Happened to Sonja Farak After "How to Fix a Drug Scandal," and Where She Is Now*, NEWSWEEK (Apr. 1, 2020, 10:35 AM), https://www.newsweek.com/heres-what-happened-sonja-farak-after-how-fix-drug-scandal-where-she-now-1495337 [https://perma.cc/8E5E-YGG9].

193. *See generally How to Fix a Drug Scandal*, *supra* note 183.

194. Tom Jackman, *Prosecutors Who Covered up Mass. Drug Lab Scandal Now Face Bar Discipline, Civil Rights Lawsuit*, WASH. POST (July 30, 2019), https://www.washingtonpost.com/crime-law/2019/07/30/prosecutors-who-covered-up-mass-drug-lab-scandal-now-face-bar-discipline-civil-rights-suit/ [https:/perma.cc/SL7Z-WRRC].

that she would not have entered that plea had she known of the misconduct in the drug lab.[195] But she also notes how her own work as an organizer—as opposed to merely her experiences as a defendant—affect her understanding of the effects of the criminal justice system on Black women such as herself.[196] She further notes:

> In 1974, My mother Arlene Gladden-Reaves became the first woman, as well as the first Black woman, to serve as an officer in the Springfield Police Department. I was 8 years old. During her tenure as the "First Woman," I saw my mother endure brutal racism, sexism and classism. Watching her deal with those hardships while I was just a young child gave me a full understanding of how the justice system can be stacked against people of color.[197]

These observations do not attack the accuracy of Reaves's plea—as Farak herself observed at her trial, her results were not challenged for so many years because most defendants already knew if the substance they had been arrested for was, in fact, a narcotic, and so they had no reason to do so.[198] Reaves does not allege that she would have been acquitted had she taken the case to trial and been able to challenge the accuracy of the lab results. Rather, she contextualizes the wrong she experienced within a context of systemic bias that started with her own mother's experiences with racism as a Springfield police officer. In other words: her affidavit focuses on the dignitary wrongs of having been convicted in a system she was unaware involved a drug-addicted chemist whose word would have been accepted over hers at trial.[199]

Nothing about Reaves's case would necessarily have come out differently if she had known she would have a right to cross-examine the relevant lab tech in person at trial—nor, granting Farak's cynical (yet logically plausible) view of defendant incentives—would anything necessarily change about most Massachusetts drug lab cases. Ninety-six percent of criminal cases end in plea agreements and never reach trial, in

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195. Affidavit of Herschelle Reaves at 3, Comm. of Counsel Servs. v. Attorney General, 108 N.E.3d 966 (Mass. 2018) (No. SJC-12471).

196. *Id.* at 1–2.

197. *Id.*

198. *How to Fix a Drug Scandal*, *supra* note 183, at 48:28.

199. Note that the Supreme Court has held that a prosecutor's duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to turn over exculpatory evidence to the defense does not apply to impeachment evidence in cases where the defendant signs a plea bargain. United States v. Ruiz, 536 U.S. 622 (2002). So here, even if the prosecution had been aware of Farak's drug abuse, it would not have been obligated to disclose this information to the defense. This means that the opportunity for the few defendants who *do* go to trial to cross-examine repeat actors like crime lab scientists is particularly important.

part due to the strength of the cases prosecutors have against defendants they threaten to take to trial, and in part due to the terrible stakes even innocent indigent defendants face when they choose to stand trial with only the assistance of an overworked public defender. These risks are compounded by the wide ranges of potential sentences defendants face under the statutory definitions of most crimes, which give prosecutors plenty of leeway for negotiation.[200] Beyond that, it is hard to imagine how likely it would be for even a highly paid defense attorney to be able to investigate thoroughly enough to turn up strong enough evidence of wrongdoing in state crime labs and "break" bad actors like Dookhan and Farak, Perry Mason-style, on the witness stand.

Yet trials are forced to serve as bellwethers for the rest of the system; their outcomes drive the parties' evaluations of their incentives during the plea process.[201] Indeed, a common justification for why it is okay for 95% of defendants to waive their trial rights through plea deals is that they do so in the "shadow" of likely outcomes at constitutionally sound trials.[202] Surely this makes it even more important, with all of the dignitary problems the system already causes, for courts to ensure that defendants get the full dignitary *and* accuracy benefit of their confrontation rights in the very few trials that do occur!

The case of the Massachusetts drug labs highlights how the *highly* personal motivations of individual lab techs—be it ambition, romance, or addiction—can and do impact the veracity of their testimony. For such testimony to avoid cross-examination would affect not only the accuracy of the outcome, but the inherent dignity of the defendant. Bad lab techs made use of defendants' lives and bodies, through the formal apparatus of the state, to serve these highly personal ends. The right to confront such lying and unreliable lab witnesses face-to-face, with the potential for causing them emotional guilt, gives defendants a reciprocal personalized agency against the self-interested apparatus improperly deployed against them.

3. Confrontation and Interpretive Authority

Pulling back a bit from the specific case of lab technicians to the general idea of a dignitary interest in confrontation, another question arises. Even if one accepts the possibility of a dignitary value at stake in the Sixth Amendment, is it not a rather narrow constitutional interest if it can only be realized in cases where the witness feels actual guilt as a result

200. *See* Stuntz, *supra* note 22, at 2568.

201. *Id.* at 2548.

202. *Id.*

of face-to-face confrontation? Apart from the possibility that accomplished liars may not feel any guilt at all,[203] other inaccurate witnesses may not lie intentionally and, therefore, believe themselves to be telling the truth. As it turns out, even in those cases, an understanding of the defendant as an active participant in and interpreter of the cross-examination provides a basis for a dignitary understanding of the confrontation right.

Returning to Walter Raleigh, who was, of course, acting as his own counsel, it is noteworthy that throughout the proceedings, he insisted upon himself as a textual participant *in* the law, as a meaning-generating reader. As discussed above, Raleigh researched both the legal and Biblical authorities stipulating that the testimony of one witness should not be enough to convict a defendant of a capital crime and gave his opinion as to the meaning of those authorities. Beyond that, the narrative Raleigh develops throughout his trial speeches integrates his own interpretations of the law into his personal narrative about Cobham as an unreliable witness. While Raleigh's agency as an author of legal truth-claims was heightened because he was acting as both counsel and defendant, his trial nonetheless demonstrates the defendant's potential dignitary right to participate directly in the meaning-generating process of a courtroom examination, even simply by observing it.

The criminal trial in an adversarial system has long been understood to create epistemological problems.[204] While the trial produces official legal "truth," it necessarily does so by collecting the fractured, subjective accounts of individual witnesses and subjecting them to the "crucible" of cross-examination by opposing parties.[205] Although the ultimate jury verdict constitutes "official," objective legal truth, it may not always track with "actual," factual truth (as in the cases of wrongful convictions or exonerations). And even in cases where the verdict is "right," it may nonetheless occlude the important subjective truths contained in an individual's testimony (in a case, for example, where a rape victim is "correctly" convicted for killing their assailant years after the fact, but where their individual testimony contains a narrative of justification that is "truthful," though not recognized at law).

So-called "law and literature" scholarship has helped to shed light on the ways in which the epistemological possibility of multiple "truths"

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203. *See* Kristin Choo, *Perjury with Conviction: Lawyers Can Use Strategic Tactics at Trial to Expose Pathological Liars on the Witness Stand*, 85 A.B.A. J. 71, 71 (1999).

204. *See* Mirjan Damaška, *Epistemology and the Legal Regulation of Proof*, 2 LAW, PROBABILITY & RISK 117, 117 (2003).

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

complicates legal fact-finding, particularly in hard cases.[206] Scholars of law and narrative point to how the rise of the novel as a literary genre, with its multiple points of view, demonstrated to eighteenth and nineteenth-century audiences how multiple characters could give differing accounts of the same events, with no clear unitary "truth" emerging to the reader (sitting, implicitly, as fact-finder).[207] This literary innovation appears to have had at least some discernible impact on the development of specific evidentiary rules—for example, eighteenth-century reforms to the old common law treatment of a rape victim's "reputation" as stable, legally knowable, and relevant to the existence of consent.[208]

These insights show how a defendant's *own* narrative of events is a relevant source of truth. They also underscore the dignitary aspects of the defendant's right to testify under oath in their own defense. These rights became recognized through reforms removing the old common law bar on a defendant serving as their own sworn witness.[209] What has been less discussed is the defendant's dignitary interest in acting as the "reader" rather than the "author"—as the engaged interpreter of the testimony of *other* witnesses. German critic Wolfgang Iser, credited with founding the "reader-response" school of literary criticism, argues that a literary work is not an object in and of itself but an effect on the implied reader who is the required audience for the text.[210] Iser's point was most obvious in

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206. *See* Linda Myrsiades, *Review: Law and Literature*, 21 COLL. LITERATURE 164 (1994) (reviewing DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE (Peter Fitzpatrick ed., 1991); LAW AND THE ORDER OF CULTURE (Robert Post ed., 1991); RICHARD WEISBERG, POETHICS, AND OTHER STRATEGIES OF LAW AND LITERATURE (1992); and JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990)).

207. *See* LISA RODENSKY, THE CRIME IN MIND: CRIMINAL RESPONSIBILITY AND THE VICTORIAN NOVEL (2003); TONI BOWERS, FORCE OR FRAUD: BRITISH SEDUCTION STORIES AND THE PROBLEM OF RESISTANCE, 1660–1760 (2011); ALEXANDER WELSH, STRONG REPRESENTATIONS: NARRATIVE AND CIRCUMSTANTIAL EVIDENCE IN ENGLAND (1992); SANDRA MACPHERSON, HARM'S WAY: TRAGIC RESPONSIBILITY AND THE NOVEL FORM (2010); AYELET BEN-YISHAI, COMMON PRECEDENTS: THE PRESENTNESS OF THE PAST IN VICTORIAN LAW AND FICTION (2013).

208. As I have argued elsewhere, Samuel Richardson's 1748 novel *Clarissa* exposed the circularity of the particular common law rule admitting hearsay-like 'general' reputation evidence while excluding testimony about specific facts. ERIN SHELEY, CRIMINALITY AND THE COMMON LAW IMAGINATION IN THE EIGHTEENTH AND NINETEENTH CENTURIES 164–74 (2020). Specifically, Richardson shows the gap between immediate, individual points of view and public "fame," which we get only third-hand through reports from letter writers on conversations they had had with characters the reader never directly accesses. *Id.* Clarissa's struggle to protect both her physical bodily integrity and her socially-constructed reputation demonstrates the epistemological incoherence of generalized reputation evidence serving as legal proof against rape. *Id.* Ultimately, by dramatizing the separate and only partially overlapping realities of reputation and particular fact, Richardson calls into question the heightened legal relevance of the former in rape cases. *Id.*

209. *See* Langbein, *supra* note 35, at 282.

210. *See generally* WOLFGANG ISER, THE IMPLIED READER (1972).

literary texts with specifically unreliable narrators, such as Henry James's *Turn of the Screw*. While Iser's work may seem relevant primarily to literary critics working in the Ivory Tower, it impacted not only literary criticism, but also theological criticism. Some critics of the New Testament—a document with law-like claims for those who recognize it as the word of God—came to believe that the reader should be active, not passive, in creating Biblical meaning.[211]

If the claims of reader-response theory have a role in Biblical interpretation, elevating the interpretive perceptions of the individual ostensibly subject to the "Word" of the text, they seem equally relevant to a defendant's point of access to the "Word" of the witness who would condemn them. Stanley Fish said that Iser's scholarly project was "no less than to free the literary text from the demand that it yield or contain a referential meaning, an embodied truth,"[212] with the effect of enhancing the dignity of the human being.[213] Reader-response theory suggests that there is a dignity inherent in a personal point of interpretive access to any sort of text that makes an external claim on an individual. Raleigh's historical importance to our current understanding of the Confrontation Clause started with his active participation in the legal texts relevant to his trial and with assertions that his lack of access to a particular text—the testimony of Lord Cobham in real time—was an affront to both the trial's accuracy and his personal dignity.

When a declarant gives a testimonial statement out of court, some arm of the State is, by its very nature, the intended audience, whether it be a police officer taking a statement or the notary taking the lab tech's affidavit in a state-initiated ritual of solemnization. Indeed, the existence of a State audience is precisely what makes the statement testimonial under *Crawford*. One concept of dignity assumes that "a person's identity and worth depend on his relationship to society."[214] Where the State acts as the sole "reader" of a statement that will be used to convict a defendant, this asymmetry does harm to a defendant's dignity.

It should be obvious that a defendant merely observing a testifying witness—assuming that witness does not experience guilt at lying in front of the defendant—may provide no accuracy benefit in terms of the outcome of the trial. Unlike a reader of a book (even, depending on one's

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211. Stephen D. Moore, *Negative Hermeneutics, Insubstantial Texts: Stanley Fish and the Biblical Interpreter*, 54 J. AM. ACAD. RELIGION 707, 716 (1986).

212. Stanley Fish, *Why No One's Afraid of Wolfgang Iser*, *in* THE COMMUNICATION THEORY READER 407 (Paul Cobley ed., 1996).

213. *See* Jonathan Culler, *Stanley Fish & the Righting of the Reader*, 5 DIACRITICS 26, 29 (1972).

214. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 188 (2011).

theological views, the Bible), a defendant cannot change the jury's interpretation of testimony simply by interpreting it in their own way. Yet many already-recognized dignitary rights of defendants track accuracy interests in some cases while failing to serve them in others. For example, a defendant's right not to appear in court in prison garb may serve to remove a jury's inaccurate bias against the defendant, or it may not. A defendant's right to self-representation may allow them to do a better job than a state-appointed counsel would, but in many cases it may very much do the opposite. Courts still recognize these dignitary rights even when they part ways with accuracy.

The defendant's proposed Sixth Amendment dignitary interest in acting as an original "reader" of a witness's testimony is structurally similar. A defendant already has a right to participate in their own defense—a right generally assumed to promote accuracy because the defendant may understand the facts of the case better than their counsel does. Yet even in cases where, given the facts, that may not turn out to be true, there remains a dignitary valence to the defendant's right to be present during the State's presentation. That dignitary interest is compromised where the State alone has been the sole intended audience for an out-of-court testimonial statement that will ultimately be used at trial. The next Part will pursue these comparisons further by discussing the dignitary confrontation right within the context of other dignitary interests already recognized in our constitutional jurisprudence.

III. DIGNITY AND THE SIXTH AMENDMENT IN CONSTITUTIONAL CONTEXT

Thus far, we have examined the dignitary confrontation interest in isolation from broader jurisprudential debates about the general nature of dignity. This discussion brought to light the ways in which confrontation serves the defendant's dignity interest, distinct from their interest in accuracy. Such observations, however, arise in the midst of a much bigger philosophical conversation as to what "dignity" is, as a constitutional value, in the first place. This Part lays out that debate and suggests how a dignitary understanding of the Confrontation Clause harmonizes with the Supreme Court's recognition of dignity in other criminal procedural contexts.

While "dignity" became a prominent feature of rights discourse only in the mid-twentieth century, heavily associated with post-World War II constitution-building and international law instruments,[215] it has actually

215. *See* G.P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONT. L. REV. 171, 171

been present since the Founding. Thus, dignity is highly relevant to any originalist reading of the Sixth Amendment, like Scalia's in *Crawford*. Thomas Paine spoke of "the natural dignity of man," which has been read as a repudiation of the Burkean view of dignity as the product of social rank.[216] The Founders drew on Paine's views of dignity, with Thomas Jefferson asserting that "the dignity of man is lost in arbitrary distinctions based on 'birth or badge'"[217] and Alexander Hamilton describing a constitutional democracy as the "safest course for your liberty, your dignity, and your happiness."[218] While he did not use the term "dignity" explicitly, George Mason echoed these dignity-based objections to arbitrary, state-enforced distinctions between citizens in his letter to the committee of London merchants opposing the Stamp Act, excerpted in Part I. He declared that enforcing the Act through ex parte interrogatories created "an odious distinction between us and our fellow-subjects residing in Great Britain."[219] Mason's choice of words suggests that hanging in the balance of the confrontation issue was the very status of the American colonials as citizens and subjects of the Crown, identities which the disparate treatment threatened through the potential arbitrary predations of "every sycophant and informer."[220] These objections turn on dignity, insofar as they implicate the manner in which a person's value is recognized by others and by the state.

As Neomi Rao writes, "[t]he type of dignity that a society protects is part of how a community defines itself—how individuals belong to the community and how the state must act to respect human dignity."[221] At a time when the American colonies were just about to define themselves for the first time, Mason's dignitary concerns about the Stamp Act prosecutions seem particularly relevant. While a thorough philosophical account of dignity is beyond the scope of this Article, this section provides a brief account of dignity as an American constitutional value and, most importantly, of the specific dignitary interests of criminal defendants recognized by American courts.

(1984); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848 (1983); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145 (1984).

216. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 200 (2011) (citing THOMAS PAINE, RIGHTS OF MAN 41 (Gregory Claeys ed., Hackett Publ'g Co., 1992) (1791–1792)).

217. THOMAS JEFFERSON, WRITINGS 575, 587 (Merrill D. Peterson ed., 1984).

218. THE FEDERALIST NO. 1, at 14 (Alexander Hamilton) (E.H. Scott ed., 1898).

219. ROWLAND, *supra* note 49, at 383.

220. *Id.*

221. Rao, *supra* note 214, at 270.

A. The Nature of Dignitary Interests

According to Kant, "that which constitutes the condition under which alone anything can be an end in itself, this has not merely a relative worth, *i.e*. value, but an intrinsic worth, that is *dignity*."[222] Kant's famous "categorical imperative" is to treat our own and others' humanity as an end in itself and never as a means.[223] He writes that "[w]hatever has a value can be replaced by something else which is *equivalent*; whatever, on the other hand, is above all value, and therefore admits of no equivalent, has a dignity."[224] This underscores the irreducible nature of dignity and other rights, whose "existence does not depend on the good consequences that follow from their exercise."[225]

Kant became popular as a legal philosopher in the 1980s, perhaps in reaction to the prevailing vogue of utilitarianism.[226] Yet explicit "dignity" talk had emerged quite a bit earlier, with the wave of international human rights conventions in the years after World War II. Most prominently, the Universal Declaration of Human Rights states, "all human beings are born free and equal in dignity and rights."[227] Since then, dignity has repeatedly emerged throughout American constitutional jurisprudence to justify outcomes in contexts as disparate as abortion,[228] free speech,[229] and

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222. Kant, *supra* note 170, at 192 (emphasis in original). Kant's *Fundamental Principles* appeared just four years before the U.S. Constitution in 1785, and it is therefore possible that the Founders would have been aware of some of his ideas, which were circulating in the same general Enlightenment public sphere. Kant was enthusiastic about the American Revolution, *see* Lewis W. Beck, *Kant and the Right of Revolution*, 32 J. HIST. IDEAS 411, 411 (1971), and made offhand reference in his writings to secession violating the U.S. Constitution. IMMANUEL KANT, METAPHYSICS OF MORALS 120 (M. Gregor ed., 1996) (1785). Certainly, the Founders' conceptions of inalienable rights seem compatible with Kant's categorical imperative. *See generally* C. Ellsworth Hood, *Kant on Inalienable Rights*, *in* AKTEN DES SIEBENTEN INTERNATIONALEN KANT-KONGRESSES 325 (Manfred Kleinschnieder & Gerhard Funke eds., 1991). Yet it is difficult to find any concrete evidence of any of the Founders reading him and, indeed, we know that as of 1797 John Adams had not. Letter from John Adams to Thomas Boylston Adams (Oct. 25, 1797), https://founders.archives.gov/documents/Adams/04-12-02-0158 [https://perma.cc/2HXX-697W] (asking his son about "a misterious Phenomenon in Germany by the Name of Kant"). Thus, it would not be wise to treat Kant as relevant to an originalist reading of the Sixth Amendment but, instead, as providing a framework for dignity rights that has become relevant in modern jurisprudence.

223. Kant, *supra* note 170, at 194–95.

224. *Id.* at 192.

225. Fletcher, *supra* note 215, at 173.

226. *Id.* at 171.

227. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

228. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

229. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) (noting the hope "that use of such

welfare benefits.[230]

Yet as many scholars have pointed out, the concept of "dignity" has not retained a consistent meaning throughout the case law and commentary; indeed, its very slipperiness demonstrates the wide variation of potential conceptions of human rights generally within and across communities.[231] Examples such as the legality of prostitution and physician-assisted suicide show how proponents of both sides of certain divisive issues may each invoke dignity to advance their arguments.[232] Some commentators have even argued that dignity is amorphous enough to be philosophically meaningless for the purposes of recognizing specific individual rights.[233]

It is clear, however, that the Supreme Court heavily utilizes the concept of dignity in arriving at constitutional holdings: in the past 220 years, Supreme Court Justices have invoked the term in more than 900 opinions.[234] Indeed, in a 2011 empirical survey, Leslie Henry found that "conservative" and "liberal" justices appeared to use the term equally often,[235] and that the use of the term in majority opinions has increased over time at a statistically significant rate.[236] Of course, these numbers show only that as a descriptive matter—despite the skeptics—dignity is alive and well as a basis for Supreme Court decision-making. Only a closer look at *how* the Court uses the term can illuminate the precise constitutional values it captures.

Several scholars have attempted to impose order on the concept of dignity by identifying the various understandings of the term appearing in case law and other materials. In one such study, Leslie Henry rejects

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freedom [of expression] will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

230. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) (explaining that "[f]rom its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders").

231. *See* Rao, *supra* note 214, at 186; Henry, *supra* note 216, at 172; Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381 (2011); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); Benjamin F. Krolikowski, Brown v. Plata*: The Struggle to Harmonize Human Dignity with the Constitution*, 33 PACE L. REV. 1255 (2013).

232. *See* Henry, *supra* note 216, at 175 n.30, 222.

233. *See* Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419, 1419 (2003); John Harris, *Cloning and Human Dignity*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 163, 163 (1998); Helga Kuhse, *Is There a Tension Between Autonomy and Dignity?*, *in* 2 BIOETHICS AND BIOLAW 61, 72 (Peter Kemp et al. eds., 2000).

234. *See* Henry, *supra* note 216, at 178.

235. *Id.* at 172.

236. *Id.* at 179.

earlier reductivist and essentialist approaches by philosophers that have tried, but failed, to impose a unitary meaning on the term.[237] She argues that dignity is better understood in practice rather than in the abstract and should therefore be understood to have multiple different, if related, meanings depending on the context in which it is used.[238] She identifies five distinct meanings:

1. *Institutional status as dignity* (once used to justify the Burkean conception of dignity attached to rank and now most frequently used by the Court to justify the doctrine of sovereign immunity).[239]
2. *Equality as dignity* (the idea of dignity as universal and arising from shared humanity, and frequently invoked by the Court in anti-discrimination cases).[240]
3. *Liberty as dignity* (the Kantian/Lockean idea of dignity as derived from autonomy, associated with American political liberalism and used by the Court to protect individual choices in contexts such as abortion and same-sex relationships).[241]
4. *Personal integrity as dignity* (the dignity Aristotle associated with human excellence—exemplified by virtues such as deliberation, wisdom, self-respect, courage, and self-control—which is capable of being reduced through one's own actions or from external interference, as when a person is "robbed of [their] dignity" by unconstitutional police intrusions like unannounced entries).[242]
5. *Collective virtue as dignity* (a communal dignity concerned with how a society values the totality of human life, invoked as a criticism of torture and lesser police practices that still "shock the conscience," and also as a justification for bans on prostitution, on the theory that sex work is an affront to women's "collective dignity").[243]

Like Henry, Neomi Rao rejects a unitary meaning of dignity and divides the concept into distinct legal usages, though finds only three important types from the case law.[244] The first category is "intrinsic dignity," which focuses on "human potential" rather than the realization of such potential.[245] This concept includes most negative liberties *from* state interference and arises in cases involving freedom of speech,

237. *Id.* at 177.
238. *Id.* at 182–86.
239. *Id.* at 190–99.
240. *Id.* at 199–205.
241. *Id.* at 206–12.
242. *Id.* at 212–20.
243. *Id.* at 220–29.
244. *See* Rao, *supra* note 214, at 186–92.
245. *Id.* at 187.

privacy, and freedom from interference in sexual relations.[246] The second category includes "substantive" conceptions of dignity, which involve the state making value judgments about the proverbial "good life."[247] This conception of dignity "depends on specific ideals of appropriateness and deems a person worthy or dignified to the extent that he conforms to such ideals."[248] Laws prohibiting activities such as dwarf-tossing and prostitution mobilize this understanding of dignity.[249] Rao's final category conceives of dignity as a form of recognition. This dignity "is rooted in a conception of the self as constituted by the broader community—a person's identity and worth depend on his relationship to society."[250] Rao notes that central to this conception is the particular "attitude" toward an individual expressed by the state and by other private parties.[251] Examples of dignity as recognition include laws against hate speech and defamation, and the right to same-sex marriage (as opposed to civil unions), due to the "expressive and symbolic" importance of marriage.[252] Recognition dignity also seems implicit in the presumption of innocence, which prevents the state from changing the moral status of one of its citizens without proof beyond a reasonable doubt.[253]

While this Article will not attempt its own typology, this previous scholarship helpfully outlines the various ways in which dignity has informed legal and especially constitutional values in American law. It remains, to some extent, a moving target, particularly in the cases where one view of dignity would urge a different outcome than another view. To narrow the field of view a bit, the next section turns to the dignitary interests the Court has recognized in the realm of constitutional criminal procedure generally, and the trial rights of defendants specifically.

B. The Dignitary Interests of Criminal Defendants

The Supreme Court has, periodically, recognized specific dignitary interests when it comes to criminal defendants. We may think of the basic fact of *being* a criminal defendant as intrinsically undignified to the extent that, once in the criminal justice system, defendants lose many basic negative rights against constraints on their liberty. Somewhat

246. *Id.*

247. *Id.* at 187–88.

248. *Id.*

249. *Id.* at 188.

250. *Id.*

251. *Id.*

252. *Id.* at 188–89.

253. Thanks to my colleague Kenneth Klein for this observation.

counterintuitively, Kant believed that prosecuting wrongdoers retributively—that is to say, only in strict accordance with the severity of the harms they have caused—actually recognizes their human dignity by treating them as rational beings and an end, rather than a means.[254] The non-individuated, mechanical reality of modern criminal justice, however, seems hard to reconcile with almost any concept of human dignity, particularly dignity as recognition.

Nonetheless, in several contexts, the Supreme Court has found dignitary rights of defendants dispositive to the outcomes of constitutional questions. It has held that the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government."[255] This includes the "dignity that can be destroyed by a sudden [police] entrance."[256] The Court has held unlawful, at least in part on dignitary grounds, bodily searches such as a compelled surgery to remove a bullet[257] and a forced stomach pump intended to acquire evidence.[258] In the Fifth Amendment context, the watershed *Miranda v. Arizona*[259] opinion stated that the constitutional foundation for the privilege against self-incrimination was "the respect a government . . . must accord to the dignity and integrity of its citizens."[260]

The Court has also found dignity to be one of the motivating principles grounding the Eight Amendment's prohibition on cruel and unusual punishment. In *Trop v. Dulles*,[261] which dealt with the constitutional limits to forfeiture of citizenship, the Court held that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[262] Subsequent decisions have applied this dignitary reasoning to criminal punishment in cases involving prisoner civil rights and the application of the death penalty.[263] Nonetheless, as prison reform activists

254. *See* Kant, *supra* note 170.

255. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 613–14 (1989).

256. Hudson v. Michigan, 547 U.S. 586, 594 (2006).

257. Winston v. Lee, 470 U.S. 753, 766 (1985).

258. Rochin v. California, 342 U.S. 165, 174 (1952).

259. 384 U.S. 436 (1966).

260. *Id.* at 460.

261. 356 U.S. 86 (1958).

262. *Id.* at 100.

263. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 745 (2002) (holding that the Alabama Department of Corrections' treatment of its prisoners constituted cruel and unusual punishment and describing the treatment as "antithetical to human dignity" where the plaintiff "was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous"); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the execution of a mentally disabled defendant violated the Eighth Amendment in light of then-existing "standards of decency");

and scholars have noted, in the Eighth Amendment context, the Court has not fleshed out a clear conception of "individual dignity." Decisions considering prisoner civil rights claims often defer substantially to the judgment calls of prison officials.[264]

Most relevant to our Confrontation Clause question, however, are the cases involving dignitary interests at trial. The Court has recognized a qualified right to self-represent that exists on both dignitary and utilitarian grounds, even when those grounds are in opposition. In *McKaskle v. Wiggins*,[265] the Supreme Court said that "[t]he defendant's appearance in the status of one conducting [their] own defense is important in a criminal trial, since the right to appear pro se exists to affirm the accused's individual dignity and autonomy."[266] (The Court noted, skeptically, that self-representation could also "allow the presentation of what may, at least occasionally, be the accused's best possible defense," but describes that ostensibly dubious utilitarian benefit as a "distinct" objective from the dignitary ones.[267]) Rao discusses the right to self-represent as an example of *both* intrinsic dignity (respecting the defendant's autonomy to make choices free from state interference)[268] and substantive dignity (noting that the Court has limited the absolute right of self-representation in cases involving mentally disabled defendants because the potential "spectacle" of self-representation could itself, in these cases, be undignified).[269]

Similarly, Justices have recognized the criminal defendant's due process right not to appear before the jury in prison attire on dignitary grounds distinct from parallel utilitarian ones. In *Estelle v. Williams*,[270] Justice Brennan wrote: "Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand [them] in the eyes of the jurors with an unmistakable mark of guilt."[271]

Justice Brennan clearly acknowledges the utilitarian argument against

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Roper v. Simmons, 543 U.S. 551, 560 (2005) (reasoning that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons").

264. *See* Shelby Calambokidis, *Beyond Cruel and Unusual: Solitary Confinement and Dignitary Interests*, 68 ALA. L. REV. 1117, 1136 (2017).

265. 465 U.S. 168 (1984).

266. *Id.* at 178.

267. *Id.* at 177.

268. Rao, *supra* note 214, at 209.

269. *Id.* at 230 (citing Indiana v. Edwards, 554 U.S. 164, 176 (2008)).

270. 425 U.S. 501 (1976).

271. Id. at 518 (Brennan, J., dissenting).

prison garb: it is likely to increase the risk of inaccurate outcomes by predisposing the jury to believe the defendant guilty. Yet the first, separate, purpose he mentions—"respect and dignity"[272] accorded to trial participants—turns entirely on the defendant as an end themselves, as a participant in his trial. It is a defendant's constitutional right to receive the recognition dignity of being treated, by the state and observers, with the same respect as others in the room for the proceeding.

C. Contextualizing a Dignitary Confrontation Clause

While dignity remains a fractured concept that courts recognize somewhat inconsistently in adjudicating the rights of criminal defendants, it nonetheless has several stable meanings. Moreover, it frequently serves as a basis for the Supreme Court's constitutional holdings. Furthermore, the aspects of the confrontation right this Article identifies as dignitary fit cleanly into several well-established conceptions of dignity. Confrontation allows for a humanized, embodied meeting of defendant and accuser, which enhances the defendant's interpersonal agency. Such confrontation is particularly important in cases of dishonest testimony, where the defendant's presence may impose a cost in guilt on the perjurer. This is important not only for increasing potential accuracy, but as an expression of the defendant's moral worth as a human being. Finally, confrontation allows the defendant the ability to be part of the present audience for the adverse witness's live testimony, as opposed to being condemned by a testimonial statement made out-of-court to a state actor.

One conception of dignity implicated by these rights is dignity as recognition, which George Mason invoked by complaining about the "odious" distinction made by the Crown between Americans and other British citizens through the use of ex parte interrogatories in the Stamp Act cases.[273] Recognition dignity "focuses on the unique and subjective feelings of self-worth possessed by each individual and group."[274] While Mason doubtless had utilitarian concerns on his mind when he wrote his letter (the physical difficulty Americans would have in bringing evidence in their defense if made to travel long distances to trial, and the risk of losing their property due to the lies of self-interested "informers"),[275] the "odiousness" he attributes to the policy seems to come from the lack of recognition of the shared community between colonists and other British citizens.

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272. *Id.*

273. *See* ROWLAND, *supra* note 49, at 125.

274. Rao, *supra* note 214, at 189.

275. ROWLAND, *supra* note 49, at 129.

While the distinction between Brit and colonist is obsolete, the idea that a person's sense of worth may depend on their relationship to society remains highly relevant to criminal adjudication. The objectification inherent in being processed by the State as a criminal defendant is always an affront to recognition dignity, in some ways unavoidably, in other ways that are compounded by the inadequacies and inequities in our actual criminal justice system. Being convicted on the testimony of a witness who has communicated with state actors only outside the courtroom is yet another way in which a criminal defendant's humanity can be negated. This is true regardless of whether the witness is a spurned lover, intentionally lying to the police, or a State-paid lab technician whose potential for laziness, intoxication, or dishonesty may become hidden behind a piece of paper, read into the record by another employee. In all cases, the defendant has been deprived of their relational right of confrontation: the right to assert the presence of their humanity against the machinery of the State.

The relational conception of dignity developed here also shares a basis in the notion of "personal integrity" as dignity, associated with Aristotle's theories of human excellence.[276] Virtues like self-respect, deliberation, and self-control are necessarily affronted when the State classifies a person as a criminal defendant, especially through the accompanying foreclosure, temporary or permanent, of all potential for accomplishment, striving, human contact, or independent action. To the extent that the face-to-face confrontation between defendant and accuser facilitates self-respect, deliberation, or any other human quality suppressed by the criminal justice system, it fosters the dignity of personal integrity. At a minimum, it may prevent the further degradation of these qualities that arise when an accuser's words of accusation fall, alone, on the ears of the State, which musters those words against the defendant outside of their presence.

Finally, as is true with all police and trial procedures applied to criminal defendants, the confrontation right implicates the notion of "collective virtue" as dignity. All criminal proceedings involve the restriction of a defendant's rights for the ostensible benefit of society as whole. While out-of-court, un-cross-examined testimony may not quite "shock the conscience" to the same degree as involuntary stomach pumping, our collective virtue remains at stake in all trial processes that operate unfairly.

In any case, it is not necessary to adopt a particular unitary definition of dignity to see how the defendant's relational right of confrontation

276. *See* Henry, *supra* note 216, at 212–20.

harmonizes with several of the major categories already recognized by courts. If *Crawford* expanded the confrontation right on originalist grounds, the case law has never explicitly considered how the historical understanding of confrontation espoused in the Raleigh trial and its aftermath implicates dignitary interests. It now remains to consider how this new understanding can help impose order on the thorny interpretive issues left by *Crawford* and its progeny.

IV. IMPLICATIONS FOR POST-*CRAWFORD* JURISPRUDENCE

Dignity, as a constitutional value, is of value in its own right and therefore distinct from the consequential benefits that may accompany it.[277] Therefore, while accuracy is a deeply important value protected by the Confrontation Clause and a dignity-focused account of confrontation may often harmonize with it, dignity must nonetheless be analyzed separately. This dignitary interest consists primarily of the defendant's right to assert the moral weight of their embodied humanity in the face of accusation, including the relational right to impose feelings of guilt on the dishonest witness. If we accept these premises, several consequences follow, which this Part will divide into the two most relevant problematic categories emerging from the case law: statements to the police and statements of lab technicians.

A. Statements to Police

In *Michigan v. Bryant*, in an effort to compress Confrontation Clause analysis back into hearsay analysis, the Supreme Court wholly ignored the defendant's dignitary interest in confronting a testimonial witness.[278] Recall that in *Bryant*, the Court said, "[i]mplicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination."[279] The Court also observed that this "logic is not unlike that justifying the excited utterances exception in hearsay law."[280] Quite simply, in saying that the Sixth Amendment "*does not require*" confrontation where "the prospect of fabrication" is "diminished," the Court read a dignitary interest out of the Confrontation

277. *See* Fletcher, *supra* note 215, at 173.

278. 562 U.S. 344 (2011).

279. *Bryant*, 562 U.S. at 361.

280. *Id.*

Clause altogether.[281] Recall that one of the major pragmatic criticisms of the *Davis/Bryant* "primary purpose" test has been that it is so fact-specific that it creates results even less clear (and more prosecution-friendly) than the garbled lab tech cases.[282] This test's uncertain outcomes compound its dignitary problems for defendants.

This is not to say that *all* statements made to police should fall within the ambit of *Crawford.* The distinction the Court made between *Davis* and *Hammon*—between a victim's plea for help to prevent violence in real time and a victim giving a report after the fact—may have proved workable were it not for the confusion added by *Bryant.* In the former case, the *Davis* 911 call, it is fair to say, as the Court then did, that the victim was not "testifying" but seeking aid.[283] Yet a dignitary focus shows why Scalia's critiques of the changes wrought to *Davis*/*Hammon* by *Bryant* were well-founded. Beyond largely displacing the "primary purpose" analysis with, essentially, an accuracy analysis, *Bryant* introduced the idea that the officer's purpose in receiving a statement, in addition to the declarant's in making it, is relevant to determining whether the statement was "testimonial."[284] As Scalia wrote in dissent:

> In-court testimony is more than a narrative of past events; it is a solemn declaration made in the course of a criminal trial. For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and [they] must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused.[285]

He observed that "[a]n inquiry into an officer's purposes would make no sense when a declarant blurts out 'Rick shot me' as soon as the officer arrives on the scene."[286] Understanding the defendant's confrontation interest as dignitary and relational vis-à-vis the witness adds further coherence to Scalia's insistence that only the *speaker's* intent to testify against the defendant is relevant, not the listener's intent in receiving it. This is because it is the dignitary harm of the *speaker's* potential deployment of state machinery against the defendant for their own ends that can be partially redressed by the defendant's confrontation *with the speaker*.

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281. *See id.* (emphasis added).

282. Davis v. Washington, 547 U.S. 813, 822 (2006); *Bryant*, 562 U.S. at 359.

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

284. *Bryant*, 562 U.S. at 359–60.

285. *Id.* at 381 (Scalia, J., dissenting).

286. *Id.* at 382.

To give another example, one could imagine a declarant walking up to an off-duty police officer—who has no intention of investigating any offense, much less interrogating the specific declarant—and making an accusation against a defendant. It should be irrelevant that the officer has no subjective intent to collect evidence for a prosecution. If the State subsequently *introduces* that statement at trial, it is making use of the declarant's considered, solemn statement. Furthermore—again, regardless of the officer's subjective intentions—the officer nonetheless exists as an arm of the state; the state creates the conditions empowering officers to act on what they have been told. In that statement, the declarant uses the State to bring about a particular effect for the defendant. The defendant's dignity is, therefore, harmed by an inability to assert their agency through an interpersonal confrontation with the declarant at trial.

Thus far, the rule emerging is that, in cases where the declarant's primary purpose is to give an accusatory narrative to a state actor, the defendant's dignitary interest in confrontation attaches. But other considerations may also affect the analysis. To return, again, to the archetype of the Raleigh trial, remember that Raleigh stated, "if my accuser were dead or abroad, it were something. But he liveth, and is in this very house!"[287] This could, of course, be construed as a utilitarian point, premised on the greater necessity of using out-of-court testimony in cases where the speaker was dead or otherwise unavailable (a consideration relevant to many of the traditional exceptions to the rule against hearsay, and originally one of the two factors in the pre-*Crawford* Confrontation Clause test stated in *Ohio v. Roberts*[288]). Even in *Crawford*, the Court mentioned, in a passing footnote, that the "dying declaration" exception to hearsay appeared, historically, also to be an exception to the rule against ex parte statements embodied in the Confrontation Clause: "Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are."[289]

The accuracy-based reasoning that grounds the exception in hearsay law turns on the familiar proposition that no one would want to meet their maker with a "lie upon [their] lips."[290] But if, as the *Crawford* court insists, the confrontation question turns on values other than accuracy, why should the dying declaration be an exception? Even the Court appeared unable to answer this. Considering this anomaly from a dignitary perspective provides a potential answer: the defendant has far less of a

287. *The Trial of Sir Walter Raleigh*, *supra* note 143.

288. 448 U.S. 56, 66 (1980).

289. Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

290. Idaho v. Wright, 497 U.S. 805, 820 (1990) (quoting R. v. Osman (1881) 15 Cox Crim. Cas. 1, 3 (Eng.)).

relational interest in imposing the moral weight of their presence upon a speaker who is already dead. A dead witness cannot assert their will in any direction; their own human dignity has been extinguished. Even if the State continues to use the witness's words to disadvantage the defendant, they are no longer a means to whatever their personal ends were, because those ends have terminated. Thus, testimonial dying declarations do not implicate the defendant's dignitary interest in the same way as other testimonial statements. Indeed, on this reasoning, the defendant's dignitary interests are weaker in *all* cases in which the speaker is dead by the time of trial. The State's argument here is weaker when the potentially dishonest speaker lived for some time during which they presumably reaped whatever were the private benefits of their out-of-court testimony.[291] Yet it is nonetheless clear that the defendant's dignitary interest in imposing moral guilt upon the potentially lying witness is weaker where that witness no longer exists.

B. Lab Technician Cases

The dignitary analysis also sheds light on some of the confusions arising from the lab tech line of cases. Ronald Coleman and Paul Rothstein helpfully break down the six possible theories remaining after the *Williams* plurality under which courts can admit the out-of-court reports of lab technicians.[292] Here, I briefly touch on each and the relevance of dignity analysis to its viability:

1. *If the report were not testimonial (i.e., if it were a medical or psychiatric report not prepared for the prosecution*).[293] This would not seem to implicate the heightened dignitary interests that arise when a declarant uses the state apparatus to affect the defendant. Thus, such reports—already admissible under the status quo—would not be affected by dignitary analysis.

2. *If it were used as a foundation for expert testimony and not for the truth of the matter contained in it.* [294] This is the approach adopted by the *Williams* plurality but rejected by five justices in *Williams* and by Justice Gorsuch, apparently, in *Stuart*.[295] Such a strategy offends the defendant's dignitary interests as clearly as it offends the accuracy interests Justice Gorsuch identifies. The strategy allows a testifying "expert" to simply

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291. Note, of course, that this reasoning does not apply in cases where the witness is simply "abroad" or otherwise unavailable.

292. *See* Coleman & Rothstein, *supra* note 119, at 28.

293. *Id.* at 52.

294. *Id.* at 52–53.

295. *See* Epstein, *supra* note 3, at 67–68.

"draw a conclusion" that may just be recitation of the results the out-of-court technician memorialized. On the one hand, it is a long-accepted principle of the evidentiary laws governing experts that they are permitted to testify based on hearsay evidence if it is the sort of information on which an expert in the field might ordinarily rely in forming an opinion. (So, for example, an accident recreation expert might rely on the out-of-court statements of witnesses, and so forth). As Gorsuch noted, however, a case like *Stuart* poses accuracy problems beyond those normally associated with expert testimony.[296] It involves the expert not merely considering a hearsay statement as one of a number of bases for forming their own opinion, but instead simply parroting the entirety of the prior lab tech's results.

If such a method poses accuracy concerns, it poses distinct dignitary concerns. The rules of evidence allowing experts to testify about opinions formed on the basis of other parties' out-of-court statements reflect the goals of the common law of evidence, which created hearsay exceptions based solely on accuracy. Such a model did not engage the Confrontation Clause at all, much less the constitutional value of dignity. The potential dignitary affront to a criminal defendant is at its peak where the state has created its own evidence (whether in public labs or private labs funded by public money) and introduced it in an adjudicatory system in which the defendant is already at a dramatic power disadvantage. For additional layers of state actors to block the defendant from face-to-face confrontation with the accusing lab technician is an offense to their dignitary interest in asserting their humanity during an already objectifying process. Thus, this is a particularly weak justification for admitting the out-of-court statements of lab techs.

3. *Where the report is not specifically accusatory.*[297] This is the *Williams* plurality's other theory, based upon the fact that the Cellmark test involved an anonymous subject rather than a particular, identified suspect existing at the time the test was run. Like the second theory, this represents the views of only four justices, though given the dissimilarity of the BAC test at issue in *Stuart*, we cannot predict Justice Gorsuch's views on it. The *Williams* plurality made much of the fact that the DNA profile had been produced by a private laboratory rather than the state crime lab, as well as the fact that it was a full-scale DNA profile rather than, as in *Melendez-Diaz*, a yes/no answer to the question of whether a substance was contraband.[298] It is clear that both considerations are highly

296. Stuart v. Alabama, 586 U.S. __, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari).

297. *Id.* at 53.

298. Williams v. Illinois, 567 U.S. 50, 84–86 (2012).

relevant to the accuracy of the testimony. Presumably, a private lab has less incentive to tamper with results than does a State-run crime lab. Even more importantly, generating a DNA profile in the absence of a pre-identified suspect is not the sort of enterprise a selfishly motivated technician like Annie Dookhan could "throw" to benefit the state. In a case like *Williams*, there is no "right" answer analogous to the reliably positive results in Dookhan's drug tests.

If we look at *Williams* from a dignitary perspective, however, it appears somewhat different. Cellmark may have been a private lab, but it was paid with state resources, resources the defendant most likely lacked. Thus, like an eyewitness making an unsolicited report to a police officer, the private actors at the lab were telling a fact-based story to a state listener. The defendant's lack of equal access to a firsthand account of that story constitutes an affront to their dignitary interest in confronting their accuser. It may be the case that courts should treat the significantly increased accuracy benefits of this type of DNA evidence (as opposed to the positive/negative drug sample tests) as rising to the level of constitutional significance. But ignoring the dignitary rights defeated by the *Williams* holding has not led to particularly clear case law. This is the stronger of the plurality's two justifications in *Williams*, but it nonetheless creates dignitary problems that courts should address when refining this doctrine.

4. *Where the report lacks sufficient formality*.[299] These were the grounds on which Justice Thomas concurred in *Williams* given the lack of certification on the Cellmark report. This distinction is rather frivolous when we compare an uncertified DNA report provided to a police department with an unsolicited excited utterance made to a police officer. If Jake runs up to a police officer and says, "Bob killed Nancy!" but never gives a signed statement, it would seem curious not to apply *Crawford* where we would if such a statement existed. (If anything, from an accuracy standpoint, the lack of a signed statement would seem to render the unsigned statement *less* rather than more reliable—certainly the hearsay rules tend to treat formality as an indicium of reliability).

It is difficult to see why the reports of lab technicians should be any different; when a technician generates a report based on a semen sample, they know that it is eventually going to be part of a criminal prosecution. And from a dignitary standpoint, the fact that the declarant knows that their statement may become a weapon of the state is the statement's most important attribute, because it implicates the power relations between the declarant, the state, and the defendant.

299. *Id.* at 54–55.

5. *Where the testifying witness is more than a mere "surrogate" or "conduit" for the report because they had sufficient authority in the lab that the report's "entire analysis can be sufficiently tested by cross-examining the testifying expert."*[300] This was the justification of the Court of Appeals for the Armed Forces in *Katso*, allowing another lab technician to testify about the rape kit run by an unavailable colleague. This theory has a lot of pragmatic appeal on accuracy grounds, as it allows the defendant to cross-examine the in-court witness about lab practices and methods, including efforts made to prevent fraud, mishandling of samples, and so forth. It does not, however, satisfy the defendant's dignitary interest in personal confrontation, which turns in part on the relational right to make the relevant declarant present their narrative of accusation face-to-face with the affected party.

6. *Where a notice-and-demand statute exists and demand is not made.*[301] The Court appeared to approve this practice in dicta in *Melendez-Diaz*. It does not appear to raise dignitary concerns. Constitutional rights may be waived by defendants most of the time, including by failure to assert them, and there is nothing unique about this one that would make waiver suspect.

To distill a rule from all of the above: apart from cases in which a defendant has waived their Sixth Amendment right, or where a report is made for reasons genuinely unrelated to prosecution, a defendant's dignitary interests in confrontation are heavily implicated in all cases in which a state-funded lab report threatens to convict them. While courts and practitioners have been understandably concerned with the time and cost involved in making lab technicians physically available for trial, it is important to note the context in which these cases arise. The entire plea-bargaining system, which dispenses with trial rights for 90%–95% of criminal defendants, is predicated primarily on efficiency concerns. As this state of affairs is unlikely to change any time soon, despite the dignitary costs it imposes on all criminal defendants, it is even more important to vindicate the dignitary rights of those few defendants who actually see trial.

CONCLUSION

This Article has shown how the Supreme Court has overlooked the dignitary aspects of the Sixth Amendment right to confrontation and has noted the ways courts should weigh those rights in specific trial scenarios. It does not suggest that the dignitary inquiry is the only relevant question

300. *Id.*

301. *Id.* at 55.

courts should consider as they try to untangle the mess that is current Confrontation Clause jurisprudence. Other values, including accuracy, are relevant to creating a workable rule moving forward. The Court held in *Crawford* that accuracy is *not* the lodestar of Confrontation Clause analysis, yet in seventeen years, it has failed to provide a coherent statement of what, exactly, *is*. This Article invites the Court to consider the ways in which a dignitary framework sheds light on important values inherent in confrontation. Harmonizing dignitary values with accuracy and other values is a project that courts must necessarily address on a case-by-case basis. This Article merely proposes a concrete answer to a question that has bedeviled commentators since the start of the *Crawford* revolution: what *is there* in the confrontation right beyond accuracy? Why do we care if a statement is explicitly *testimonial*, so long as it passes the accuracy screen provided by the hearsay laws? This Article has sought to show that there is a substantive residual to the confrontation right in cases of "testimonial" out-of-court statements, one that is more than simply formalistic. In better understanding the dignitary interests at stake in the Confrontation Clause, courts can begin to untangle the morass left by cases that have either relied on formal categories or considered accuracy alone.