

AVOIDING TRIAL BY RUMOR: IDENTIFYING THE DUE PROCESS THRESHOLD FOR HEARSAY EVIDENCE AFTER THE DEMISE OF THE *OHIO V. ROBERTS* “RELIABILITY” STANDARD

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“The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice.”¹

“[T]he Confrontation Clause has no application to [nontestimonial hearsay statements] and therefore permits their admission even if they lack indicia of reliability.”²

I. INTRODUCTION

The revolution in the law governing the interplay between the criminal defendant’s right of Confrontation and the admissibility of hearsay statements initiated by the Court’s 2004 *Crawford*³ decision – and given fuller definition in 2006 and 2007 – has had tremendous impact and raised numerous concerns. These include: identifying what statements meet the *Crawford* test of “testimonial”⁴ and thus fall within the Confrontation Clause’s reach; whether the Court’s reading of history in *Crawford* was accurate;⁵ analyzing the application and consequences of this new Confrontation paradigm on the prosecution of child assault and domestic violence cases;⁶ and a strong revival, and controversial articulation, of the doctrine of forfeiture by wrongdoing.⁷

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¹ United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807).

² Whorton v. Bockting, 127 S. Ct. 1173, 1183 (2007).

³ Crawford v. Washington, 541 U.S. 36 (2004).

⁴ As is detailed in Section II, *infra*, *Crawford* divided all hearsay statements into two categories, “testimonial” and “nontestimonial,” and applied the Confrontation Clause’s protection to the former. In *Crawford’s sequela*, the Court expressly excluded nontestimonial hearsay from the reach of the Confrontation guarantee.

⁵ See, e.g., Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007) [hereinafter Davies, *Revisiting*]; Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105 (2005); Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier’s Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL’Y 471 (2007) [hereinafter Jonakait]; Robert P. Mosteller, *Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Require that Roberts Had to Die*, 15 J.L. & Pol’y 685 (2007); Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?* 71 BROOK. L. REV. 35, 38-39 (2005).

⁶ See, e.g., Robert P. Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: “A Little Child Shall Lead Them”*, 82 IND. L.J. 917 (2007); Myrna S. Raeder, *Comments on Child*

Yet while all of these *sequelae* are significant, it may be argued (and is the thesis of this article) that the single most important, and potentially most far-reaching result of *Crawford* is found in its dismissal of any concern for substantive reliability of hearsay statements.

We rejected that argument [that the purpose of the Confrontation Clause was to ensure the reliability of evidence] (and our prior cases that had accepted it) in [*Crawford*] [T]he Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”⁸

Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation, 82 IND. L.J. 1009 (2007).

⁷ This doctrine permits the introduction of testimonial hearsay when the accused has engaged in conduct that prevents the witness from appearing and facing cross-examination. See *Reynolds v. United States*, 98 U.S. 145, 158 (1879). Decisional law in this area has expanded to apply the forfeiture principle even when there is no proof that the defendant intended to prevent a witness from testifying. See, e.g., *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (“There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness’s unavailability, he intended to prevent the witness from testifying.”). This no-intent requirement was held to be incompatible with the Confrontation guarantee in *Giles v. California*, 128 S. Ct. 2678, 2689 (U.S. 2008) (“[U]nconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying . . .”). *People v. Giles*, 152 P.3d 433 (Cal. 2007). But see *People v. Stechly*, No. 97544, 2007 Ill. LEXIS 452 (Ill. 2007) (finding intent necessary to satisfy Confrontation Clause requirements). Scholars have urged that the doctrine be read expansively to apply to batterers in domestic violence and child abuse cases. See e.g., Tom Lininger, *Prosecuting Batterers after Crawford*, 91 VA. L. REV. 747, 809-10 (2005) (endorsing the use of the forfeiture doctrine in domestic violence cases with a preponderance standard); Deborah Tuerkheimer, *Crawford’s Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 49-51 (2006). See also Andrew King-Reis, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441 (2006). *Giles* suggests some flexibility on this issue. 128 S. Ct. at 2693 (“Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution - rendering her prior statements admissible under the forfeiture doctrine.”).

⁸ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (quoting *Crawford*, 541 U.S. at 36). See also *Davis v. Washington*, 547 U.S. 813, 825 n.4 (2006) (holding that *Crawford* overruled *Ohio v. Roberts*). The Court restated this unanimously in *Whorton v. Bocking*:

[W]hatever improvement in reliability *Crawford* produced in this respect must be considered together with *Crawford*’s elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under *Roberts*, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under *Crawford*, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.

Whorton v. Bocking, 127 S. Ct. 1173, 1183 (2007).

This absolute repudiation of the *Ohio v. Roberts* “reliability” test⁹ for Confrontation Clause challenges to hearsay in criminal trials occurred without briefing¹⁰ and in cases that failed to raise the question of the test’s continued viability.¹¹ It leaves a potential vacuum in constitutional restrictions for hearsay classified as “non-testimonial,” which the Court has clearly placed outside of the reach of the Sixth Amendment and which scholarship has yet to address. Should the use of “unreliable” hearsay evidence be authorized, either by judicial action or legislative development of new hearsay exceptions, is there no constitutional provision that might check or limit this practice? Imagine a criminal trial in which the only evidence of guilt is the repetition of a victim’s statement, made to a friend, that “last week [the accused] assaulted me – he punched me and broke my arm.” Meeting no currently-existing hearsay exception, may the statement nonetheless be admitted and serve as the basis for conviction¹² if a legislature were to create an “injured person” hearsay exception?¹³

The use of out-of-court, non-cross-examined statements has been a staple of American trials for much of the last century,¹⁴ notwithstanding its condemnation

⁹ See *infra* notes 18-19 and accompanying text.

¹⁰ As noted by Professor Kirkpatrick: “The Court has staked out its position on the question, which is apparently to exclude nontestimonial hearsay entirely from the protection of the Sixth Amendment, without hearing argument from any of the litigants who might actually be affected by such a ruling.” Laird C. Kirkpatrick, *Nontestimonial Hearsay after Crawford, Davis and Bockting*, 19 REGENT U. L. REV. 367, 370 (2007) [hereinafter Kirkpatrick].

¹¹ *Gonzalez-Lopez* addressed “whether a trial court’s erroneous deprivation of a criminal defendant’s choice of counsel entitles him to a reversal of his conviction.” *Gonzalez-Lopez*, 548 U.S. at 142. *Bockting* looked solely at whether *Crawford* “is retroactive to cases already final on direct review.” *Bockting*, 127 S. Ct. at 1177. In *Davis*, the issue briefed was “how *Crawford* applies to a ‘victimless’ prosecution based almost exclusively on statements reporting a crime to a 911 operator.” Brief for Petitioner at 2, *Davis v. Washington*, 547 U.S. 813 (2006) (No. 05-5224). *Hammon*’s Brief addressed the question of “[w]hether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford*.” Brief of Petitioner Hershel Hammon at 1, *Hammon v. Indiana*, 547 U.S. 813 (2006) (No. 05-5705).

¹² The distinction between evidentiary admissibility and evidentiary sufficiency for nontestimonial hearsay is beyond the scope of this article, which focuses on the former. However, if admissible, such hearsay could undoubtedly serve as the primary proof on which a criminal conviction is predicated. See *infra* notes 72 *et seq.*, and accompanying text.

¹³ The concern here is not a fanciful one. It has been recognized that *Crawford* might permit legislatures to create new hearsay exceptions without regard to a reliability component or determination. Professor Lininger explicitly urges “an expansion of statutory hearsay law” while proposing some countervailing statutory confrontation/reliability standard. Tom Lininger, *Reconceptualizing Confrontation after Davis*, 85 TEX. L. REV. 271, 299-310 (2006) [hereinafter Lininger, *Reconceptualizing*]. See also Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of Crawford*, 105 COLUM. L. REV. 2409 (2005) (arguing that *Crawford* may necessitate revising this hearsay exception but calling for a statutory reliability mandate if *Ohio v. Roberts* is no longer applicable to non-testimonial hearsay).

¹⁴ The historical record is inconsistent in part because of the failure to distinguish criminal and civil proceedings. Wigmore identifies the “time of the definite emergence of the hearsay rule” as being “by the end of the 1600s.” 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1580

200 years ago as endangering to “life, liberty and property”¹⁵ and its repudiation as “not evidence” across the Nineteenth century.¹⁶ But that ingredient of modern American trials was tempered with Confrontation Clause limits: the hearsay had to be “reliable,” a standard met either by its fitting within a hearsay exception of

(Chadbourn Rev. ed., 1974) (hereinafter WIGMORE, EVIDENCE IN TRIALS). He finds support for acceptance of hearsay exceptions such as “regular entries” [business records] in colonial times, *id.* at § 1518, “declarations about family history,” deemed “one of the oldest exceptions,” *id.* at § 1480, and “statements of facts against interest” as an exception “traced back . . . to the early 1700s,” *id.* at § 1455. Yet Wigmore does not distinguish between civil and criminal trials in tracing the ancestry of these exceptions, and in fact much of the hearsay known today was *not* routinely admitted at the time of the Framing or thereafter. The treatises indicate that most of the modern exceptions to the rule against hearsay were in place by the end of the Eighteenth century, even if their contours in particular cases required clarification. These exceptions were: legitimacy, family relationships, pedigree, prescription, custom, general reputation, prior consistent and inconsistent statements, and dying declarations. See T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 533 (1999) (footnotes omitted). Other than dying declarations, these exceptions are not the source of proof in most criminal prosecutions. [Prior consistent and inconsistent statements apply only when the declarant is a trial witness, making them inapposite to this analysis.] For the more typically occurring criminal law exceptions, Wigmore cites to an 1873 Maine prosecution for a case first accepting the spontaneous declaration/excited utterance exception. WIGMORE, EVIDENCE IN TRIALS, *supra*, at § 1747 (citing *State v. Wagner*, 61 Me. 178, 195 (Me. 1873)).

¹⁵ *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807).

I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principel [sic] in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered.

Id.

¹⁶ See, e.g., *Williams v. State*, 12 S.E. 743 (Ga. 1891) (“[H]earsay evidence and common rumor are incompetent to prove particular facts.”); *Blaisdell v. Bickum*, 1 N.E. 281, 282 (Mass. 1885) (distinguishing hearsay used to prove pedigree from “the general rule that hearsay evidence and common rumor are incompetent to prove particular facts”). In criminal prosecutions, the use of hearsay was restricted:

The great security of the accused however, after all, is in the fundamental principle of the common law, that *legal evidence consists in facts testified to by some person who has personal knowledge of them; thus excluding all suspicions, public rumors, second-hand statements, and generally all mere hearsay testimony, whether oral or written, from the consideration of the jury* -- the usual test of this hearsay evidence being that it does not derive its value solely from the credit to be given to the witness who is before them, but partly from the veracity of some other individual.

State v. McO’Blenis, 24 Mo. 402, 414 (Mo. 1857). The Missouri Court recognized two exceptions: “dying declarations in reference to the same homicide, and the deposition of a witness regularly taken in a judicial proceeding against the accused in respect to the same transaction and in his presence, when the subsequent death of the witness has rendered his production in court impossible” *Id.* at 414-15.

long standing¹⁷ or by unique circumstances attendant to the making of the particular statement.¹⁸

The construct of “reliability” had its deserved criticisms: it was at a minimum a-scientific, if not contrary, to psychological observations for excited utterances¹⁹ and seemingly at odds with human behavior regarding truthfulness to physicians.²⁰ As well, and as aptly detailed in *Crawford*, reliability can best be described as “in the eyes of the beholder” or, in the Court’s word, “amorphous”:

Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its

¹⁷ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”).

¹⁸ *Idaho v. Wright*, 497 U.S. 805, 820-21 (1990).

[T]he “particularized guarantees of trustworthiness” required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.

Id. (citations omitted).

¹⁹ See, e.g., Josephine Ross, *After Crawford Double-Speak: “Testimony” Does Not Mean Testimony and “Witness” Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 174-75 (2006) (noting studies that reliability of statements drop after a matter of seconds pass between event and response); Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking”*, 53 HASTINGS L.J. 843, 858 n.84 (2002) (“The reliability rationale for ‘excited utterances,’ Rule 803(1), would be laughable, if it were not for the serious problem that such evidence is commonly admitted under this exception in criminal cases, despite the obvious potential defects with the declarant’s ability to perceive, recall, and communicate correctly.”); Eleanor Swift, *Smoke and Mirrors: The Failure of the Supreme Court’s Accuracy Rationale in White v. Illinois Requires a New Look at Confrontation*, 22 CAP. U. L. REV. 145, 154 n.38 (1993) (collecting social science research repudiating the purported reliability of “excited utterances”). Similar concerns have been raised about the reliability of dying declarations, particularly in homicides involving traumatic wounds. Hemorrhage functionally leads to anoxic or hypoxic states, causing death. Under controlled conditions, hypoxia alone results in significant effects upon cognition. Further, hypoxic events, trauma, and physical and psychosocial stressors appear to have a causative relationship with delirium, a heightened state of impaired cognition. Because this state would appear to be plausibly relevant to circumstances when dying declarations are uttered, the scientific and medical evidence seriously challenges the contention that dying declarations are inherently reliable. See Bryan A. Liang, *Shortcuts To “Truth”: The Legal Mythology of Dying Declarations*, 35 AM. CRIM. L. REV. 229, 243 (1998).

²⁰ See, e.g., Carla K. Johnson, *Lying to Doctor Can Mean Health Risks*, WASH. POST, Feb. 16, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/16/AR2007021600984.html> (reporting on studies and anecdotal proof that lying to physicians is prevalent). For a general challenge to the reliability construct, see Michael L. Siegel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 909 (1992).

inculcation of the defendant was “detailed,” while the Fourth Circuit found a statement more reliable because the portion implicating another was “fleeting.”²¹

It bears note that *Crawford* has been criticized for its failure to eliminate judicial discretion, as it merely altered the focus from discretionary determinations of reliability to discretionary determinations of what hearsay is properly classified as “testimonial.”²² Yet notwithstanding these flaws, the reliability test put *some* limits on hearsay evidence for criminal prosecutions.²³ Legislators enacting new evidence provisions were forced to incorporate reliability standards, a phenomenon found in particular in child “tender years hearsay” statutes (which at least 40 states have adopted).²⁴ As well, courts held hearsay evidence inadmissible for failing to meet the baseline reliability criterion.²⁵

The turn away from the reliability requirement was made clear beyond dispute in 2007 in *Whorton v. Bocking*, where the Court wrote dismissively of the need for reliability as a Confrontation Clause threshold for admitting non-testimonial hearsay: “[T]he Confrontation Clause has no application to

²¹ *Crawford*, 541 U.S. at 63 (citations omitted). The *Crawford* Court continued with other examples:

The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given ‘immediately after’ the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed.

Id. (citations omitted).

²² See, e.g., Michael D. Cicchini & Vincent Rust, *Confrontation after Crawford v. Washington: Defining “Testimonial”*, 10 LEWIS & CLARK L. REV. 531, 540 (2006) [hereinafter Cicchini].

²³ How extensive those limits were is, admittedly, debatable. See, e.g., John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 206 (1999).

Almost twenty years after *Roberts*, it is hard to conclude that the Confrontation Clause, as an exclusionary rule, has much practical impact on hearsay in criminal trials. . . . Its second pillar, the ‘reliability’ test, has limited effect largely because the vast majority of admissible hearsay now fits within ‘firmly rooted’ exceptions and, therefore, is effectively exempt from any constitutional reliability assessment.

Id.

²⁴ See, e.g., *Snowden v. State*, 846 A.2d 36, 40 (Md. Ct. Spec. App. 2004) (referencing statutes from various states). Illustrative is the Maryland statute, which requires “particularized guarantees of trustworthiness” and details considerations for finding reliability. MD. CODE ANN., CRIM. PROC. § 11-304 (2002).

²⁵ See, e.g., *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (excluding statements made to a physician alleging sexual abuse, sought to be admitted under a residual hearsay); *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir. 2003) (excluding codefendant’s custodial statement implicating Hill as unreliable hearsay); see also *Franqui v. State*, 699 So. 2d 1312, 1318 (Fla. 1997).

[nontestimonial hearsay statements] and therefore permits their admission even if they lack indicia of reliability.”²⁶

Unanswered by *Bockting* was the correlate inquiry – does any Constitutional provision preclude “admission even if [the non-testimonial hearsay] lack[s] indicia of reliability[?]”²⁷ This Article posits an affirmative answer, with the Due Process guarantee arising from dual factors – the historic opposition to trial by rumor²⁸ due to its dangers of unreliability²⁹ and the correlate primacy accorded to the power of cross-examination to seek the truth. That Due Process test will result in setting some (albeit modest) reliability standard for non-testimonial evidence.

The Article begins with an overview of the *Crawford* revolution in hearsay/Confrontation analysis and the Court’s ensuing decisions that have begun to set the boundaries for what hearsay is nontestimonial. Section II then examines the Court’s uneven Due Process jurisprudence in regulating and limiting prosecutorial evidence on reliability grounds. Of particular importance is the analysis applied to evidence used in probation revocation and immigration hearings, proceedings in which the Confrontation guarantee has no applicability

²⁶ *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007).

²⁷ *Id.*

²⁸ The term “rumor” is used herein as cognate with “hearsay.” Across Nineteenth century jurisprudence, the terms were used either as synonyms, *see, e.g.*, *Whitsett, Garner & Co. v. Slater*, 23 Ala. 626, 633 (Ala. 1853) (maintaining that “rumor is, at best, but hearsay”), or as expressions of degree describing second hand information, with rumor being the hearsay of unidentified declarants, *see, e.g.*, *Gibson v. State*, 38 Miss. 313 (Miss. 1860) (reporting jury instruction that “proof of a fact by common rumor, which is hearsay evidence of hearsay evidence, is never admitted except upon the last necessity,—is the least satisfactory of all evidence, and is never conclusive of the fact attempted to be proved”). The focus here is on hearsay where personal knowledge cannot be proved and declarant credibility cannot reasonably be assessed, the *sine qua non* of a “rumor.”

²⁹ That rumor engenders at least a risk of unreliability should not be questionable. Psychological studies have demonstrated that:

[I]nformation can be distorted as it is passed orally from one person to another. Details may be misunderstood or forgotten. More importantly, each person who hears the information filters it through a particular cognitive lens. Expectations, stereotypes, and schemas of the perceiver can influence what is perceived and therefore what is reported at the next stage. Because hearsay passes through at least two such lenses before reaching the jury (those of the declarant and hearsay witness), there is good reason to expect some distortion and loss of accuracy in hearsay transmission.

William C. Thompson & Maithilee K. Pathak, *How Do Jurors React to Hearsay Testimony?: Empirical Study of Hearsay Rules: Bridging the Gap Between Psychology and Law*, 5 PSYCHOL. PUB. POL’Y AND L. 456, 464 (1999). A more recent study of how factfinders process information raises the concern that “hegemonic narratives” are used to structure how jurors receive testimony and concludes that they “will give evidence that does cohere with the narrative increased weight, regardless of the probative force they might accord to it in other contexts.” Doron Menashe & Hamutal Esther Shamash, *Pass These Sirens By: Further Thoughts on Narrative and Admissibility Rules*, in 5 INT’L COMMENT. ON EVIDENCE 1 (2007), available at <http://www.bepress.com/ice/vol5/iss1/art3>.

but for which Due Process principles have been molded to determine the admissibility of hearsay. In Section III, the Article proposes a case-specific Due Process test, one tied to the circumstances under which the statement was made and the relative loss suffered by an absence of cross-examination. That test embraces three concerns: that the identity of the declarant be established; that the foundation of personal knowledge be clear; and that reliability/probativeness be established solely by the circumstances surrounding the making of the statement and not by reference to extrinsic corroboration.

II. CRAWFORD'S ANTECEDENTS, HOLDING, AND IMPACT

It cannot be gainsaid that *Crawford v. Washington* wrought a sea-change in hearsay and Confrontation Clause analysis.³⁰ The *Crawford* decision has been described by commentators and jurists as a “monumental” transition,³¹ a “revolutionary decision,”³² a “paradigm shift in Confrontation Clause analysis,”³³ and a “Copernican shift in federal constitutional law,”³⁴ and in less than three years it has been cited in more than 3,500 cases and 360 law review articles.³⁵ Many articles have capably followed the trajectory of Constitutional limitations on legislated (or common law) hearsay, documenting what one scholar depicted as its marriage of the hearsay rule and the Confrontation Clause followed by its divorce.³⁶

Where did this all begin? The Supreme Court’s initial foray applying a Confrontation Clause analysis to hearsay, *Mattox v. United States*,³⁷ upheld a criminal conviction achieved by use of the notes of testimony of a now-deceased witness who had testified and been cross-examined at an earlier trial (the verdict in which had been set aside). The use of the transcript from the earlier trial was

³⁰ The *Bockting* Court held as much even when it rejected a retroactivity claim for *Crawford*: “[I]t is clear that *Crawford* announced a new rule. The *Crawford* rule was not ‘dictated’ by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled.” *Whorton v. Bockting*, 127 S. Ct. 1173, 1181 (2007).

³¹ Lininger, *Reconceptualizing*, *supra* note 14, at 278 (“[T]he transition from *Roberts* to *Crawford* was a monumental one.”).

³² *People v. Pantoja*, 18 Cal. Rptr. 3d 492, 498 (Cal. Ct. App. 2004).

³³ *People v. Cage*, 15 Cal. Rptr. 3d 846, 851 (Cal. Ct. App. 2004).

³⁴ *People v. Victors*, 819 N.E.2d 311, 323 (Ill. App. Ct. 2004).

³⁵ A *Shepard's* search for *Crawford v. Washington* conducted on April 6, 2007 showed a total of 4,608 citing documents, of which 360 were law review articles, 352 were treatises, and the great remainder being federal and state court decisions.

³⁶ See, e.g., Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185 (2004). For other recapitulations of the Court’s treatment of Confrontation challenges to hearsay admitted against defendants in criminal trials, see Cicchini, *supra* note 23, at 534-40 (2006); Lininger, *Reconceptualizing*, *supra* note 14, at 276-80

³⁷ 156 U.S. 237 (1895).

considered unexceptional.³⁸ At the same time, the Court approved the exclusion of collateral impeachment³⁹ of the now-deceased declarant because of a concern for reliability:

While the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible.⁴⁰

The Court continued its approval of admitting prior testimony in the Twentieth century, finding that the cross-examination at the earlier proceeding contributed to or established the reliability necessary for admission of the trial notes at a subsequent trial where the declarant could not be “confronted.”⁴¹ In the course of developing its Confrontation/hearsay jurisprudence, the Court made one further, critical determination – Confrontation concerns were not implicated where hearsay of a *testifying* declarant was admitted as substantive evidence because, at least in part, “subsequent cross-examination at the defendant’s trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.”⁴²

The determination that reliability was the linchpin of Confrontation Clause analysis for all forms of hearsay was made by the Court in *Ohio v. Roberts*.⁴³ After holding that proof of the hearsay declarant’s unavailability is usually a necessary predicate to allowing consideration of out-of-court assertions, the Court concluded that a hearsay statement is admissible only if it bears adequate “indicia of reliability.”⁴⁴ “Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”⁴⁵ Underlying this definition was the overarching

³⁸ *Id.* at 242. “[T]he authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming.” *Id.*

³⁹ The proposed impeachment consisted of testimony from two witnesses claiming that the now-deceased declarant had admitted to not seeing Mattox commit the shooting, that he had lied under oath at trial, and that he had so testified because of threats made against him. *Id.* at 244-45.

⁴⁰ *Id.* at 250.

⁴¹ *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). *See also* *Barber v. Page*, 390 U.S. 719, 722-25 (1968) (approving of the use of prior testimony but only upon a showing that the witness was now unavailable); *Pointer v. Texas*, 380 U.S. 400, 405-08 (1965) (acknowledging the admissibility of prior testimony of a now-unavailable witness but conditioning it on the opportunity for counseled cross-examination at the earlier proceeding).

⁴² *California v. Green*, 399 U.S. 149, 161 (1970).

⁴³ 448 U.S. 56 (1980).

⁴⁴ *Id.* at 66.

⁴⁵ *Id.*

concern of evidentiary *accuracy* and the assumption that as a general practice adversary testing was essential to the truth-determining process.⁴⁶

Although the unavailability pre-condition of *Roberts* was soon to be diminished⁴⁷ and then largely jettisoned (other than for prior testimony)⁴⁸ the test mandating “reliable” hearsay stood for nearly a quarter century. Its demise, although hinted at by expressions of dissatisfaction from some members of the Court⁴⁹ and urged by some in academia,⁵⁰ was not clearly on the table when, in 2004, the Court decided *Crawford*.

The facts of *Crawford* are fairly simple. Crawford was charged with the stabbing of one Lee, in Lee’s apartment, with Crawford’s wife Sylvia present.⁵¹ The defense was that Lee had reached into his pocket and pulled what might be a weapon *before* Crawford struck; but Sylvia Crawford had told police, in a statement tape-recorded at police headquarters the night of the crime, that she saw nothing in Lee’s hands at the time of the stabbing.⁵² Because Crawford was able to invoke a state statutory privilege⁵³ and prevent Sylvia from being called as a prosecution witness, the state responded by presenting her taped interview.⁵⁴

The Court accepted *Crawford* as an invitation to reconsider “the original meaning of the Confrontation Clause.”⁵⁵ After a lengthy exegesis of what the Court propounded⁵⁶ as the historic origins of the Clause, two conclusions were drawn. The first was that “the principal evil at which the Confrontation Clause

⁴⁶ *Id.* (stating that a signal purpose of the Confrontation Clause is “to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence”).

⁴⁷ *See* United States v. Inadi, 475 U.S. 387, 394-95 (1986) (limiting *Roberts*’ unavailability requirement to the admission of prior testimony, and declining to apply it to co-conspirator statements).

⁴⁸ *White v. Illinois*, 502 U.S. 346, 356-57 (1992) (rejecting an unavailability requirement for spontaneous utterances and states made for purposes of medical treatment because, *inter alia*, “adversarial testing can be expected to add little to its reliability”).

⁴⁹ *See, e.g.*, *Lilly v. Virginia*, 527 U.S. 116, 140-41 (1999) (Breyer, J., concurring) (raising the need for a re-evaluation of the relationship between Confrontation Clause theory and hearsay analysis); *White v. Illinois*, 502 U.S. 346, (1992) (Thomas, J., concurring) (“The truth may be that this Court’s cases unnecessarily have complicated and confused the relationship between the constitutional right of confrontation and the hearsay rules of evidence.”).

⁵⁰ *See, e.g.*, AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 125-131 (1997); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 *GEO. L.J.* 1011 (1998). Both of the forgoing were cited by the Court in *Crawford v. Washington*. *See Crawford*, 541 U.S. at 61 (2004). *See also* Christopher B. Mueller, *Tales Out of School – Spillover Confessions and Against-Interest Statements Naming Others*, 55 *U. MIAMI L. REV.* 929, 949 (2001) [hereinafter Mueller].

⁵¹ *Crawford*, 541 U.S. at 38.

⁵² *Id.*

⁵³ WASH. REV. CODE ANN. § 5.60.060 (West 2008) (“A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband . . .”).

⁵⁴ *Crawford*, 541 U.S. at 40.

⁵⁵ *Id.* at 42.

⁵⁶ As noted above, *supra* note 6, the accuracy of the Court’s view of history has been challenged.

was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.⁵⁷ Hearsay in this class was denominated “testimonial.” Second, “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁵⁸

The *Crawford* majority concluded that Sylvia Crawford’s police-station interview was paradigmatically “testimonial,” and thus subject to exclusion.⁵⁹ It did not, however, provide a comprehensive definition of “testimonial,” instead identifying the “core” class of such statements:

[E]x parte in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.⁶⁰

Pertinent to this Article, however, is the Court’s treatment of *Roberts*. The reliability rule was eliminated for “testimonial” statements, where the determinant instead was to be whether a meaningful opportunity for cross-examination had been provided.⁶¹ For “nontestimonial” hearsay, the rule apparently remained an option: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”⁶²

To the two justices joining in concurrence, however, the message was clear: *Roberts* had been overruled.⁶³ Two years later, the Court returned to *Crawford* and began the thorny process of fleshing out the dividing line between testimonial and nontestimonial hearsay.⁶⁴ In the context of two domestic

⁵⁷ *Crawford*, 541 U.S. at 50.

⁵⁸ *Id.* at 53-54.

⁵⁹ *Id.* at 68.

⁶⁰ *Id.* at 51-52 (citations and internal quotations omitted).

⁶¹ *Id.* at 61-62.

Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 61.

⁶² *Id.* at 68.

⁶³ *Id.* at 69 (Rehnquist, C.J., concurring) (“I dissent from the Court’s decision to overrule *Ohio v. Roberts*.”).

⁶⁴ See *Davis v. Washington*, 547 U.S. 813 (2006).

violence prosecutions, the Court distinguished between statements made to authorities while an emergency was ongoing (nontestimonial) and statements made describing a past event once the emergency had dissipated (testimonial).⁶⁵ Again, the Court explicitly declined to provide an “exhaustive classification”⁶⁶ of testimonial and nontestimonial hearsay. But the Court took pains to address the application of the Confrontation Clause to nontestimonial hearsay, and held it to be outside the reach of that constitutional provision:

We must decide, therefore, whether the Confrontation Clause applies only to testimonial hearsay; and, if so, whether the recording of a 911 call qualifies A limitation [of the Confrontation Clause to testimonial hearsay] so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its “core,” but its perimeter.⁶⁷

That nontestimonial hearsay was no longer subject to Confrontation Clause restrictions was reiterated twice subsequent to *Davis*. In *United States v. Lopez-Gonzalez*,⁶⁸ the Court explained that: “We rejected that argument [that hearsay had to be reliable] . . . in *Crawford*, saying that the Confrontation Clause ‘commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.’”⁶⁹

The proposition was restated more emphatically, by a unanimous Court, in 2007. “The *Crawford* rule is flatly inconsistent with the prior governing precedent, *Roberts*, which *Crawford* overruled.”⁷⁰ What the Court did not say, and has yet to discuss, is whether *any* Constitutional limits restrict the definition and admission of nontestimonial hearsay in criminal trials.⁷¹

⁶⁵ *Id.* at 822.

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.

Id.

⁶⁶ *Id.*

⁶⁷ *Id.* at 823-24.

⁶⁸ 548 U.S. 140 (2006).

⁶⁹ *Id.* at 146 (quoting *Crawford*, 541 U.S. at 61 (2004)) (citations omitted).

⁷⁰ *Whorton v. Bockting*, 127 S. Ct. 1173, 1181 (2007).

⁷¹ The importance of this question grew in light of *dicta* in the Court’s 2008 decision in *Giles*, 128 S. Ct. 2678, 2692-2693 (2008), which seemingly excluded *all* civilian-to-civilian statements from the reach of the Confrontation guarantee. “Statements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules[.]”

III. THE COURTS' VARIEGATED DUE PROCESS JURISPRUDENCE

Application of the Due Process clause has set a substantive reliability threshold for the admission of inculpatory evidence, for determining the fairness and the adequacy of the proof of conviction in a criminal trial, and for evidentiary admissibility and sufficiency determinations in quasi-criminal proceedings. While the jurisprudence in these areas is uneven, and decisions are made in one category without reference to holdings in others, an overarching theme emerges – there is a base level of fairness and reliability that must accompany a criminal prosecution.

A. Evidentiary Sufficiency

The Court's first foray into evidentiary sufficiency as a Due Process concern occurred in 1960, when it addressed the conviction, for disorderly conduct, of a man who sat in a café and shuffle-danced on the street corner. Finding a complete absence of proof, the Court held that: "Just as 'conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."⁷²

The "no evidence" standard enunciated in *Thompson* pre-dated the Court's application of the "beyond a reasonable doubt" standard to state court prosecutions. In *In re Winship*,⁷³ the Court held that the Due Process Clause mandated a base level of *factual* reliability in guilt determinations in criminal cases:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. . . . [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.⁷⁴

Winship commanded a revisiting and transformation of *Thompson*'s "no evidence" standard.⁷⁵ This was accomplished in 1979, when the Court decided *Jackson v. Virginia*⁷⁶ and had to confront a record that "was not totally devoid of evidence of guilt."⁷⁷ Finding that *Winship* had altered the landscape first assayed

⁷² *Thompson v. Louisville*, 362 U.S. 199, 206 (1960) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937)).

⁷³ 397 U.S. 358 (1970).

⁷⁴ *Id.* at 363-64.

⁷⁵ Edward J. Imwinkelried, *Jackson v. Virginia: Reopening the Pandora's Box of the Legal Sufficiency of Drug Identification Evidence*, 73 KY. L.J. 1, 22 (1984) (detailing how lower courts, and Justice Stewart in a 1977 dissent from denial of certiorari, "viewed *Winship* as a deathknell for *Thompson*").

⁷⁶ 443 U.S. 307 (1979).

⁷⁷ *Id.* at 315.

in *Thompson*,⁷⁸ the Court set forth the requisite standard of evidentiary sufficiency: “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁷⁹ This was held to be the threshold “necessary to guarantee the fundamental protection of due process of law.”⁸⁰

Even though the *Jackson* test, rarely met by defendants challenging their convictions,⁸¹ is one of sufficiency rather than a determinant of evidentiary admissibility, its reliability rationale is relevant to those determinations as well. This linkage is found in decisional law rejecting reliance on questionable hearsay as the sole basis for conviction (although again with restrictive application of the principle). Several courts have found that an unsworn, oral prior statement of a witness that is inconsistent with the in-court testimony of the declarant, and is the only inculpatory evidence, cannot meet *Jackson*’s mandate of serving as proof that a rational trier of fact could deem sufficient.⁸² The rationale is simple: the jury must guess, without adequate foundation, as to which statement is true.⁸³ Albeit a rule of limited applicability,⁸⁴ it embodies the Due Process guarantee precluding unreliable adjudications, and, in particular, convictions founded upon unsworn hearsay.⁸⁵

⁷⁸ *Id.* (“The constitutional problem addressed in *Winship* was thus distinct from the stark problem of arbitrariness presented in *Thompson v. Louisville*.”).

⁷⁹ *Id.* at 319.

⁸⁰ *Id.*

⁸¹ The test is defined, alternatively, as “stringent,” *United States v. Morissett*, 49 Fed. Appx. 334, 339 (2d Cir. 2002), or “difficult,” *United States v. Benitez-Augustin*, 61 Fed. Appx. 337, 339 (9th Cir. 2003).

⁸² *See, e.g., United States v. Bahe*, 40 F. Supp. 2d 1302, 1308 (D.N.M. 1998) (“[T]he majority of state courts to address the issue have gone so far as to adopt a per se rule that a prior inconsistent statement, recanted at trial, is alone insufficient to support a conviction.”).

⁸³ *Id.* at 1310.

The central difficulty with basing a conviction on nothing more than an out-of-court statement which has been recanted at trial is that the fact finder has no logical basis for determining which statement is true and may even be falsely persuaded by the presentation of the out-of-court statement.

Id.

⁸⁴ The rule is inapplicable where the unsworn, inconsistent statement helps corroborate other evidence or complete a picture. *United States v. Arnold*, 410 F.3d 895, 906 (6th Cir. 2005) (Out-of-court statements “may be used to corroborate evidence which otherwise would be inconclusive, may fill in gaps in the Government’s reconstruction of events, or may provide valuable detail which would otherwise have been lost through lapse of memory.”). It also may not apply when the statement, albeit inconsistent, has some purported *indiciu*m of reliability. *See, e.g., Nance v. State*, 629 A.2d 633, 643 (Md. 1993) (rejecting application of the principle when the prior statement “is reduced to writing and signed or otherwise adopted by him, and [the declarant] is subject to cross-examination at the trial where the prior statement is introduced”).

⁸⁵ *See Arnold*, 410 F.3d at 906. “This Court has previously noted the importance of the notions of fairness upon which our judicial system is based. Foremost among them is the ‘principle that man should not be allowed to be convicted on the basis of unsworn testimony.’” *Id.* (quoting *United States v. Shoupe*, 548 F.2d 636, 644 (6th Cir. 1977)).

B. Unreliable Eyewitness Testimony

Confronted with an historic record of wrongful convictions based upon unreliable eyewitness identifications,⁸⁶ the Court, in a series of cases between 1967 and 1976,⁸⁷ identified two Due Process thresholds for this category of evidence: an out-of-court identification would be inadmissible if the suggestivity of the identification process created a “substantial likelihood of misidentification,” and an in-court identification would be inadmissible if the suggestivity and lack of reliability created a “substantial likelihood of *irreparable* misidentification.”⁸⁸ An analogous standard applies where an in-court identification follows an out-of-court identification conducted in violation of the defendant’s Fourth⁸⁹ or Sixth⁹⁰ Amendment rights: the identification has to have a reliable source in the initial encounter between criminal and witness, rather than be a product of the pre-trial identification process.⁹¹

⁸⁶ The Court’s acknowledgement that “the vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification,” *United States v. Wade*, 388 U.S. 218, 228 (1967), came in the middle of a century of scholarship and governmental studies confirming that eyewitness testimony was the most prevalent cause of wrongful conviction. The *Wade* Court cited to many studies. *See id.* at n.6. Since 1967, the documentation of this phenomenon has persisted. *See* Jules Epstein, *Tri-State Vagaries: The Varying Responses of Delaware, New Jersey, and Pennsylvania to the Phenomenon of Mistaken Identifications*, 12 WIDENER L. REV. 327, 330-33 (2006) (summarizing the historic awareness of the risk and actuality of mistaken identification). As of 2007, there have been more than 200 DNA exonerations in the United States, with eyewitness identification a major contributing factor in roughly three quarters of those cases. Innocence Project – Understand the Causes, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited June 15, 2007).

⁸⁷ *See* *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

⁸⁸ *E.g.*, *Biggers*, 409 U.S. at 198. Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is “a very substantial likelihood of irreparable misidentification.” While the phrase was coined as a standard for determining whether in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of “irreparable” it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. *Id.* (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)) (citations omitted).

⁸⁹ *See, e.g.*, *United States v. Crews*, 445 U.S. 463, 472 (1980) (holding that an out-of-court identification may be suppressed as the fruit of an unlawful arrest or stop).

⁹⁰ *See, e.g.*, *Gilbert*, 388 U.S. at 273; *Wade*, 388 U.S. at 224 (barring admission of uncounseled corporeal identification procedures conducted post-indictment).

⁹¹ *Moore v. Illinois*, 434 U.S. 220, 226 (1977).

Among the factors to be considered in making this determination are the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant’s actual description, any identification prior to lineup of another person, the identification by picture of the

The limitations of this Due Process standard are many. It is arguably applicable only to police or government conducted identification procedures, and thus without relevance to setting evidentiary thresholds where there is no governmental role in securing the proof, although there is some scholarship⁹² and decisional law⁹³ applying the test to all identification evidence (even in the absence of police conduct that contributed to suggestivity).

A second limitation is in assessing whether the “substantial likelihood of mistaken identification” or “substantial likelihood of *irreparable* mistaken identification” is the proper analog for application to other types of evidence.⁹⁴ Yet the distinction may not be one of degree but simply be descriptive of where in the criminal investigative and trial process the unreliable identification occurs: pre-trial, it may lead to arrest and subsequent investigation (and thus in some sense be *reparable*); while at trial it is the end-game in the process, and thus results in the *irreparable* harm of conviction and sentence.⁹⁵

The efficacy of the Court’s test for evaluating eyewitness reliability has been challenged as scientifically flawed⁹⁶ and sympathetic to only extreme⁹⁷ suggestiveness. And in application the threshold is remarkably difficult to meet.⁹⁸ Yet the a-scientific nature and stringency of the ultimate test do not

defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Id. at n.2 (quoting *Wade*, 338 U.S. at 241).

⁹² See, e.g., Evan J. Mandery, *Legal Development: Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 404 (1996) (urging Due Process protection against the suggestiveness inherent in in-court identifications).

⁹³ See, e.g., *Commonwealth v. McGaghey*, 507 A.2d 357, 359 (Pa. 1986) (excluding identification as unreliable without regard to any state action).

⁹⁴ For hearsay, the comparable standard could only be expressed as whether the introduction of hearsay holds a “substantial likelihood of mistaken [fact determination].” *Biggers*, 409 U.S. at 198.

⁹⁵ That this timeline distinction is what the Court meant is admittedly not clear. In *Gilbert v. California*, 388 U.S. 263, 274 n.3 (1967), the Court recognized that out-of-court identifications may themselves stand as substantive proof of guilt and be so used at trial, yet the observation occasioned no discussion of which standard would apply.

⁹⁶ See, e.g., Gary L. Wells, *What is Wrong with the Manson v. Braithwaite Test of Eyewitness Identification Accuracy?*, <http://www.psychology.iastate.edu/faculty/gwells/Mansonproblem.pdf> (last visited ?)

⁹⁷ Ruth Yacona, Comment, *Manson v. Brathwaite: The Supreme Court’s Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539, 561 (2006). “[The Court’s] logic [in *Manson*] necessarily assumes that the human memory is a dependable truth-finding tool. . . . The Court did not understand that even the slightest suggestive procedure . . . can make the original memory ‘irreparable,’ and lost forever because of its inherent malleability.” *Id.*

⁹⁸ In *Biggers*, the Court emphasized that it found a Due Process violation in only one case (where police had shown the victim was the suspect in three identification procedures and thus made the ultimate identification “all but inevitable”), while approving identification testimony where the opportunity to observe was substantially limited – “an in-court identification by a witness who had a fleeting but ‘real good look’ at his assailant in the headlights of a passing car.” *Biggers*, 409 U.S. at 197. Courts have found identifications to comport with the Due Process command where the viewing is fleeting and/or the description minimal. See, e.g., *Garvey v. Duncan*, 485 F.3d 709, 712 (2d Cir. 2007) (opportunity to observe less than one minute, witness unable to provide any description beyond “dark clothing”); *United States v. Simoy*, 998 F.2d 751 (9th Cir. 1993) (view

distract from the Due Process concern – the Court wanted identification testimony that was drawn from the witness’s observations at the crime scene, and not the product of subsequent events. “Suggestive confrontations are disapproved because they increase the likelihood of misidentification.”⁹⁹ This is a test of personal knowledge and probativeness, as well as of “fairness.”¹⁰⁰

The Court did make clear that this test allows evidence of questionable merit:

Short of [the case involving a very substantial likelihood of irreparable misidentification], such [eyewitness] evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.¹⁰¹

Yet this acknowledgment came within a context – the percipient eyewitness would be subject to meaningful cross-examination. “The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method’s potential for error.”¹⁰² Read in this light, the Court’s Due Process concern can be re-stated as follows:

- Eyewitness identification testimony is particularly potent evidence.¹⁰³
- Given that potency, it must be based on actual observation and have value to the fact finder.
- Questionable eyewitness evidence derived from first-hand observation is admissible because it is subject to cross-examination.
- Unreliable eyewitness evidence must be excluded.

The eyewitness testimony standard has one additional component of significance to the articulation of a Due Process standard for evaluating non-testimonial hearsay – the determination of admission or exclusion should be

limited to five seconds, from forty-five feet away, in a dark breezeway); *People v. McCoy*, 397 N.E.2d 79, 88 (Ill. App. Ct.1979) (witness “looked very hard” at perpetrator for 2 to 5 seconds before slamming door).

⁹⁹ *Biggers*, 409 U.S. at 198.

¹⁰⁰ *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977) (“The standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment.”).

¹⁰¹ *Id.* at 116.

¹⁰² *Simmons v. United States*, 390 U.S. 377, 384 (1968).

¹⁰³ *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (equating the power of identification evidence with that of a confession).

made without regard for the existence of corroborating evidence (e.g., the suspect's possession of proceeds from the crime, or a confession).¹⁰⁴

C. Prosecutorial Misconduct

The Court's Due Process jurisprudence has addressed a range of prosecutorial misconduct (usually alleged to occur in closing arguments) ranging from the deliberate and knowing presentation and use of false evidence¹⁰⁵ to more subtle behavior where an improper inference may be drawn from the closing argument.¹⁰⁶ The former has been condemned without regard to the weight of the remaining evidence,¹⁰⁷ at least if the error is left uncorrected by a curative instruction.¹⁰⁸

For more nuanced error, the Court has also applied a two-tiered standard of scrutiny, distinguishing between prosecutorial argument that deprives an accused of a right specified in the Bill of Rights, and other more general misconduct: while the former requires the Court to take "special care" that the Constitutional

¹⁰⁴ See *Manson*, 432 U.S. at 116 (emphasizing that extrinsic corroboration of the validity of the identification "plays no part in our analysis"). Lower courts have split on this issue, with some adhering to *Manson's* directive. See, e.g., *Abdur Raheem v. Kelly*, 257 F.3d 122, 140 (2d Cir. 2001), cert. denied, 534 U.S. 1118 (2002); *United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995). Others consider the presence of corroborating evidence in making the threshold determination of reliability. See, e.g., *United States v. Wilkerson*, 84 F.3d 692, 695 (4th Cir. 1996); *United States ex rel. Kosik v. Napoli*, 814 F.2d 1151, 1158 (7th Cir. 1987). See also Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097 (2003). These latter cases do not undermine the determination that extrinsic corroboration cannot be considered. Beyond the fact that neither court cites to *Manson's* controlling language, the statement in *Wilkerson* permitting consideration of external corroboration is *dictum*, as there was no proof of initial suggestivity, and the precedent cited by the Fourth Circuit actually involved legal sufficiency determinations rather than suppression standards. *Wilkerson*, 84 F.3d at 695 (citing *United States v. DiTommaso*, 817 F.2d 201, 214 n.17 (2d Cir. 1987); *United States v. Bell*, 812 F.2d 188, 193 (5th Cir. 1987)) (identification may be reliable in the context of all the circumstances and evidence). Similarly, *Napoli* omits any mention of the *Manson* requirement that the determination be made without regard to external factors.

¹⁰⁵ See, e.g., *Miller v. Pate*, 386 U.S. 1, 5 (1967) (prosecutor, knowing clothing to have paint stains, argued to jury that the stains were the blood of the deceased).

¹⁰⁶ See, e.g., *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974). In *Donnelly*, the prosecutor's closing argument implied that the defendant had sought out a guilty plea to a lesser charge, when in fact no such overture ever was made. *Id.* at 643. A curative instruction directed jurors to treat the case as if the offending argument had never been made. *Id.* at 644.

¹⁰⁷ See, e.g., *Pate*, 386 U.S. at 7. "More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. There has been no deviation from that established principle." *Id.* (citations omitted).

¹⁰⁸ See, e.g., *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (emphasizing that comments depriving a defendant of a specific constitutional right "if left uncorrected, might so affect the fundamental fairness of the . . . proceeding"). Although an Eighth Amendment case, the *Caldwell* Court applied *Donnelly* and its Due Process analysis. *Id.*

right has not been infringed upon,¹⁰⁹ more general attacks are judged using a harmless error or similar standard. The determination to be made is whether, in the particular trial, the harm of the comment was sufficient to “infect[] the trial with unfairness.”¹¹⁰

The *Donnelly* test has limited relevance to a Due Process standard for assessing hearsay evidence. While reflective of the Court’s concern for a fair trial, it responds to an antithetical circumstance – proper trial evidence corrupted by extraneous, ambiguous argument with a curative instruction.¹¹¹ Indeed, the *Donnelly* Court acknowledged that its test could not apply to impermissible evidence: “[H]ere there was neither the introduction of specific misleading evidence important to the prosecution’s case in chief nor the nondisclosure of specific evidence valuable to the accused’s defense.”¹¹²

Thus, while *Donnelly* affirms the Court’s concern with fundamental fairness in trials, its harmless component (one that analyzes the challenged evidence against the remainder) offers little help in determining a Due Process standard for *admitting* evidence, particularly evidence that might “mislead.” At best, it affirms the baseline of a jury deciding a case on proper evidence *and on no more*.

D. Sentencing and Probation/Parole Revocation Proceedings

It has long been the law that a sentencing court may consider types of information inadmissible at a criminal trial.¹¹³ It is in these post-trial

¹⁰⁹ See *Donnelly*, 416 U.S. at 643 (“When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them.”).

¹¹⁰ *Id.*

But here the claim is only that a prosecutor’s remark about respondent’s expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention.

Id. See also *Darden v. Wainwright*, 447 U.S. 168, 181 (1986) (applying *Donnelly*); Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479 (2006); Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There’s More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298 (1988).

¹¹¹ See, e.g., *Donnelly*, 416 U.S. at 644.

¹¹² *Id.* at 647.

¹¹³ See *Williams v. New York*, 337 U.S. 241, 246 (1949) (distinguishing between a trial’s “strict evidentiary procedural limitations” and a sentencing judge’s “wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law”). Professor Penny White has argued, cogently, that this is a-historic and that the Sixth Amendment’s “in any criminal prosecution” language should extend to sentencing proceedings. Penny J. White, “*He Said,*” “*She Said,*” and *Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 403 (2006). Because capital sentencing proceedings have some aspects of a trial, see *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003); *Ring v. Arizona*, 536 U.S. 584, 609 (2002), some courts

proceedings, ones appurtenant to criminal trials but where, indisputably, the right of Confrontation is inapplicable,¹¹⁴ that Due Process jurisprudence shows that a baseline of reliability still applies in determining evidentiary admissibility and may even mandate some entitlement to cross-examination. This is found in a trilogy of cases: *Specht v. Patterson*,¹¹⁵ *Gardner v. Florida*,¹¹⁶ and *Morrissey v. Brewer*.¹¹⁷

In *Specht*, the Court confronted a hybrid proceeding, one that followed a criminal conviction but subjected the defendant to an enhanced sentence under a habitual sex offender provision.¹¹⁸ Significantly, the Court did not denominate this separate proceeding a criminal trial; rather, it concluded that the nomenclature was unimportant in assessing what process was due. “These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause.”¹¹⁹ The Court’s conclusion was that, in such circumstances, what Due Process requires is counsel, an opportunity to be heard, the opportunity to “be confronted with witnesses against him [and] have the right to cross-examine.”¹²⁰

Specht has been read narrowly, with the Court emphasizing that it presented “a radically different situation” than a typical sentencing.¹²¹ Yet the Court continues to characterize it as a sentencing matter, rather than as a *de facto* trial,¹²² making its holding relevant in assessing due process restrictions on evidentiary admissibility at a criminal trial with its burden of proof.¹²³ While a

recently have found a Confrontation right at capital sentencing trials, at least as to proof of aggravating factors. See *People v. Wilson*, 114 P.3d 758, 780 (Cal. 2005) (applying *Crawford* to a penalty hearing hearsay claim); *Lewis v. Woodford*, 2005 U.S. Dist. LEXIS 23686, at *3 (E.D. Cal. 2005) (same); *United States v. Bodkins*, 2005 U.S. Dist. LEXIS 8747, at *12-13 (W.D. Va. 2005). But see *Summers v. State*, 148 P.3d 778, 782 (Nev. 2006) (applying *Williams* and finding no Confrontation right at a penalty trial).

¹¹⁴ *Mitchell v. United States*, 526 U.S. 314, 337 (1999) (Scalia, J., dissenting).

¹¹⁵ 386 U.S. 605 (1967).

¹¹⁶ 430 U.S. 349 (1977).

¹¹⁷ 408 U.S. 471 (1972).

¹¹⁸ *Specht*, 386 U.S. at 607.

The Sex Offenders Act may be brought into play if the trial court ‘is of the opinion that any . . . person [convicted of specified sex offenses], if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill.’ He then becomes punishable for an indeterminate term of from one day to life.

Id. (citations omitted).

¹¹⁹ *Id.* at 608.

¹²⁰ *Id.* at 610.

¹²¹ *Almendarez-Torres v. United States*, 523 U.S. 224, 241-42 (1998).

¹²² *Id.*

¹²³ As one commentator emphasizes, “it is significant that [*Specht*] discussed confrontation as a due process right rather than looking to the text of the Confrontation Clause.” Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of Crawford at Sentencing After Booker*, 37 McGEORGE L. REV. 589, 595 (2006).

right of cross-examination may not follow, a concern over reliability of hearsay at this non-trial proceeding remains core.¹²⁴

Gardner, a capital trial, involved a Florida sentencing process where a jury could recommend the punishment but a judicial override was permitted. Although the jury recommended a sentence of life imprisonment, the judge determined otherwise, making explicit reliance on a pre-sentence report available to the court but not to Gardner or his counsel.¹²⁵ After distinguishing the 1949 holding in *Williams v. New York*¹²⁶ on the ground that Williams and his counsel did not dispute the facts in the pre-sentence report (which were disclosed in open court),¹²⁷ the Court emphasized the need for a defendant *at sentencing* to be able to address “the quality, as well as the quantity, of the information on which the sentencing judge may rely.”¹²⁸ Of particular significance to the Court was the risk of un-examinable hearsay: “Assurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip, and may imply a pledge not to attempt independent verification of the information received.”¹²⁹ The Court’s ultimate determination was to reverse a death sentence imposed *to some extent* “on the basis of information that he had no opportunity to deny or explain.”¹³⁰

Due process rights to ensure evidentiary reliability have also been found to apply in parole revocation proceedings, long after a criminal prosecution has concluded and clearly in a circumstance beyond the reach of the Sixth Amendment’s confrontation right.¹³¹ In *Morrissey v. Brewer*, the Court set minimum standards because of the “grievous loss”¹³² attendant upon a revocation of parole and because both the parolee and society have “an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole.”¹³³

The *Morrissey* Court guaranteed a right of cross-examination absent “specific good cause” for not allowing confrontation, yet simultaneously allowed use of *some* hearsay: “It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.”¹³⁴ This caveat does not

¹²⁴ See, e.g., *United States v. Beaulieu*, 893 F.2d 1177, 1181 (10th Cir. 1990) (limiting *Specht* to cases where “sentencing amounts to an additional criminal conviction” but emphasizing that hearsay use at a sentencing hearing may not be unfettered but, instead must be “reliable hearsay . . . to determine the appropriate punishment”).

¹²⁵ *Gardner v. Florida*, 430 U.S. 348, 353 (1977).

¹²⁶ 337 U.S. 241 (1949).

¹²⁷ *Gardner*, 430 U.S. at 356.

¹²⁸ *Id.* at 359.

¹²⁹ *Id.*

¹³⁰ *Id.* at 362. Cf. *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (overturning a sentence “predicated on misinformation or misreading of court records”).

¹³¹ See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972)

¹³² *Id.* at 481.

¹³³ *Id.* at 484.

¹³⁴ *Id.* at 489.

seem to address reliability determinations but, rather, cross-examination, as it follows the Court's earlier command that the process be sufficient to ensure that there be no "erroneous" revocation.¹³⁵ And *Morrissey* continued a consistent demand – a threshold of evidentiary reliability and testing¹³⁶ to ensure that no erroneous adjudication results.

This same concern has required Due Process limitations on the evidence admitted in deportation proceedings, a completely non-criminal process. Although the United States Supreme Court has not set forth an evidentiary threshold,¹³⁷ Courts of Appeals have required a level of reliability analogous to that in sentencing and parole revocation hearings.¹³⁸ Clearly, the evidentiary reliability demanded by the Due Process guarantee in sentencings, parole revocations, and immigration proceedings can be no less at the criminal trial.

¹³⁵ Professor Lininger advocates use of hearsay in parole revocation cases where the alleged violation is an act of domestic violence and the abuse victim refuses or fails to appear. Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 313 (2006). Yet even his proposal recognizes that hearsay use must be limited by Constitutional commands, and his proposed legislation urges that in any case where hearsay is to be used there must be "notice to the defendant in advance of the hearing, so that the defendant can prepare to meet the government's hearsay evidence and perhaps subpoena the declarants himself." *Id.*

¹³⁶ The Courts of Appeals have recognized the dual Due Process requirements of reliability and "testability" for admitting evidence at a sentencing proceeding. *See, e.g.* *United States v. Kelley*, 446 F.3d 688, 692-93 (7th Cir. 2006); *United States v. Hall*, 419 F.3d 980, 987 (9th Cir. 2005) ("[L]ong-standing exceptions to the hearsay rule that meet the more demanding requirements for criminal prosecutions should satisfy the lesser standard of due process accorded the respondent in a revocation proceeding."); *Hatch v. Oklahoma*, 58 F.3d 1447, 1465 (10th Cir. 1995) (admitting evidence of unadjudicated offenses at a capital case sentencing where there is the opportunity for "cross-examination and contrary evidence by the opposing party"); *United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir. 1984) (collecting cases and affirming use of "out-of-court information" at sentencing "so long as the defendant is afforded an opportunity to refute it, and it is reliable"). The same requirements have been held applicable at proceedings to revoke supervised release. *United States v. Perez*, 526 F.3d 543, 548 (9th Cir. 2008) ("given the particular facts of this case, the admission of this evidence without allowing Perez to cross-examine the laboratory technician was error.").

¹³⁷ The Court has issued a general condemnation of the unbridled use of hearsay in deportation proceedings. *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945) (criticizing the substantive use of inconsistent statements as substantive proof because "[s]o to hold would allow men to be convicted on unsworn testimony of witnesses – a practice which runs counter to the notions of fairness on which our legal system is founded").

¹³⁸ *See, e.g.*, *Felzcerk v. INS*, 75 F.3d 112, 115-117 (2d Cir. 1996) ("[A] document's admissibility under the Federal Rules of Evidence lends strong support to the conclusion that admission of the evidence comports with due process."); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405-06 (3d Cir. 2003) ("Because the Federal Rules of Evidence do not apply in asylum proceedings, [t]he test for admissibility of evidence . . . is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.") (internal quotations omitted); *Bustos-Torres v. INS*, 898 F.2d 1053, 1055-56 (5th Cir. 1990) ("The test for admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.").

E. Forfeiture by Wrongdoing: Cross-examination Lost, but Reliability Still Demanded

In cases where the defendant has forfeited the right of cross-examination of a hearsay declarant, the concern for a judicial determination of reliability is seemingly absent, particularly because decisional law has broad language defining this concept. Yet as this doctrine is examined, it is clear that a threshold of reliability is still a Due Process mandate.

Forfeiture,¹³⁹ enshrined in American law in 1879, is an equitable doctrine but one limited to the right of confrontation. That which is forfeited is the right to demand the declarant's presence and submission to the oath and to cross-examination:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.¹⁴⁰

The language of *Reynolds* supplies two conditions antecedent to the admission of hearsay evidence following a forfeiture: the consequence of the forfeiture must be "legitimate" and the evidence must be "supplied in some lawful way."¹⁴¹ *Reynolds* itself relied for precedent on cases where the evidence introduced had traditional and extensive hallmarks of reliability: the examination of a witness, under oath, by a coroner; a deposition taken under oath and in the presence of the accused; and testimony from a former trial.¹⁴² While *Reynolds* is not and cannot be limited to prior *examined* proof, the illustrative cases confirm that what is forfeited is confrontation, and not *Due Process* reliability.

Crawford confirmed the viability of *Reynolds*' forfeiture doctrine in expansive language. "[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability."¹⁴³ In 2006 the Court in *Davis* expanded upon this:

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not

¹³⁹ See *supra* note 8 and accompanying text.

¹⁴⁰ *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

¹⁴¹ *Id.* (emphasis added).

¹⁴² *Id.* at 158-59.

¹⁴³ *Crawford*, 541 U.S. at 62 (2004).

require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.”¹⁴⁴

The “reliability” concern extinguished by forfeiture, then, is the reliability *process* found in the Sixth Amendment – confrontation.¹⁴⁵ Yet the command of “integrity of the criminal-trial system”¹⁴⁶ is achieved by letting the jury hear [or read] that which the witness would have been permitted to testify to if her presence had not been precluded by conduct attributable to the accused, evidence from a named individual testifying from personal knowledge.¹⁴⁷

An examination of forfeiture cases decided subsequent to *Crawford* confirms that these two predicate conditions are uniformly met (if unspoken in the courts’ assessments of admissibility). Courts have permitted introduction of grand jury testimony of a witness with personal and direct knowledge of events¹⁴⁸ and statements made to friends and family admitting direct personal culpability and stating the declarant’s intent [state of mind].¹⁴⁹ The standard has been articulated by one court as admitting hearsay “statements that would have been admissible if [the absent witness] himself had made them on the witness stand, no more and no less.”¹⁵⁰

The process approved by the court of appeals in *White v. United States* is illuminative:

¹⁴⁴ *Davis v. Washington*, 547 U.S. 813, 833 (2006) (quoting *Crawford*, 541 U.S. at 62). The Court’s most recent forfeiture jurisprudence, *Giles*, 128 S. Ct. 2678, reaffirms that forfeiture extinguishes confrontation rights, at least where the forfeiting act was intended to procure the witness’ unavailability.

¹⁴⁵ That one is forfeiting a *confrontation* right and not all challenges to the admissibility of the evidence at issue is generally recognized. As the Advisory Committee Note explains in discussing the 1997 amendments to Rule 804: “Rule 804(b)(6) has been added to provide that a party forfeits the right to object *on hearsay grounds* to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.” FED. R. EVID. 804 advisory committee’s note on 1997 amendments. Commentary by Professors Saltzburg, Capra, and Martin echoes this limitation: what is waived, along with Confrontation, is “the parallel hearsay objection.” In 2008, the Court iterated this in *Giles*, 128 S. Ct. at 2686, emphasizing that forfeiture extinguished both confrontation and hearsay rights.

¹⁴⁶ *Davis*, 547 U.S. at 833.

¹⁴⁷ See FED. R. EVID. 602 (precluding witnesses from testifying to matters “unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter”). These two preconditions, that the declarant be identifiable and that there be evidence showing personal knowledge, are urged by this author as core components of a Due Process test for determining the admissibility of non-testimonial hearsay. See ‘ III, *infra*.

¹⁴⁸ See, e.g., *United States v. Montague*, 421 F.3d 1099, 1102 (10th Cir. 2005) (testimony of defendant’s wife regarding conduct of her husband that she personally witnessed).

¹⁴⁹ *United States v. Johnson*, 354 F. Supp. 2d 939, 963 (N.D. Iowa 2005).

¹⁵⁰ *United States v. White*, 116 F.3d 903, 913 (D.C. Cir. 1997)

At the preliminary hearing, the trial court heard testimony on the circumstances under which Williams made the statements to the police, whether they were based on first-hand knowledge, and how they were recorded. This was to serve as a basis for evidentiary objections later on at trial, which defense counsel were as free to make as if Williams had taken the stand.¹⁵¹

This recognition that evidentiary reliability outside of Confrontation concerns must be assessed when reviewing hearsay under the forfeiture doctrine is not an isolated one.¹⁵² The forfeiture doctrine, therefore, still presupposes testimony equivalent to that presented by a live witness – first-hand information

¹⁵¹ *Id.* at 913. Other factors, such as bias and motive, could be challenged by extrinsic proof and did not affect admissibility:

The factors which supposedly undermined Williams's reliability were standard imperfections for a witness of his sort--impure motives and side deals with another drug dealer from whom he had made undercover purchases. Rather than warranting wholesale exclusion, these objections were for the jury to consider in deciding what weight (if any) to give Williams's statements.

Id.

¹⁵² *See, e.g.,* United States v. Dhinsa, 243 F.3d 635, 655 (2d Cir. 2001) (collecting cases and maintaining that after finding forfeiture a court "must still perform the balancing test required under Fed. R. Evid. 403 in order to avoid the admission of facially unreliable hearsay"). One scholar, Professor Raeder, urges otherwise when the witness who has been dissuaded from appearing is a child who, had she appeared, would have been held incompetent and thus unable to give testimony. Myrna S. Raeder, *The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009, 1020 (2007). This argument is undeveloped in her comments, and proceeds with no analysis of how admitting testimony of a person deemed unable to give live testimony advances the truth-seeking process. Indeed, elsewhere in her article she defends the logic of excluding the testimony of a child who appears but is found to be incompetent:

I am not troubled by an approach that accepts that there is no justification for admitting the out-of-court statement of someone who could not testify to the same words at trial. Indeed, I think this is one of the reasons that so much child hearsay has been funneled into the excited utterance exception. Since the stress of the event is deemed to defeat the ability to lie, we need not rely on whether the individual child is competent because the general ability to discern and tell the truth is not at issue. Similarly, many courts recognize that statements introduced under medical exceptions are only admissible if the child understands the negative consequences of giving medical personnel false information, a concept intertwined with truthfulness.

Id. at 1012. In her article, Raeder's nuanced view mirrors that alluded to by the United States Supreme Court:

[T]he Confrontation Clause does not erect a per se rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. Although such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a per se rule of exclusion would not only frustrate the truthseeking purpose of the Confrontation Clause, but would also hinder States in their own enlightened development in the law of evidence.

Idaho v. Wright, 497 U.S. 805 (1990) (internal citations and quotations omitted).

from a declarant whose identity is known (and whose credibility can therefore be investigated and challenged).

G. Legislated Reliability

In contrast to the doctrine of forfeiture by wrongdoing, at least in terms of longevity, is the relatively recent trend to admit propensity evidence in sexual assault and molestation cases. Although a practice not involving hearsay, its significance to this Article and the determination of a Due Process standard for assessing novel hearsay rules is clear – for this is an arena where legislatures have “declared” evidence to be reliable, and courts have had to respond by assessing whether the rules and their application comply with Due Process requirements.

Federal Rules of Evidence 413¹⁵³ and 414¹⁵⁴ (and their civil case correlate, Rule 415), were drawn up and approved at least in part as a response to a public outcry over high-publicity sexual assault cases.¹⁵⁵ Adoption was strongly opposed by both the judicial¹⁵⁶ and scholarly¹⁵⁷ communities, with explicit concern over introducing an element of *unreliability* into the criminal

¹⁵³ FED. R. EVID. 413. Rule 413(a) provides, in pertinent part, that: “In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.”

¹⁵⁴ FED. R. EVID. 414. Rule 414, applicable to prosecutions for child sexual abuse, provides that: “In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.”

¹⁵⁵ See Michael S. Ellis, Comment, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, n. 128 (1998).

¹⁵⁶ See, e.g., FED. R. EVID. 413 advisory committee’s note on the Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases [hereinafter Judicial Conference Report]. As explained in the Report sent to Congress:

The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors. The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The committee’s report was unanimous except for a dissenting vote by the representative of the Department of Justice.

Id.

¹⁵⁷ In addition to the scholars who submitted comments to the Judicial Conference, law review articles challenged the wisdom of adopting such rules. See, e.g., Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1130-36 (1993). But see David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994).

adjudicative process.¹⁵⁸ The concern has been borne out by statistical studies of criminal recidivism rates, which confirm especially low sex offense re-arrest rates for convicted sex offenders in general,¹⁵⁹ although showing some correlation between specific sub-groups of offenders and re-commission of sexual offense crimes.¹⁶⁰ Here, the concern is reliability of verdict, as a low to non-existent correlation between prior conduct and recidivism invites conviction on an unreliable assumption – did it once, did it again.

Without acknowledgment of these data, courts have uniformly accepted legislative pronouncements of propensity evidence reliability as comporting with the requirements of Due Process.¹⁶¹ The Due Process command, however, is not ignored, as each provision has been upheld because of the authority of the trial judge to apply a Rule 403¹⁶² balance and exclude patently unreliable proof.¹⁶³

¹⁵⁸ As the Judicial Conference Report concluded:

[T]he new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. . . . A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

Judicial Conference Report, *supra* note 151.

¹⁵⁹ PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>. For a detailed review of the disconnect between the statistical evidence and the assumptions underlying Rules 413-415, see Charles H. Rose III, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 N.M. L. REV. 341 (2006).

¹⁶⁰ See, e.g., Center for Sex Offender Management, *Recidivism of Sex Offenders*, <http://www.csom.org/pubs/recidsexof.pdf> [hereinafter CSOM]; R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348 (1998); R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism, An Updated Meta-Analysis: Public Safety and Emergency Preparedness Canada* (2004).

¹⁶¹ See, e.g., *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998); *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (holding that, subject to the protections of Rule 403, Rule 413 did not violate the Due Process Clause); *United States v. Castillo*, 140 F.3d 874, 883 (10th Cir. 1998) (“application of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414”); *People v. Falsetta*, 986 P.2d 182, 189 (Cal. 1999) (rejecting a Due Process challenge to such evidence in part because such evidence has “too much” probative value); *People v. Donoho*, 788 N.E.2d 707, 720-21 (Ill. 2003) (following *Falsetta* and finding no Due Process violation in provision admitting propensity evidence). *But see State v. Burns*, 978 S.W.2d 759, 762 (Mo. 1998) (invalidating a propensity evidence provision under the Missouri constitution because it violated that document’s requirement that a person be tried only on the charged offense). Absent from any of these decisions is a reference to or acknowledgment of the apparent conflict between the legislative enactment and the statistics of recidivism.

¹⁶² Fed R. Evid 403. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.*

Although a Due Process threshold applies, it is decidedly low in these cases. As the Tenth Circuit explained in *Enjady*, “the district court must recognize the congressional judgment that Rule 413 evidence is “normally” to be admitted” when applying 403 scrutiny.¹⁶⁴ That low standard has caused consternation because 403 exclusion almost never follows a Government application to admit such evidence. As Professor Orenstein trenchantly noted: “[t]he balancing test of Rule 403, upon which the constitutionality of these sexual propensity rules purportedly rests, is a shadow of its true self in these instances.”¹⁶⁵

The rejection of Constitutional challenges to propensity rules has been built on two premises: that a legislative determination of reliability is accorded great weight, but that the Due Process command requires some oversight (after an *assumption* of reliability) to ensure no undue prejudice. How these prongs should play into the development of a Due Process test for the admissibility of non-testimonial hearsay is addressed below. Yet even these Rules arise from the presentation of first-hand witness testimony, evidence subject to cross-examination and adversarial testing.¹⁶⁶

IV. A SUGGESTED DUE PROCESS STANDARD

The consistency of Due Process jurisprudence mandates the conclusion that *some* Constitutional threshold determination for admissibility of non-testimonial hearsay must be made. It is in identifying the contours and components of this

¹⁶³ See, e.g., *Enjady*, 134 F.3d at 1433 (finding Rule 413 constitutional because the Rule 403 balancing test applies); *Kerr v. Caspari*, 956 F.2d 788, 790 (8th Cir. 1992) (finding state lustful disposition rule constitutional because evidence is subjected to the state equivalent of the Rule 403 test).

¹⁶⁴ *Enjady*, 134 F.3d at 1434. The “normal” standard of admissibility, as set by Congress, was an assumption of admissibility in virtually all cases. See 140 CONG. REC. H8,991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari).

In other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court’s authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect. . . . The presumption is in favor of admission.

Id. “The presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.” 140 Cong. Rec. S12,990 (daily edition, Sept. 20, 1994) (statement of Rep. Dole).

¹⁶⁵ Aviva Orenstein, *Deviance, Due Process, and The False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1491 (2005). Professor Orenstein’s analysis of decisional law concluded, for example, that the “Eighth Circuit, in particular, has rendered Rule 403 toothless and ineffectual.” *Id.*

¹⁶⁶ See *Enjady*, 134 F.3d 1427, 1433.

Rule 413(b) requires that the government disclose to defendant the similar crimes evidence to be offered no later than fifteen days before trial (unless shortened by court order). This notice period protects against surprise and allows the defendant to investigate and prepare cross-examination. It permits the defendant to counter uncharged crimes evidence with rebuttal evidence and full assistance of counsel.

Id. (citations omitted).

standard that the Court has only suggested guidance. Two facets are clear – absent a radical revisiting of the Confrontation right as redefined in *Crawford*, the threshold will not include a prerequisite of declarant unavailability or prior cross-examination, as the right to command a witness' presence and submission to questioning has been limited to instances of testimonial hearsay.

The path of least resistance would be to simply resurrect the reliability standard of *Ohio v. Roberts*¹⁶⁷ as a Due Process prerequisite and require either a long-standing hearsay exception or declaration-specific reliability criteria¹⁶⁸ as a condition of admissibility. Yet such an approach is inappropriate. First, to do so essentially 'freezes' the development of the law of hearsay, by requiring either no innovation or an incubation period of a century or more before new exceptions become historically accepted as reliable. Such rigidity is contrary to the assessment of the Court in *Crawford*, which recognized the right (and, perhaps, the need) for a flexible and kinetic approach to the development of the law of hearsay.¹⁶⁹

A second flaw is apparent in transferring the *Roberts* Confrontation analysis to a Due Process one. Two consistent values in Due Process jurisprudence are the avoidance of trial by rumor¹⁷⁰ and the need for first-hand knowledge from the declarant/witness.¹⁷¹ Yet hearsay admissible under the *Roberts* standard has been forgiving in both regards – the courts admit hearsay from unnamed, unidentified declarants,¹⁷² certainly the hallmark of rumor;¹⁷³ and the admission of such statements without clear proof of personal knowledge is the rule.¹⁷⁴

¹⁶⁷ 448 U.S. 56, 66 (1980) (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”). See also *supra* note 18 and accompanying text.

¹⁶⁸ The Court in *Idaho v. Wright*, 497 U.S. 805, 816 (U.S. 1990), described this as “a showing of particularized guarantees of trustworthiness.”

¹⁶⁹ *Crawford* stated that “[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Crawford*, 541 U.S. at 68.

¹⁷⁰ See *supra* note 125 and accompanying text.

¹⁷¹ See *supra* sections II.B, II.E, and II.F.

¹⁷² Under Federal Rules of Evidence 803, the availability of the declarant and his/her identity are immaterial to the admissibility determination. FED. R. EVID. 803. The *Roberts* test simply required that the assertion meet “a firmly rooted hearsay exception,” and imposed no additional mandate of proving the declarant’s identity. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Cf. *United States v. Inadi*, 475 U.S. 387 (1986) (eliminating any requirement of declarant unavailability for most hearsay other than prior testimony, and admitting the ‘firmly rooted’ co-conspirator hearsay statements).

¹⁷³ “Rumor” has been defined as, alternately, “talk or opinion widely disseminated with no discernible source [or] a statement or report current without known authority for its truth[.]” MERRIAM-WEBSTER ONLINE DICTIONARY (2008), available at <http://www.merriam-webster.com/dictionary/rumor> (last visited June 21, 2008).

¹⁷⁴ See *United States v. Short*, 1995 U.S. App. LEXIS 4684, at *8 (9th Cir. 1995). See also FED. R. EVID. 803 advisory committee’s note (stating that the foundation of firsthand knowledge “may appear from [the] statement itself or be inferable from circumstances”); *Miller v. Keating*, 754 F.2d 507, 511 (stating that “[d]irect proof of perception, or proof that forecloses all speculation is not

The *Roberts* standard has additional failings. As critiqued by the majority in *Crawford*, it is “unpredictable” and “amorphous.”¹⁷⁵ And, as set forth above,¹⁷⁶ it survives regardless of the dubiousness of its reliability predicates, e.g., that excitement or impending death engenders accuracy.¹⁷⁷

A. The Components of a Due Process Standard for Hearsay Reliability

What then are the essentials of a Due Process standard for admitting non-testimonial hearsay? The common threads of Due Process decisional law are three – no trial by rumor;¹⁷⁸ the capacity for adversarial testing;¹⁷⁹ and reliability/probativeness established solely by the circumstances surrounding the making of the statement and not by reference to extrinsic corroboration.

The defining aspect of a prohibition against trial by rumor should be a strong preference,¹⁸⁰ if not an absolute requirement, for the declarant to be identifiable by name. The Due Process command that there be no trial by rumor¹⁸¹ necessitates fact-finder and adversarial knowledge of who the declarant is, particularly to permit testing of the witness’ credibility. Indeed, the Court has

required” and that the substance of the statement itself may establish personal perception). For example, the statement “Lans did it” suffices, rather than “I saw Lans do it” as long as “personal knowledge of the facts may be inferred from the utterance itself.” *State v. Hoosman*, 2001 Iowa App. LEXIS 478, at *14 (Iowa Ct. App. 2001), *cert. denied*, 536 U.S. 909 (2002).

¹⁷⁵ *Crawford*, 541 U.S. at 63 (2004).

¹⁷⁶ See notes 20 and 21, *supra*.

¹⁷⁷ See, e.g., FED. R. EVID. 803(2) and 804(b)(2).

¹⁷⁸ See, e.g., *supra* text at note 125. The denial of the right to face and question one’s accuser at trial has been viewed as “call[ing] into question the ultimate ‘integrity of the fact-finding process.’” *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quoting *Berger v. California*, 393 U.S. 314, 315 (1969)).

¹⁷⁹ See, e.g., *supra* text accompanying notes 126 and 132.

¹⁸⁰ Although an absolute ban on hearsay from unnamed and unidentifiable declarants is the more efficient standard, there may be instances where the statement is clearly based on first-hand knowledge and the source has no bias or lack of capacity. Illustrative is when a witness comes in and says:

I saw the crime, and immediately after the shooting the person I was standing next to, a stranger to our town, ran with me to the victim. She spoke clearly and carefully as she gave medical attention to the victim. All she kept repeating was “the shooter had a fu manchu mustache.”

Parker v. State, 778 A.2d 1096, 1105 (Md. 2001) (observing cases from several jurisdictions). None of several recognized modes of impeachment – bias, lack of capacity, or prior inconsistent statement – would likely apply. Courts have recognized the importance of scrutinizing hearsay of unidentified declarants more stringently “to prove the requisite indicia of reliability.” *Id.*

¹⁸¹ The defense of “anonymous” hearsay often involves statements that are not in fact hearsay. Michael L. Seigel, *Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 933 (“A familiar example involves unidentified persons calling an alleged gambling house where a police raid is in progress and unsuspectingly placing bets with the police officer answering the phone.”). Yet such a statement is not intended as an assertion and instead stands as circumstantial proof of the enterprise. See, e.g., *United States v. Zenni*, 492 F. Supp. 464, 469 (E.D. Ky. 1980) (holding that unknown declarants’ statements placing bets over the telephone are not hearsay because the declarants did not intend to communicate this implied assertion).

treated this as the *sine qua non* for confronting the witness who testifies live: “[W]hen the credibility of a witness is in issue . . . [t]he witness’ name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.”¹⁸²

Certainly, the requirement cannot be less when the absent hearsay declarant is offering case-critical¹⁸³ information; for without a name, the capacity for adversarial testing¹⁸⁴ of the speaker’s contention is gone.¹⁸⁵

Concomitant with a determination of declarant identity must be a showing of personal knowledge.¹⁸⁶ Without the opportunity for cross-examination, it may be impossible to assess whether the hearsay declarant’s statement “Jules shot the victim”¹⁸⁷ is based on direct observation, repetition of hearsay, or conjecture, although in a proper case this predicate can be established circumstantially. The concern regarding personal knowledge is coextensive with the development of hearsay law and practice, with McCormick emphasizing that it is a requirement

¹⁸² *Smith v. Illinois*, 390 U.S. 129, 131 (1968) (citations omitted). Forbidding anonymous witness testimony is clearly the norm. *See, e.g., Alvarado v. Superior Court*, 5 P.3d 203, 217 n.10 (Cal. 2000) (collecting cases from numerous jurisdictions).

¹⁸³ The requirement of name/address disclosure may be less, at least in terms of *pre-trial* discovery, when the declarant’s evidence is overall “inconsequential.” *Id.*

¹⁸⁴ Such testing is available through application of Federal Rules of Evidence 806, which permits attacking “the credibility of the declarant . . . by any evidence which would be admissible for those purposes if declarant had testified as a witness . . .” FED. R. EVID. 806. As the Advisory Committee Note explains, the practice is grounded in the essentials of fairness, for the hearsay declarant is *de facto* a testifying witness whose “credibility should in fairness be subject to impeachment and support as though he had in fact testified.” FED. R. EVID. 806 advisory committee’s note.

¹⁸⁵ A separate issue that may plague criminal trials is the *timing* of disclosure. John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2135-38 (2000) (noting that federal rules governing the pre-trial discovery process in criminal cases permit delayed disclosure that may prevent effective investigation of the hearsay declarant whose very existence may not be known until a trial witness proffers hearsay evidence).

¹⁸⁶ FED. R. EVID. 602. The personal knowledge requirement is generally applied to all hearsay exceptions. It is deemed inapplicable to party admissions, but parties are present and thus know the declarant [themselves] and can respond to the evidence at issue. CHARLES T. MCCORMICK, MCCORMICK’S HANDBOOK OF THE LAW OF EVIDENCE § 263 (2d ed. 1972); 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1053 (J. Chadbourn rev. ed. 1972); *see also* J.F. Falknor, *Vicarious Admissions and the Uniform Rules*, 14 VAND. L. REV. 855, 860 (1961).

¹⁸⁷ An even more problematic illustration is the mother’s statement that “my son is involved in selling drugs.” The source of this knowledge is unstated and cannot even be established circumstantially unlike the shooting hypothetical, where the timing of the shooting and the making of the statement, and the witness’ proximity to the victim, may establish percipience circumstantially. This is not always the judicial response, which often permits the statement as “bootstrap” proof of the exciting event. *See, e.g., United States v. Brown*, 254 F.3d 454, 459 (3d Cir. 2001) (citing the “generally prevailing rule that an excited utterance may of itself be sufficient to establish the occurrence of the startling event”).

“more ancient than the hearsay rule.”¹⁸⁸ It remains the preferred method for ensuring the probativeness of evidence.¹⁸⁹ It is, again, emblematic of the concern of avoiding trial by rumor. The recognition of the need for proof of personal knowledge in hearsay declarants not in court¹⁹⁰ has some adherence in appellate jurisprudence. Illustrative is *Ash v. Reilly*,¹⁹¹ where the District Court carefully scrutinized the proof to conclude that:

An equally plausible reading of the record is that the group of people who were in front of 529 East 27th pointing at [Ash] heard some commotion from another room, or even from outside, and arrived in time to see Ash running down the street, but nothing more. Hearsay that is equally susceptible to the interpretation that the declarant was speculating or repeating information from another source does not bear sufficient circumstantial guarantees of trustworthiness to justify nonproduction of the declarant.¹⁹²

The problem here is less that of principle than of application. The rule has been stretched to assume personal knowledge without strong circumstantial

¹⁸⁸ MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE, *supra* note 186, § 247. In the context of the residual hearsay exception, the requirement of personal knowledge remains core in evaluating whether there are sufficient guarantees of trustworthiness. “In making this determination the trial court should consider [*inter alia*] . . . the extent to which the testimony reflects the declarant's personal knowledge. *United States v. Barlow*, 693 F.2d 954, 962 (6th Cir. 1982). *But see* Paul Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 KY. L.J. 841 (1986) (emphasizing the distinction between percipiency and ambiguity and noting that the hearsay cases focusing on personal knowledge address only the former concern).

¹⁸⁹ *See, e.g.*, Richard D. Friedman, *Conditional Probative Value: Neoclassicism Without Myth*, 93 MICH. L. REV. 439, 475 (1994) (proposing that Rule 602 be amended to require that “testimony concerning a matter shall be deemed to have probative value only to the extent that the witness has personal knowledge of the matter”); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 121-22 (1986) (proposing a relaxation of hearsay rules in civil cases but with the continuing mandate of personal knowledge for the declarant).

¹⁹⁰ This is the exception that may prove the rule. It is only the hearsay declaration of the party opponent, a person directly or vicariously present in court, that does not require the speaker to have personal knowledge. *See, e.g.*, Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 473 (2002) (“A key feature of the rule governing party admissions is that the declarant need not have personal knowledge.”). The primary rationale for this is that the declarant is present and, in the adversarial setting, capable of explaining that the statement was conjecture or supposition. FED. R. EVID. 801 advisory committee's note (“Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”). It is when the speaker is not present, and no explanation can be offered or elicited, that personal knowledge is a prerequisite to admissibility.

¹⁹¹ 433 F. Supp. 2d 37 (D.D.C. 2006), *appeal dismissed*, 2006 U.S. App. LEXIS 20504 (D.C. Cir. 2006).

¹⁹² *Ash*, 433 F. Supp. 2d at 46 (citations omitted). The witnesses' reported outcries were that “that's him” and that he [Ash] had perpetrated the assault. *Id.* By contrast, in *Commonwealth v. Harbin*, the declarant told police that she “saw everything . . . China and Terry did it.” *Commonwealth v. Harbin*, 760 N.E.2d 1216, 1220 (Mass. 2002) (emphasis added).

support. Most recently, the Tennessee Supreme Court permitted use of a dying declarant's opinion that a woman was probably behind a robbery-shooting because "the record suggests that the victim's identification of the Defendant is rationally based upon the perception of the victim."¹⁹³ In a more classic formulation, the statement "Lans did it" has been presumed to be based on personal knowledge because the declarant emerged from the crowd at the scene of the shooting and "because a declarant's personal knowledge of the facts may be inferred from the utterance itself."¹⁹⁴ Such bootstrapping is at odds with the prohibition against trial by rumor; and as the declarant is not present for questioning, this more lax approach to the personal knowledge command should be repudiated.

With these two criteria stands a third. The "reliability" of any hearsay declaration should be determined by reference to the circumstances surrounding the making of the statement, and not to the presence of corroborative evidence. This was the standard under *Roberts*;¹⁹⁵ it is the Due Process standard for evaluating the admissibility of identification testimony;¹⁹⁶ and it acknowledges that extrinsic evidence is not necessarily *reliable* (or may not be found reliable by the jury) and thus is an impermissible bootstrap.¹⁹⁷ While a ban on utilizing extrinsic evidence to assess hearsay reliability has its critics,¹⁹⁸ the command that

¹⁹³ *State v. Lewis*, 2007 Tenn. LEXIS 649, at *36 (Tenn. 2007) (internal quotation omitted). In *Lewis*, the victim was shot by a young male but opined that "he 'knew' that 'the lady with the vases' was involved in the offenses . . ." *Id.* at *26.

¹⁹⁴ *State v. Hoosman*, 2001 Iowa App. LEXIS 478, at *14 (Iowa Ct. App. 2001), *cert. denied*, 536 U.S. 909 (2002).

¹⁹⁵ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (absent an established hearsay exception, the reliability requirement can be met by a showing of "particularized guarantees of trustworthiness"). *See also Idaho v. Wright*, 497 U.S. 805, 822 (1990) ("To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.").

¹⁹⁶ *See supra* note 100 and accompanying text.

¹⁹⁷ This concern was underscored in *Holmes v. South Carolina*, 547 U.S. 319 (2006), where the Court condemned South Carolina's practice of determining admissibility of defense evidence based on the apparent strength of the prosecution's proof:

[T]his logic depends on an accurate evaluation of the prosecution's proof, and the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact

Id. at 330.

¹⁹⁸ *See, e.g., Mueller, supra* note 48, at 949.

It is very hard to understand why a court may look beyond the statement at the factors mentioned by the Court, or at the factors that courts must consider in applying other major exceptions, but may not consider corroborative evidence. Among the first

there be no trial by rumor necessitates a standard of admissibility that relies on the *intrinsic* quality of the hearsay declaration. To hold otherwise would endorse rumor, as long as extrinsic evidence *seemingly*¹⁹⁹ corroborated it.

For hearsay categories of long standing, the historic track record of putative²⁰⁰ reliability attendant to the circumstances of making the statement would likely be deemed sufficient for Due Process purposes *if* coupled with the personal knowledge and identity-of-declarant requirements. It will be in addressing novel enactments or codifications of hearsay exceptions that a Due Process analysis will have to be more exacting, and examine whether such statements have intrinsic *indicia* of reliability.

B. Applying a Due Process Standard to New Hearsay Enactments

New hearsay enactments that incorporate the *Roberts* intrinsic²⁰¹ reliability criteria, if coupled with the mandate for declarant identification and personal knowledge, will satisfy this Article's proposed Due Process test. A particular dilemma will arise if and when legislatures fail to incorporate the *Roberts* criteria and instead declare that a category of hearsay is reliable *ipso jure*, as when a new provision is accompanied by a statement of "findings" supporting the claim of intrinsic reliability. As shown above,²⁰² courts have paid exceptional deference to such determinations in applying the inclusionary principle of Rules 413-415

things anyone would want to know in appraising trustworthiness is whether the statement is correct on important particulars. To put this resource out of bounds is to ask judges to perform a task while tying one hand, so to speak, behind their backs.

Id. See also Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1238 (2002) (describing extrinsic corroboration as a "basis that frequently offers strong guarantees of trustworthiness").

¹⁹⁹ It cannot be gainsaid that much evidence once thought compelling has now been shown to be of questionable merit. Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 724 (2007) ("In recent years, empirical studies and select trial courts have called into question the legitimacy of evidentiary stalwarts like handwriting, voice exemplars, hair and fiber, bite and tool marks, and even fingerprints"). As well, lab error in even recognized scientific fields requires concern regarding the presumptive validity of scientific "corroboration." Craig M. Cooley, *Forensic Science and Capital Punishment Reform: An "Intellectually Honest" Assessment*, 17 GEO. MASON U. CIV. RTS. L.J. 299, 317 (2007) ("Over the past decade, numerous audits of publicly funded crime lab systems have identified reoccurring problems with our nation's crime labs.").

²⁰⁰ The questionable underpinnings of some hearsay exceptions have been noted above. See *supra* notes 20-21. Nonetheless, from a Due Process standpoint, unless and until such evidence is shown to be consistently unreliable, and where personal knowledge and declarant identity are established, such proof will meet the standard of avoiding a "substantial likelihood of mistaken [evidence]," the parallel to the standard applied to eyewitness identification opinion testimony. See *supra* notes 80-84 and accompanying text.

²⁰¹ The intrinsic component is that of reliability/probateness being established solely by the circumstances surrounding the making of the statement and not by reference to extrinsic corroboration.

²⁰² See *supra* section II.G.

(even when the record showed questionable or weak data to support the finding).²⁰³

The most contentious²⁰⁴ proposal this Article makes is that statutory enactments of novel hearsay exceptions declared by the legislating entity to be presumptively reliable should be subject to non-deferential judicial scrutiny before being approved for use in criminal prosecutions.²⁰⁵ Such a stance runs contrary to the tradition of judicial deference to “rational” legislative enactments that do not tread upon fundamental rights or involve invidious classifications.²⁰⁶ It is also incompatible, at least facially, with the judicial response to the legislative approval of propensity evidence in sex offenses discussed above in section II G.

Yet differences²⁰⁷ abound and warrant the judiciary treating hearsay differently from propensity proof. Propensity evidence – or as one court put it, evidence with “too much” probative value²⁰⁸ – is deemed relevant.²⁰⁹ The Due Process challenge is not due to the inherent unreliability of such evidence, but the risk of “overpersua[sion].”²¹⁰ No such “presumption” of probativeness attends to

²⁰³ As the Tenth Circuit explained in *United States v. Enjady*, “the district court must recognize the congressional judgment that Rule 413 evidence is ‘normally’ to be admitted” when applying 403 scrutiny. *United States v. Enjady*, 134 F.3d 1427, 1434 (1998).

²⁰⁴ The proposal is denominated as “contentious” because, unlike the three criteria for a Due Process test articulated above, it is not clearly derived from the historic treatment of hearsay and thus founded in “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). Rather, it is seen as derivative from that history, and stands as the only bulwark against legislative enactments that may reflect current political sentiments rather than a commitment to evidentiary reliability. It is also reflective of the unique history of the courts in making such reliability assessments (and witnessing first-hand the consequences of admitting unreliable evidence) for over two centuries.

²⁰⁵ Such statutes or enactments would likely arise, first, in child abuse or domestic violence cases, where the difficulty in securing a declarant’s presence or establishing her/his credibility is substantial. A sample statute is described at note 207, *infra*.

²⁰⁶ See, e.g., *Cent. State Univ. v. Am. Ass’n of Univ. Professors*, 526 U.S. 124, 129 (1999) (upholding a state statute allowing petitioner to impose a faculty workload policy exempt from collective bargaining because it was rationally related to the legitimate objective of increasing faculty time in the classroom).

²⁰⁷ One critical distinction is that in propensity cases, the accused normally will have a fact witness to confront (usually the victim of, or eyewitness to, the other act or acts) or have the conduct proved with evidence of a prior conviction (itself resulting from a proceeding where the defendant had a right of confrontation). Any questioned reliability of the propensity evidence is at least partially “offset” by the opportunity to directly challenge the declarant/accuser, the condition absent from hearsay evidence.

²⁰⁸ *People v. Falsetta*, 986 P.2d 182, 189 (Cal. 1999) (“Such evidence is [deemed] objectionable, not because it has no appreciable probative value, but because it has too much.”) (internal citation and quotation omitted).

²⁰⁹ See *Michelson v. United States*, 335 U.S. 469, 476 (1948) (describing the “admitted probative value” of character/propensity evidence).

²¹⁰ *Id.* at 476.

hearsay; indeed, to the contrary, there is an historic record derogating most hearsay as inherently unreliable.²¹¹

Judicial scrutiny may also be justified because of the history of court assessment of hearsay unreliability.²¹² Due Process cannot tolerate the anomaly that some hearsay is to be excluded when the judiciary has found it unreliable, but the same or similar hearsay is admissible if the legislature thereafter mandates its use *regardless* of actual reliability.²¹³

Because of the historic aversion to trial by rumor, something more should be required than a “reliability by fiat” standard. At a minimum, before admitting such legislatively-approved hearsay evidence in criminal trials, courts should have to scrutinize novel legislatively-enacted hearsay exceptions in two regards: whether the legislature had actual data to support the new rule’s reliability; and whether courts have previously found, through historic experience, that such evidence has grave accuracy concerns.²¹⁴ Indeed, this is little different than the

²¹¹ See, e.g., *Glover v. Millings*, 2 Stew. & P. 28, 43-44 (Ala. 1832). The historic rootedness of the recognition of the unreliability of much hearsay cannot be questioned. Illustrative is the discourse of the Alabama Court in *Glover*: “[H]earsay” evidence is in its own nature inadmissible. . . . Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule. *Id.* at 43. The Kansas Supreme Court described hearsay evidence as proof that “could be easily manufactured, and [is] clearly inadmissible” *Blue v. Peter*, 20 P. 442, 453 (Kan. 1889). It is a consistent theme of Nineteenth century decisional law that hearsay and rumor are inadmissible. See, e.g., *Carney v. State*, 4 So. 285, 287 (Ala. 1887) (hearsay of wife’s infidelity insufficient to prove its occurrence and justify husband’s abandonment of family); *Ashcraft v. De Armond*, 44 Iowa 229, 233 (Iowa 1876) (hearsay inadmissible to prove insanity); *People v. McQuaid*, 48 N.W. 161, 162 (Mich. 1891) (hearsay inadmissible to prove the cohabitation element of an “informal” marriage). For further contemporaneous judicial decisions expressing disdain for hearsay as inherently unreliable, see *supra* note 17. Although criminal jurisprudence of the Twentieth century expanded the use of hearsay, the essential precondition remained “reliability.”

²¹² See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (declarations against interest made to authorities); *Williamson v. United States*, 512 U.S. 594, 600 (1994) (same); *Lee v. Illinois*, 476 U.S. 530, 541 (1986); *Idaho v. Wright*, 497 U.S. 805, 819-22 (1990) (discussing the residual hearsay exception).

²¹³ Illustrative would be a statute approving the admission of statements of children that describe sexual assaults based on a legislative assertion that such statements are inherently reliable. Judicial scrutiny of such declarations has raised serious concerns, in light of problems with taint and suggestivity in the manner in which children are questioned. See, e.g., *Wright*, 497 U.S. at 826 (basing a finding of unreliability on part on “the suggestive manner” of interrogation); *Commonwealth v. Delbridge*, 855 A.2d 27, 34 (Pa. 2003) (collecting cases identifying the risk of “taint” occurring in the child witness interviewing process). Without substantial data showing that the taint risk is absent or minimal, a legislative authorization of such proof should not be countenanced.

²¹⁴ An illustrative hearsay exception is as follows: Hearsay is admissible in a criminal proceeding if it is non-testimonial and if the declarant is a child of seven years or younger who, without prompting or taint, has described a sexual act or behavior that a child of such age would not normally be familiar with or capable of describing. If data could establish a normative range of what young children are exposed to, such a legislatively-created exception to the ban on hearsay would meet Due Process principles, particularly if the identity of the declarant is known and first

determination that a Rule 403 balancing *by the judiciary* is essential to the constitutionality of Rules 413 and 414.²¹⁵ Here, the “balancing” is not of probativeness versus prejudice, but of probativeness itself. And without such judicial review, there is no Due Process limitation to an elimination of any ban on nontestimonial hearsay.

V. CONCLUSION

In 1992, the Court declined to read the Confrontation guarantee as a unified one, instead dividing its mandate for face-to-face confrontation of the testifying witness from its treatment of hearsay and removing from the latter any notion of “necessity” as a prequel to the admission of out-of-court statements of non-testifying declarants.²¹⁶ In what is essentially *dictum*,²¹⁷ the Court has now gone further and removed an entire class of hearsay from the Clause’s reach. The Confrontation Clause’s “reliability” jurisprudence has *no* play in addressing the admissibility of hearsay that is nontestimonial. Without a Due Process test, or a re-thinking of Confrontation Clause jurisprudence, the limits on hearsay evidence are only those thought of (or removed) by legislatures and evidence rules committees.

One might ask whether that strait is in fact such a terrible one. Factfinders weigh hearsay “proof” in all aspects of their lives, and presumably can be warned to discount such proof in light of its second-hand nature.²¹⁸ Indeed, much

hand observation is made clear. Such volunteered statements have been accepted as having internal *indicia* of reliability and, therefore, significant probativeness. “The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. . . . [including] use of terminology unexpected of a child of similar age.” *Wright*, 497 U.S. at 821 (internal citations omitted). This is particularly true as knowledge of the declarant’s identity would permit the defense to explore and prove alternate sources for the child’s knowledge. *See, e.g.*, *State v. Budis*, 593 A.2d 784, 791 (N.J. 1991) (allowing evidence of prior abuse to show alternate source for young child’s knowledge of and ability to describe sexual acts). Were the same statute to exist without the determinative condition of the declarant’s age (or with a much older age as the cut-off), questions as to reliability and probativeness would abound. *See id.* (“As children mature, they likely will learn about sexuality from many sources. Thus, evidence of prior sexual experience is less probative in cases involving older children.”).

²¹⁵ *See supra* notes 158-160 and accompanying text.

²¹⁶ *White v. Illinois*, 502 U.S. 346, 358 (1992).

[T]he admissibility of hearsay statements raises concerns raising at the periphery of those that the Confrontation Clause is designed to address [and] [t]here is thus no basis for importing the “necessity requirement” announced in [the face-to-face] cases into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule.

Id. (citations omitted).

²¹⁷ *See Kirkpatrick, supra* note 11, at 370 (emphasizing that the Court eliminated the *Roberts* test for nontestimonial hearsay “without hearing argument from any of the litigants who might actually be affected by such a ruling”).

²¹⁸ *See, e.g.*, David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 613 (2006) (“[J]urors are not incapable of perceiving the risks that the law has

evidence of questionable trustworthiness²¹⁹ is admitted at trials now, with appropriate limiting instructions, the most problematic of which is that of the accomplice turned cooperating witness. Jurors are permitted to receive such proof with the proviso that a cautionary instruction labeling the evidence as coming from a corrupt source accompany its presentation.²²⁰ As well, there is no definitive study that jurors overvalue hearsay evidence, and there is some indication that in certain contexts they undervalue its merits,²²¹ although recent experimental data show a risk of over-reliance on “gossip.”²²²

The Supreme Court has also urged an expansive view of evidentiary admissibility, illustrated perhaps best in its treatment of expert witness evidence. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,²²³ the Court emphasized use adversary process as the tool for testing evidence, rather than restricting its admission *ab initio*: “[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”²²⁴

Yet even the *Daubert* Court imposed limits, setting a gate-keeping function for trial judges to ensure that evidence lacking in fundamental reliability would

identified as inherent in hearsay evidence (and that in fact are inherent in all evidence, including testimony from live witnesses).”).

²¹⁹ Paradigmatic is the problem of testimony from jailhouse informants, often unreliable and a contributing factor to wrongful convictions. See, e.g., Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006); John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*, 12 WIDENER L. REV. 359 (2006).

²²⁰ “A ‘corrupt source’ instruction is warranted in any case where an accomplice offers testimony implicating the defendant.” *Commonwealth v. Derk*, 719 A.2d 262, 272 (Pa. 1998). Other jurisdictions urge caution, albeit in more circumspect language. The Seventh Circuit’s Pattern Criminal Instructions direct jurors that they “may give his/her testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.” COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT 33 (1998), available at <http://www.ca7.uscourts.gov/Rules/pjury.pdf>. California’s instruction explains that “[a]ny (statement/ or testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ or testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.” JUDICIAL COUNCIL OF CALIFORNIA, CRIMINAL JURY INSTRUCTIONS 1-300 CALCRIM 335 (2006).

²²¹ See generally Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149 (2003) (surveying research on this issue). But see William C. Thompson & Maithilee K. Pathak, *How Do Jurors React to Hearsay Testimony?: Empirical Study of Hearsay Rules: Bridging the Gap Between Psychology and Law*, 5 PSYCHOL. PUB. POL’Y AND L. 456, 464 (1999) (expressing concern that jurors overvalue hearsay).

²²² Ralf D. Sommerfeld et al., *Gossip as an Alternative for Direct Observation in Games of Indirect Reciprocity*, in 104 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 17435-40 (Vernon L. Smith, ed., 2007), available at <http://www.pnas.org/cgi/reprint/104/44/17435.pdf>.

²²³ 509 U.S. 579 (1993).

²²⁴ *Id.* at 596.

be excluded pre-trial.²²⁵ And in *Daubert* circumstances, the witness is present and subject to cross-examination.

The *Daubert* gate-keeping role needs its twin in the hearsay context. Ultimately, a carefully wrought Due Process reliability threshold is better than ever-shifting legislative creations of hearsay exceptions and exclusions. It is also consistent with the general notion of evidentiary practice that inherently unreliable proof has no place in the adjudication of guilt and innocence. Finally, it comports with the view of two architects of the Supreme Court's jurisprudence on Confrontation rights, Justices Scalia and Thomas, who viewed the Sixth Amendment guarantee as procedural and explicitly left reliability concerns to the Due Process guarantee:

Although the historical concern with trial by affidavit and anonymous accusers does reflect concern with the reliability of the evidence against a defendant, the Clause makes no distinction based on the reliability of the evidence presented. . . . Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them.²²⁶

The history of the acceptance of hearsay remains unresolved, with no consensus over whether Justice Scalia's distinction between testimonial and non-testimonial statements finds support in founding era caselaw²²⁷ and disagreement

²²⁵ *Id.* at 597. Indeed, the gatekeeping has been stringent, if not restrictive. Professor Moreno writes of studies documenting the exclusion of up to ninety percent of experts proffered by defendants in criminal cases. Joelle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?* 79 TUL. L. REV. 1, 3 (2004). A study by the Federal Judicial Center concluded that "Compared to 1991, judges in 1998 reported that they were more likely to scrutinize expert testimony before trial and were less likely to admit it." Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, in 8 PSYCHOLOGY, PUBLIC POLICY AND LAW 309-32 (2002), available at [http://www.fjc.gov/public/pdf.nsf/lookup/judattex.pdf/\\$file/judattex.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judattex.pdf/$file/judattex.pdf).

²²⁶ *White v. Illinois*, 502 U.S. 346, 364 (1992) (Thomas, J., concurring in part and concurring in the judgment).

²²⁷ Professor Davies maintains that:

[T]here was no historical basis for the restriction of the confrontation right to only "testimonial" hearsay, but not "nontestimonial" hearsay. Because an oath was still a necessary requisite for admissible evidence in a criminal trial under framing-era law, and hearsay was then defined as any out-of-court statement not made under oath, the rule was still that "hearsay is no evidence."

Davies, *Revisiting*, *supra* note 6, at 561. See also Jonakait, *supra* note 6, at 490-91 (2007) (urging a discarding of British precedent and a confrontation clause analysis grounded in the particulars of American decisional law and the adversarial process as developed in this country). *Contra* Robert Kry, *Confrontation under the Marian Statutes: A Response to Professory Davies*, 72 BROOK. L. REV. 493, 494 (2007) (defending the assertion that "Crawford is well supported by the historical evidence"). To further complicate the historical debate, one argument accepts the testimonial/non-testimonial distinction, but maintains that many testimonial types of hearsay were admissible

as to whether the use of hearsay evidence was normative²²⁸ or the rare exception.²²⁹ For now the originalism of the Court in *Crawford* is dispositive, and the Due Process analysis offered here is both limited by it and simultaneously evolutionary, tracing a separate skein of history, the aversion to rumor and the command for reliability in determining criminal responsibility.²³⁰

In proposing what that Due Process standard is, I do not relinquish gladly the requirement of face-to-face confrontation with one's accuser and the corresponding right of cross-examination. Yet their abandonment is the current legacy of *Crawford*, *Davis*, and *Bockting*. Unless and until the Court squarely faces the dilemma of a prosecution pursued solely with non-testimonial but directly accusatory hearsay,²³¹ the Confrontation guarantee of these rights – face-

during the founding era. Tom Harbinson, *Crawford v. Washington and Davis v. Washington's Originalism: Historical Arguments Showing Child Abuse Victims' Statements to Physicians are Nontestimonial and Admissible as an Exception to the Confrontation Clause*, 58 MERCER L. REV. 569 (2007) [hereinafter Harbinson].

²²⁸ See, e.g., Anthony J. Franze, *The Confrontation Clause and Originalism: Lessons From King v. Brasier*, 15 J.L. & POL'Y 495, 500 (2007) ("It is plausible, moreover, that the Framers . . . would have understood that hearsay accounts by parents, doctors, and acquaintances concerning statements made by child sexual abuse victims would be admissible in criminal trials."); Harbinson, *supra* note 220, at 586 ("[I]t is clear that a significant number of confrontation exceptions existed in 1791, even for statements that fit *Crawford's* definition of a testimonial statement."); Thomas D. Lyon & Raymond LaMagna, *From Old Bailey to Post-Davis*, 82 IND. L.J. 1029, 1030 (2007) ("[T]he hearsay of unavailable child witnesses was routinely admitted in eighteenth century British courts . . .").

²²⁹ Thomas Y. Davies, *Not "The Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis "Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 354 (2007) ("[T]he only two kinds of out-of-court statements that constituted admissible criminal evidence involved either a sworn statement of an unavailable witness . . . or a functionally sworn statement of an unavailable witness [e.g., a] dying declaration of a murder victim."); Jonakait, *supra* note 220, at 493 ("American courts during the Framing Era courts were announcing that hearsay was generally inadmissible, and . . . hearsay exceptions in American courts during that period were limited.").

²³⁰ Although not in conformity with the *Crawford* Court's narrow view of the correct approach to historic exegesis of the Confrontation right, there is support in founding-era decisional law and the development of the American version of the adversarial trial for the standard proposed here. As Professor Jonakait urges, founding-era decisions regarding the use of hearsay show that:

American courts were seeking to provide fair, adversarial trials, and decisions about the use of out-of-court statements were just part of that concern. . . . [T]he hearsay determinations of the Framing Era cannot be meaningfully analyzed apart from an analysis of the evolving criminal trial system as a whole, and . . . the Confrontation Clause should not be interpreted as if it can be segregated from related provisions in the Constitution.

Jonakait, *supra* note 6, at 493.

²³¹ Professor Kirkpatrick emphasized this scenario as a direct consequence of the total exclusion of nontestimonial hearsay from Confrontation protections:

[If] a child's statement in a private setting is considered nontestimonial, a prosecutor could now apparently present the child's accusatory statement through a third party without calling the child for cross-examination at all, let alone by means of closed-circuit television. Ironically Justice Scalia's concern about the need for confrontation

to-face testimony and cross-examination - cannot be imported into the Due Process calculus.

What remains to ensure reliability are standards such as those proposed here: no trial by rumor; the capacity for adversarial testing; and reliability/probativeness established solely by the circumstances surrounding the making of the statement and not by reference to extrinsic corroboration. While they will not achieve the mark set by the Court in 1895 that restricts hearsay to categories “whose conditions have proven over time ‘to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath’ and cross-examination at a trial[,]”²³² they set the bar sufficiently to limit the dilemmas occasioned by trial by rumor.

in *Craig* can be completely circumvented under a regime that simply eliminates the requirement of in-court testimony by an available child when the child’s out-of-court statement is found to be nontestimonial.

Kirkpatrick, *supra* note 11, at 377-78.

²³² *Lilly v. Virginia*, 527 U.S. 116, 126 (1999) (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

