

# CROSS-EXAMINATION: SEEMINGLY UBIQUITOUS, PURPORTEDLY OMNIPOTENT, AND “AT RISK”

JULES EPSTEIN\*

*The cross was here,  
The cross was there,  
The cross was all around:*

*It cracked and growled,  
And roared and howled  
Like noises in a swound!*<sup>h</sup>

Cross-examination is regarded as the *sine qua non* of the American trial system. According to one legendary scholar of the *art* of this mode of interrogation, it is alleged to be a practice “as old as the history of nations.”<sup>2</sup> While the validity of the historic claim made by Francis Wellman is open to serious dispute,<sup>3</sup> in both this country and across the world, the centrality of cross-examination to accurate fact-finding retains its mythic and precedential value. Justices and judges of courts at all levels continue to find cross-examination not only a necessary, but also a sufficient method of confronting a variety of trial evidence and burdens.<sup>4</sup> As Wigmore once trumpeted, it remains in the eyes of the law, as in those of many practitioners and scholars, “the greatest legal engine ever invented for the discovery of truth.”<sup>5</sup>

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\* Jules Epstein is Associate Professor of Law at Widener University School of Law (Delaware). He served as co-chair of the 2007 symposium, *Cross Examination—The Great Engine(?)*.

1. With apologies to Samuel Taylor Coleridge’s *Rime of the Ancient Mariner*.

2. FRANCIS L. WELLMAN, *THE ART OF CROSS-EXAMINATION* 7 (4th ed. 1936).

3. See *infra* Part I.A.

4. See, e.g., *Dixon v. United States*, 126 S. Ct. 2437 (2006) (Breyer, J., dissenting). In *Dixon*, two justices found the power of cross-examination sufficient to overcome the problems occasioned by making the Government bear the burden of disproof in a duress defense. Justice Breyer noted that “unless the defendant testifies, it could prove difficult to satisfy the defendant’s burden of *production*; and, of course, once the defendant testifies, cross-examination is possible.” *Id.* at 2454.

The courts’ continued emphasis on the power of cross-examination to address seemingly insurmountable burdens is discussed *infra* Part II.

5. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1367 (3d ed. 1940)).

The pervasiveness of this cannot be doubted. A LEXIS search using the terms “greatest w/2 legal w/3 engine w/12 truth,” conducted January 13, 2007 in the state and federal case combined database, resulted in 483 “hits.” At the same time, the search reveals that reliance on this encomium did not occur in a reported decision until 1908. See *People v. Billis*, 58 Misc. 150, 152 (N.Y. Sup. Ct. 1908).

Whether cross-examination is at the heart of the Sixth Amendment's Confrontation guarantee<sup>6</sup> is not provable, in substantial part, because of the lack of contemporaneous documentation of the Framers' motivations and intentions regarding this component of the Bill of Rights.<sup>7</sup> Nonetheless, it cannot be denied that cross-examination is viewed as a core aspect of the trial process, both criminal and civil, and its use and purported power are omnipresent in the American adjudicative system. Indeed, this role is confirmed in the abundance of literature (both fictional<sup>8</sup> and educational) involving cross-examination, and its increasing prominence in the law school curriculum.<sup>9</sup>

This article confirms the exalted status cross-examination has achieved and arguably retains in the American trial and fact-finding process, while simultaneously identifying its frailties: its ineffectiveness as a truth-discerning tool in varying contexts; trends in constitutional law that will eliminate the requirement of cross-examination for expanding categories of witnesses; and the impact of technology and popular media on the learning processes and expectations of jurors. Particularly because of the transformation of hearsay law and the continuing trend toward visual rather than aural learning and knowledge accumulation, cross-examination may play a reduced role in the trial process and its form may need to be reinvented.

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6. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

7. Justice Harlan's observation that "the Confrontation Clause comes to us on faded parchment" is oft-cited and frequently deemed accurate. *Green*, 399 U.S. at 173-74 (Harlan, J., concurring). See, e.g., John R. Kroger, *The Confrontation Waiver Rule*, 76 B.U. L. REV. 835, 868 n.205 (1996); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 562 (1992) ("Little information exists about precisely what the concept of confrontation signified in the seventeenth and eighteenth centuries in England and the colonies."); Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1269 (2003) ("[T]he Framers left us little or no direct indication of what the confrontation right meant to them[.]"); Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332 n.181 (1981) (maintaining that the Confrontation Clause was only debated for five minutes before its adoption). In Irving Brant's *The Bill of Rights: Its Origin and Meaning* (1965) there is no discussion of why the Framers included this right and no quote from the debates addressing it. See *id.*

8. The prominence of "courtroom fiction" in popular literature can be seen as yet another confirmation of the pivotal truth-determining role attributed to cross-examination. Jon L. Breen annotates nearly 800 book-length novels and short-story compilations "that have significant portions devoted to trials and other courtroom proceedings." JOHN L. BREEN, *NOVEL VERDICTS: A GUIDE TO COURTROOM FICTION*, iv (2d ed. 1999); see also Terry White, *Introduction to JUSTICE DENOTED: THE LEGAL THRILLER IN AMERICAN, BRITISH, AND CONTINENTAL COURTROOM LITERATURE* xvii (Terry White ed., 2003).

9. See *infra* Part I.D.

I. THE ORIGINS OF CROSS-EXAMINATION AS A CORE TRIAL TOOL

A. *The Antecedents of American Trial Cross-Examination*

There is no veracity to Francis Wellman's claim that "[t]he system [of adversarial cross-examination] is as old as the history of nations."<sup>10</sup> There may have been *confrontation* rights as early as ancient Rome, where "[a]nonymous accusations were not actionable, because, among other things, the accused . . . had the right to confront his accuser,"<sup>11</sup> but these rights did not involve cross-examination and may have been more of an investigative tool, rather than a trial procedure.<sup>12</sup>

The roots of cross-examination are more easily traced to England and the development of its adversarial trial process. A recognition of the importance of cross-examination was developed in French criminal justice theory in the late sixteenth-century writings of Pierre Ayrault, who emphasized the desirability of cross-examination as a complement to the face-to-face rendering of an accuser's testimony.<sup>13</sup>

According to McCormick, as early as 1668 a court rejected an out-of-court statement because "the other party could not cross-examine the party sworn."<sup>14</sup> Professor Langbein tracked this as the transition from "[t]he oath-based system [that] presupposed the witness's fear that God would damn a perjurer. . . . [to] the new order [that] substituted its faith in the truth-detecting efficacy of cross-examining."<sup>15</sup> In his exceptional tracing of the history of adversary cross-examination, Professor Langbein dates the acceptance or institutionalizing of defense cross-examination in non-treason cases to the 1730s.<sup>16</sup> Langbein found cross-examination to be a necessary (albeit, in his view, ill-desired<sup>17</sup>) response to three occurrences in the English trial system: the growing use of lawyers to present prosecutions in both the investigative and trial stages; the reward system that offered bounties to those who provided testimony establishing that a crime reached the severity (or degree of financial loss) to qualify as a felony and thus invited fraudulent testimony, the

10. WELLMAN, *supra* note 2, at 7.

11. David Lusty, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials*, 24 SYDNEY L. REV. 361, 364 (2002) (alteration in original) (quoting JOSEPH PLESCIA, *THE BILL OF RIGHTS AND ROMAN LAW* 84 (1995)).

12. Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 211 (2005) ("While Roman law did recognize a procedure bearing that name, it was not a trial device but an investigative tool resembling a modern police lineup.").

13. Frank R. Herрман & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 540-43 (1994) (discussing the writings of Pierre Ayrault, found in L'ORDRE, FORMALITÉ ET INSTRUCTION JUDICIAIRE 1.5 (1588)).

14. MCCORMICK ET AL., MCCORMICK ON EVIDENCE 728 (Edward W. Cleary ed., 3d ed. 1984) (quoting 2 Rolle's Abr. 679, pl. 9 (1668)).

15. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 246 (2003).

16. *Id.* at 168.

17. Professor Langbein views the two-party adversary system as a "poor proxy for truth-seeking." *Id.* at 332.

corrupt motive of which required cross-examination as an antidote; and “the crown witness system for obtaining accomplice evidence in gang crimes, a prosecutorial technique that created further risks of perjured testimony.”<sup>18</sup>

### B. Cross-Examination in American Law

Although there was *some* cross-examination in early American trials, the historic record for ascertaining whether the Framers’ intent in adopting the Confrontation Clause was to enshrine cross-examination as a Constitutional right is skimpy, diffuse, and potentially contradictory. In his extensive treatment of this subject, Professor Randolph N. Jonakait acknowledges that the evidence of both the Framers’ intent and the contemporaneous practice at the time of the adoption of the Confrontation Clause is “scanty,” with only limited references in the constitutional debates.<sup>19</sup> Professor Jonakait posits that the confrontation right of cross-examination reflects the ascendance and acceptance of the role of lawyers in American colonial and early post-independence trials:

The suggestion here is that America had adopted an adversary system, with defense cross-examination at its core, by the time of the Bill of Rights. This contention is supported by the transformation defense counsel brought to English criminal procedure, America’s early acceptance of a full right to counsel, and America’s creation of a public prosecutor. An adversary system was also consistent with new American concepts about crime, a government of checks-and-balances, and how society should be ordered.<sup>20</sup>

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18. *Id.* at 4.

19. Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 116 (1995).

20. *Id.* at 108. The importance of the role of counsel in defining the intent of the confrontation right is also accepted by Professors Friedman and McCormack:

[T]he Americans did not simply draw on English law. American criminal procedure developed in a distinctive way. The right to counsel in felony trials developed far more quickly in America than in England, and with it rose an adversarial spirit that made the opportunity for confrontation of adverse witnesses especially crucial.

Richard. D Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1206-07 (2002). See also Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 742-744. As Professor Mosteller explains:

Enactment of the Sixth Amendment occurred just as evidence law was rapidly developing. . . . [A]n emphasis on cross-examination was ascending.

...

....

It cannot be disputed that cross-examination had become a signal feature of trials in the late colonial and early post-Revolution period. As one scholar explained in the early nineteenth century:

The Law never gives credit to the bare assertion of any one, however high his rank or pure his morals, but always requires the sanction of an oath: [] It further requires his personal attendance in Court, that he may be examined and cross examined by the different parties; . . . for the relation of one who has no other knowledge of the subject than the information he has received from others, is not a relation upon oath; and, moreover, the party against whom such evidence should be permitted would be precluded from his benefit of cross examination.<sup>21</sup>

At the same time, cross-examination was not necessarily ubiquitous or even commonplace. There are contentions, with documentary support, that cross-examination was either completely absent from or underutilized in many trials in the first years of the republic.<sup>22</sup> These are extrapolated from the brevity of trials and the great number of cases resolved on a single day. Each phenomenon precludes cross-examination, at least as we know it today, from either occurring or playing a significant role in the trial process. It may also reflect the absence of counsel from many of those matters. Nonetheless, the role of cross-examination grew and was recognized as cognate with and a critical component of the guarantee of confrontation.

### *C. The Court and the Importance of Cross-Examination*

The Supreme Court has always considered cross-examination in a criminal case a core component of the confrontation right, even though the historic record does not fully support such a claim. Although it did not speak on the

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. . . It is likely, however, that because they were acting in the midst of a century in which the adversary system was expanding on many fronts, the Framers were looking forward to a doctrine with the right of cross-examination preeminent . . .

*Id.* (footnotes omitted).

21. THOMAS PEAKE, COMPENDIUM OF THE LAW OF EVIDENCE 10-11 (John P. Thompson ed., 3d ed. 1809); *see also id.* at 8-9 (discussing best evidence), 9-10 (discussing the oath). The earlier (1801) version of the Compendium, in its discussion "Of The Examination Of Witnesses," explained that after a witness's direct examination "[t]he counsel retained on the other side, next cross-examines the witness, and the witness not being supposed so friendly to his client as the party by whom he is called, he is not restrained to any particular mode of examination." THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 135 (Garland Publ'g, Inc. 1979) (1801).

22. *See, e.g.,* James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681-1837*, 40 AM. J. LEGAL HIST. 455, 463 (1996); CHARLES T. CULLEN, *ST. GEORGE TUCKER AND LAW IN VIRGINIA, 1772-1804*, at 39-40 (1987); Jeremy A. Blumenthal, Comment, *Reading The Text of The Confrontation Clause: "To Be" or Not "To Be?"*, 3 U. PA. J. CONST. L. 722, 733-34 (2001).

subject until 1895, in the still-consequential decision of *Mattox v. United States*<sup>23</sup> the Court explained that “[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of. . . .”<sup>24</sup> Civil cases were thought to require the same: cross-examination was at the core of the fact-finding process.<sup>25</sup>

Continued allegiance has been paid to this principle.<sup>26</sup> As the Court explained more than three decades ago,

The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.<sup>27</sup>

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23. *Mattox v. United States*, 156 U.S. 237 (1895).

24. *Id.* at 244. See also *Kirby v. United States*, 174 U.S. 47 (1899):

[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases.

*Id.* at 55.

25. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647, 659 (1850) (Daniel, J., dissenting) (“[T]he question of nuisance or no nuisance is one proper for the cognizance of a court of law, to be determined by a jury upon the testimony of witnesses confronted and cross-examined before a jury in open court, and under its supervision.”).

26. See, e.g., *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934):

[T]he privilege to confront one’s accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts and in prosecutions in the state courts is assured very often by the Constitutions of the states. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held.

*Id.* (citations omitted).

27. *Fareta v. California*, 422 U.S. 806, 818 (1975). The Court has elsewhere described the right of cross-examination as “implicit” in the Constitutional guarantee:

The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the “accuracy of the truth-determining process.” It is, indeed, “an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” . . . But its denial or significant

In sum, despite the absence of clear proof of the Framers' intent, cross-examination has been consistently held as inherent in the confrontation guarantee. Thus the right has been constitutionalized in criminal cases, affirming its centrality to the American adversarial process.<sup>28</sup>

Even in the arena of hearsay, where cross-examination of the non-present declarant is non-existent,<sup>29</sup> the Court evinced a loyalty to the adversarial process by conditioning the admissibility of hearsay on the reliability of the out-of-court declaration that purportedly rendered cross-examination nugatory. Such was the rationale for the Court's seminal holding in *Ohio v. Roberts*.<sup>30</sup> The minimalization or abandonment<sup>31</sup> of the reliability standard of

diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.

*Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (internal citations omitted).

28. Except for the hearsay cases, discussed below, confrontation analysis involving cross-examination has addressed the scope of that right, and not the underlying premise that cross-examination is a core protection and process. *See, e.g., Davis v. Alaska*, 415 U.S. 308, 316-319 (1974) (affirming the right to cross-examine as to bias); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (same); *Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988) (emphasizing the right to cross-examine a rape complainant regarding the defense theory and the bias implicated thereby).

29. Even here, the Rules of Evidence seek to effectuate cross-examination by allowing extrinsic impeachment of the hearsay declarant to the same extent as if he/she were being cross-examined. *See* FED. R. EVID. 806.

30. *See Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) (internal quotations and citations omitted):

The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection."

31. In *Crawford v. Washington*, the Court left open whether the *Roberts* reliability test survived for the class of hearsay deemed nontestimonial. "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." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

In its subsequent holding in *Davis v. Washington*, the Court seemingly discarded the *Roberts* test entirely when it held that "other hearsay, . . . subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause" and "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter." *Davis v. Washington*, 547 U.S. 813, 821, 824 (2006). After *Davis*, lower courts divided as to whether the reliability standard still must be met for nontestimonial hearsay. *Compare Albrecht v. Horn*, 471 F.3d 435, 463 (3d Cir. 2006) ("Unless and until the Supreme Court holds otherwise, *Roberts* still controls nontestimonial statements."), *with United*

*Roberts* in *Crawford v. Washington*,<sup>32</sup> and its replacement with a “testimonial/non-testimonial” standard, derive from a continued allegiance to the rootedness of cross-examination in the adversarial process:

The historical record also supports [the] proposition[] that 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. . . . As the English authorities . . . reveal, the common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.<sup>33</sup>

In sum, as to all witnesses who actually testify, and to at least a core aspect of hearsay, cross-examination is the *sine qua non* of the adversary adjudicative process.

#### D. Cross-Examination and the Academy

The significance of cross-examination as not merely a process but a learnable skill that is essential to successful litigation and adjudication has received confirmation in both law school curricula and the geometric growth of cross-examination treatises, training manuals, and similar publications for both the law student and lawyer. In the law school arena, the roots of this education are found in the apprenticeship model of legal education of the eighteenth and nineteenth centuries,<sup>34</sup> but that approach to advocacy training was limited by both the trainer’s availability and skill base<sup>35</sup> and by the institution’s general commitment to the Harvard method of appellate case

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States v. Feliz, 467 F.3d 227, 231 (2d Cir. 2006) (“The Supreme Court, however, in *Davis* made clear that the right to confrontation only extends to testimonial statements, or, put differently, the Confrontation Clause simply has no application to nontestimonial statements.”).

What *Davis* may have left ambiguous was resolved in *Whorton v. Bockting*, 127 S. Ct. 1173, 1183 (2007). There, the Court made clear that “the Confrontation Clause has no application to [nontestimonial hearsay statements] and therefore permits their admission even if they lack indicia of reliability.” *Id.* The impact on hearsay admissibility occasioned by *Whorton* is detailed in Jules Epstein, *Avoiding Trial by Rumor: Identifying the Due Process Threshold for Hearsay Evidence After The Demise of the Ohio v. Roberts “Reliability” Standard*, 77 UMKC L. Rev. 119 (2008) [hereinafter Epstein, *Avoiding Trial by Rumor*].

As is discussed below, as the *Roberts* test has been abrogated for all nontestimonial hearsay, such a ruling will plant the seeds for a serious diminution in the role of cross-examination in adversary fact-finding. See *infra* Part III.A.

32. *Crawford*, 541 U.S. at 36.

33. *Id.* at 53-54. The *Crawford* Court continued: “Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Id.* at 60 n.9.

34. Edward D. Ohlbaum, *Basic Instinct: Case Theory and Courtroom Performance*, 66 TEMP. L. REV. 1, 6-7 (1993).

35. *Id.* at 7.

reading as the template for law school instruction.<sup>36</sup> While there are reports of early in-school programs to teach advocacy dating as far back as 1917,<sup>37</sup> it is clear that the proliferation has been in the past two decades.

One stimulus for this expansion was the American Bar Association's McCrate Report. In 1996, this report resulted in the amending of the ABA standards for law school accreditation to include the following language: "The law school shall offer to all of its students . . . an educational program designed to provide that its graduates possess basic competence in legal analysis and reasoning, oral communication, legal research, problem-solving and written communication."<sup>38</sup> As was reported in 2001, "[i]n the last five years, lawyering skills programs moved from virtual obscurity to legal education's center stage."<sup>39</sup> This drastic alteration to the Harvard model persists today.

Cross-examination's centrality and status are also confirmed in the availability of publications designed to teach and improve trial lawyering skills. Contrary to what one might anticipate, the publication of these texts was not a trickle that only recently became a deluge; rather, they have been in abundance since the end of the nineteenth century.<sup>40</sup> Today, the law student and lawyer have ample available texts, including subspecialty presentations that apply psychological research to witness examination and advocacy.<sup>41</sup> If the academy

36. Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105, 123-24 (2001). Professor Munneke discusses the predominance of this model:

The basic structure of legal education as it exists today, an exercise in evaluating appellate cases and analyzing legal opinions through a core curriculum[,] was popularized at Harvard Law School beginning in 1870. By the turn of the century, this method had become the dominant model for legal education throughout the United States.

*Id.*

37. See William Eleazer, *Trial Advocacy at Stetson: The First 100 Years*, 30 STETSON L. REV. 243, 244 (2000).

38. Leslie L. Cooney & Lynn A. Epstein, *Classroom Associates: Creating a Skills Incubation Process for Tomorrow's Lawyer*, 29 CAP. U. L. REV. 361 n.3 (2001) (quoting ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 302(a)(ii) (1994)).

39. *Id.* at 361; Munneke, *supra* note 36, at 125 ("In the 1990s, many law schools developed a legal skills curriculum and experimented with a variety of new pedagogical approaches to the teaching of practice skills. Skills education today has assumed a life of its own."). Using one oft-cited measure of recognition, the *U.S. News and World Report's* annual "best of" evaluation of law schools includes a discrete category ranking the ten best schools in teaching trial advocacy. See *America's Best Graduate Schools, 2007 Edition*, U.S. NEWS & WORLD REPORT, Dec. 2006, at 46.

40. Robert A. Mead, "Suggestions of Substantial Value": A Selected, Annotated Bibliography of *American Trial Practice Guides*, 51 KAN. L. REV. 543 (2003) (listing and briefly summarizing a large number of advocacy texts dating from the late 1800s).

41. Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 301, 301 (2005) ("Since the 1970s, volumes of scientific literature have been published on trial advocacy and the psychological principles associated with jury persuasion.").

needed nudging, the practitioners were already “on board” with their practice guides, realizing cross-examination was core—and mastering it was essential.<sup>42</sup>

## II. THE PERCEPTION OF CROSS-EXAMINATION AS OMNIPOTENT (OR PANACEA)

Cross-examination is not merely accorded historic or structural importance in the adversary process; it is also regarded as a panacea, a cure-all<sup>43</sup> for any type of evidence or witness (lay or expert) with which the lawyer and litigant are confronted. Cross-examination has been ruled sufficiently potent to respond to the introduction of questionable expert testimony;<sup>44</sup> a witness with no memory of an event;<sup>45</sup> and the vexing problem of eyewitness identification.<sup>46</sup> Lower courts have justified the denial of funds for expert

42. The fascination with lawyers, if not with the specific practice of cross-examination, has been a dominant feature in American fiction. See generally Marlyn Robinson, *Collins to Grisham: A Brief History of the Legal Thriller*, 22 LEGAL STUD. F. 21 (1998). For a list of articles surveying popular culture’s presentation of and response to lawyering, see Marlyn Robinson, *The Lawyer in Popular Culture: A Biography*, <http://tarlton.law.utexas.edu/lpop/lpopbib2.html>.

43. The term “cure-all” does not imply that cross *will* successfully address the problem—rather, it is recognized that this is all one is entitled to and that it *might*, in appropriate cases, suffice:

[T]he Confrontation Clause guarantees only “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” . . . The weapons available to impugn the witness’ statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons . . . .

United States v. Owens, 484 U.S. 554, 559-60 (1988) (alteration in original) (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987)).

44. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595-96 (1993):

Respondent expresses apprehension that abandonment of “general acceptance” as the exclusive requirement for admission will result in a “free-for-all” in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-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.

*Id.*

45. *Owens*, 484 U.S. at 560 (“The weapons available to impugn the witness’ statement when memory loss is asserted will of course not always achieve success . . . . They are, however, realistic weapons.”).

46. See *Watkins v. Sowders*, 449 U.S. 341, 348 (1981):

[W]hile identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the “integrity”—of the adversary process.

assistance when requested by indigent defendants by ruling that cross-examination of the government expert will suffice.<sup>47</sup>

This treatment of cross-examination as the palliative of choice has its flaws, not merely in its expectation that cross-examination without other resources can fairly respond to an expert witness. The mythic status of cross-examination in this regard actually impedes accurate fact-finding because leading questions are not always an appropriate or sufficient tool for truth finding. Courts have not acknowledged these limitations, which are found particularly in cases involving a defense of mistaken identification. Other problematic circumstances include cases where the witness is lying or mistaken but no impeaching evidence such as a prior inconsistent statement or criminal record exists; where a scientific laboratory has conducted flawed tests or discarded contradictory results;<sup>48</sup> or where an accepted scientific technique is

Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification . . . .

*Id.* (quoting *Manson v. Brathwaite*, 432 U.S. 98, 113 n.14 (1977)).

47. Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1356 (2004) (“[I]n rejecting a due process right to retest, several courts [have] reasoned that the defendant’s opportunity to cross-examine the prosecution’s expert witnesses provides sufficient protection.”). As one court contended:

Defendant is unable to show that denial of the expert witness funding resulted in either abuse or prejudice. His argument rests on the premise that DNA evidence is so scientifically complex and technically specialized that it is beyond the ability of most attorneys to understand and adequately defend against. His argument for state-funded expert witness assistance would be persuasive if this premise were valid. However, we disagree with his contention that the average attorney is ill-equipped to defend against this type of evidence. To the contrary, law libraries—i.e., law journals, practitioners’ guides, annotated law reports, CLE materials, etc.—are teeming with information and advice for lawyers preparing to deal with DNA evidence in trial. Even a cursory perusal of the literature in this area reveals copious lists of questions for defense attorneys to use in cross-examinations and other strategies for undermining the weight of DNA evidence.

*State v. Huchting*, 927 S.W.2d 411, 419-420 (Mo. Ct. App. 1996).

48. Periodically, forensic laboratories have been exposed for shoddy or improper testing protocols. See, e.g., Jennifer L. Eckroth, *Tainted DNA Evidence and Post-Conviction Reversals in Houston, Texas: Suggested Solutions to Curb DNA Evidence Abuse*, 31 AM. J. CRIM. L. 433, 434 (2004) (“Several crime labs across the United States have become the focal point of investigations involving the intentional or negligent abuse of DNA evidence to convict criminal defendants.”).

As Professor Brown has observed, “Contamination of samples and poor chains of custody can be hard to identify in forensic analysis, as can analytical errors arising from arcane interpretive methodologies, signal-detection theory errors, inadequately calibrated equipment,

presented as reliable, only to be proved inaccurate years later after further research and new scientific developments.<sup>49</sup>

The genesis of cross-examination was as a tool to expose dishonesty,<sup>50</sup> and thus it lacks utility when confronting the honest-but-mistaken witness, the paradigm found in eyewitness identification cases. Because eyewitnesses often do not have “impeachable” backgrounds and undeniably testify from the purest of motives (the goal being to put the actual perpetrator, usually a

negligence, or fraud.” Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1602 (2005).

49. The concern that much forensic science over-stated its conclusions was validated in February 2009, with the release of the report *Strengthening Forensic Science in the United States: A Path Forward* by the National Academy of Sciences (NAS). That report concluded that “[w]ith the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.” NAT’L RESEARCH COUNCIL, NAT’L ACAD. OF SCIS., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD*, at S-5 (2009).

Even preceding the release of the NAS report, problems in forensic evidence were becoming manifest. After years of providing expert testimony matching a crime scene bullet to a particular “batch” from a manufacturer, via a process known as Comparative Bullet Lead Analysis (CBLA), the F.B.I. in 2005 renounced the practice:

[T]he FBI in 2002 commissioned the National Research Council of the National Academies of Science (NRC) to evaluate the conclusions being drawn by its employees . . . . The FBI suspended CBLA testing while the review was pending. In February 2004, the NRC rendered a 113-page report, entitled *Forensic Analysis: Weighing Bullet Lead Evidence*, which evaluated CBLA against each *Daubert* criteria and determined that the conclusions drawn from CBLA do not meet the scientific reliability requirements established by *Daubert/Kumho*. . . .

....

Following a fourteen-month review of the findings and recommendations of the NRC, the FBI Laboratory announced on September 1, 2005, that it would no longer conduct CBLA tests.

Ragland v. Commonwealth, 191 S.W.3d 569, 578-79 (Ky. 2006) (internal citations omitted).

The second instance involved arson investigation. New advances in fire causation investigation have cast substantial doubt on expert testimony in arson cases that for years were considered unchallenged science. See, e.g., Emilie Lounsberry, *Arson Science – To the Rescue?: Advances Give Hope to Those Who Say They Were Wrongly Convicted*, PHILA. INQUIRER, Jan. 14, 2007, at A18 (“New methods of analysis and computer simulation are transforming arson investigators’ understanding of how fire start and spread. Some of the old axioms have been debunked; other have been shown to be true much of the time, but not always.”).

50. See *supra* text accompanying notes 12-16. Dean Wigmore viewed cross-examination as the essence of the trial and truth-seeking process in the United States. He viewed its capabilities more broadly, presuming it capable of serving two ends: proving untruths and completing the story by eliciting facts that “remain[ed] suppressed or undeveloped [on direct examination] . . . [including] the remaining and qualifying circumstances of the subject of testimony, as known to the witness.” 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1368, at 36-37 (3d ed. 1974) (emphasis added). Neither facility applies in eyewitness cases.

stranger towards whom there is no animus, in jail), and because eyewitnesses cannot tell us what they do not themselves know—i.e., that their identifications may suffer from own-race-bias,<sup>51</sup> weapons-focus,<sup>52</sup> or distortion caused by stress<sup>53</sup> or by post-event information<sup>54</sup>—cross-examination alone cannot expose the mistaken identification.

The failure of courts to acknowledge that cross-examination cannot expose these variables or elucidate their impact on the witness' perception, memory, and recall is prevalent. Time and again, courts have precluded expert witnesses from testifying, concluding (without any consideration of the inherent limits of cross-examination) that this tool alone is sufficient to expose a mistaken identification. A typical<sup>55</sup> pronouncement in this regard is that of the Florida Supreme Court. While adhering to a rule of "discretionary" admissibility of expert testimony in identification cases, that Court has emphasized that "a jury is fully capable of assessing a witness' ability to

51. Psychological research has persuasively demonstrated a heightened risk of mistaken identifications when the victim or witness and the perpetrator are of different races. See generally Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-race Bias in Memory for Faces: A Meta-analytic Review*, 7 PSYCHOL. PUB. POLY & L. 3 (2001). See also Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, ANN. REV. PSYCHOL., 2003, at 277, 280-281 ("[T]he evidence is now quite clear that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group."); Otto H. MacLin et al., *Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition*, 7 PSYCHOL. PUB. POLY & L. 134, 135 (2001); Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1822-23 (2003).

Because of this, in *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999), the New Jersey Supreme Court required a jury instructions directing jurors to treat cross-racial identification testimony with caution.

52. "Weapons focus" is the phenomenon of a crime witness or victim unconsciously directing his/her attention away from the perpetrator's face and towards an actual or perceived weapon. Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus,"* 11 LAW & HUM. BEHAV. 55, 55-62 (1987).

53. High stress, a typical condition in violent crime cases, increases the unreliability of subsequent identifications. See Charles A. Morgan, III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265 (2004).

54. Post-event information can come from police interviews or crime witness receipt of information from the media or other sources that taints or reconfigures the witness' memory of the perpetrator's appearance. See Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978); Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOLOGIST 867 (2003) (describing her early research on how tainted questioning of a witness can corrupt her/his memory); Elizabeth F. Loftus & Hunter G. Hoffman, *Misinformation and Memory: The Creation of New Memories*, 118 J. EXPERIMENTAL PSYCHOL. 100, 100-04 (1989).

55. That limited admission and approval of discretionary exclusion are the norm nationally is clear. See Thomas Dillickrath, Comment, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1061 (2001) ("[W]hile ostensibly following the 'majority' [discretionary admission] rule, actual policy of courts so disfavors this type of evidence that many courts are actually operating in a nearly per se exclusionary manner. The courts in many jurisdictions have never overruled the trial judge's discretionary exclusion of misidentification testimony, thereby sending a message that almost inherently disqualifies this testimony.").

perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.”<sup>56</sup>

Indeed, this thinking remains current and potent. As the Tenth Circuit asserted in 2006:

[O]utside these specialized circumstances, expert psychological testimony is unlikely to assist the jury—skillful cross-examination provides an equally, if not more, effective tool for testing the reliability of an eyewitness at trial. . . . Jurors, assisted by skillful cross-examination, are quite capable of using their common-sense and faculties of observation to make this reliability determination.<sup>57</sup>

The mistaken-identification case illustrates the dangers of treating cross-examination as omnipotent and sufficient to accurate fact adjudication.<sup>58</sup>

### III. THE “AT RISK” STATUS OF CROSS-EXAMINATION

Our Constitution has not been amended, the right to counsel in criminal cases remains intact, and trials continue in the adversarial mode. Nonetheless, two developments in the law of hearsay—the continuing impact of electronic media and the turn from a reading culture to a visual information culture—raise questions about the role and efficacy of cross-examination in the adversarial trial.

#### A. Nontestimonial Hearsay and the Removal of Reliability Limits

The successive decisions of *Crawford v. Washington*, *Davis v. Washington*, and *Whorton v. Bockting* raise the specter of there being no constitutional restrictions on state evidentiary rules that admit “non-testimonial hearsay evidence.”<sup>59</sup> If indeed the *Ohio v. Roberts* reliability test has been eliminated, states are free to craft any number of new hearsay exceptions, all of which will permit the increased admission of statements without cross-examination either at their making or at the time of trial. The sole requirement will be that the hearsay be nontestimonial, a definition which the Supreme Court has made expansive in *Davis*:

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

56. *McMullen v. State*, 714 So. 2d 368, 371 (Fla. 1998).

57. *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1125 (10th Cir. 2006).

58. For a more complete treatment of this issue, see Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727 (2007).

59. See *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). The potential for a minimal due process standard for evaluating admissibility of nontestimonial hearsay not within the reach of the Confrontation Clause is discussed in Epstein, *Avoiding Trial by Rumor*, *supra* note 31.

ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>60</sup>

The *Davis* Court left for another day "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"<sup>61</sup> However, both *Crawford's* narrow definition of "witness" as a bearer of testimony and its explicit distinction that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"<sup>62</sup> imply that most statements made to private citizens will be nontestimonial, and thus subject solely to state hearsay rules.

These distinctions have been seized on by lower courts, which have read expansively the *Davis* criterion of emergency statements as nontestimonial<sup>63</sup> and have emphasized any conceivable purpose for the interview as non-interrogation to remove hearsay declarations from *Crawford's* Confrontation strictures.<sup>64</sup> Both the de-constitutionalizing of admissibility standards for

60. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

61. *Id.* at 823 n.2.

62. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

63. *See, e.g., United States v. Clemmons*, 461 F.3d 1057, 1060-61 (8th Cir. 2006):

When the officers arrived at the scene, Williams was lying in front of a neighbor's house, suffering from multiple gunshot wounds. Officer Lester further testified that his purpose in speaking to the victim was, "[t]o investigate, one, his health to order him medical attention and, two, try[ ] to figure out who did this to him." Any reasonable observer would understand that Williams was facing an ongoing emergency and that the purpose of the interrogation was to enable police assistance to meet that emergency. Accordingly, because Williams's statements were nontestimonial, they do not implicate Clemmons's right to confrontation.

*Id.* (citations omitted) (alterations in original); *see also State v. Holdbrook*, No. CA2005-11-482, 2006 WL 3183706, 2006-Ohio-5841, at ¶ 61-62 (Ohio Ct. App. Nov. 6, 2006) (internal citation omitted) (statements made to police arriving at scene about where shots had previously been fired from were nontestimonial). *Clemmons* is arguably at odds with *Davis*, which distinguished between questions "not seeking to determine . . . 'what is happening,' but rather 'what happened.'" *Davis*, 547 U.S. at 830.

64. Illustrative of this point is *State v. Stahl*, 111 Ohio St. 3d 186, 2006-Ohio-5482, 855 N.E.2d 834:

[T]he state in the instant case seeks to introduce a statement made by a victim to a *medical professional* during an emergency-room examination identifying a person who allegedly raped her. Though made in the presence of a police officer, the identification elicited during the medical examination came to a medical professional in the ordinary course of conducting a medical examination, and no *Miranda* warnings preceded its delivery. Unlike *Crawford*, this case does not involve police interrogation. . . . Mazurek's statements to [the nurse] do not fall within [*Crawford's* list of testimonial hearsay], and we decline to expand that list to include

nontestimonial hearsay and the expansive definition being applied to that category of out-of-court statements will permit trials to be conducted with significant testimony never subjected to the testing of cross-examination.<sup>65</sup>

### B. *The Forfeiture Doctrine Resuscitated*

The doctrine of forfeiture by wrong-doing, which admits hearsay without cross-examination if the defendant was in some way culpable in procuring the declarant's absence, is of long standing<sup>66</sup> and codified in the Federal Rules of Evidence<sup>67</sup> and many state evidence codes.<sup>68</sup> Viewed as an equitable principle rather than one requiring a knowing waiver of a constitutional right,<sup>69</sup> its status was reinvigorated and scholars were prompted to explore (and suggest extensions to) the doctrine's borders after *Crawford*, in which Justice Scalia

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statements made to a medical professional for purposes of receiving medical treatment or diagnosis.

*Id.* at ¶ 18.

65. This new potential has already received scholarly acknowledgment. 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, 275, 299-310 (2006). 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 nontestimonial hearsay).

66. The principle was articulated by the United States Supreme Court as early as 1879:

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.

*Reynolds v. United States*, 98 U.S. 145, 158 (1879).

67. The Federal Rules of Evidence approve admission of a statement "against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." FED. R. EVID. 804(b)(6).

68. CAL. EVID. CODE § 1350 (West 1995); DEL. R. EVID. 804(b)(6); HAW. R. EVID. 804(b)(7); 725 ILL. COMP. STAT. ANN 5/115-10.2a (West 2004) (limited to domestic violence prosecutions); MICH. R. EVID. 804(b)(6); N.D. R. EVID. 804(b)(6); PA. R. EVID. 804(b)(6); S.D. R. EVID. 804(b)(6); TENN. R. EVID. 804(b)(6).

69. *Cf.* *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (requiring that waivers of constitutional rights be knowing, intelligent, and voluntary).

reminded us that classifying hearsay as testimonial in no way precluded its application.<sup>70</sup>

Forfeiture doctrine had been read expansively before *Crawford*, with courts emphasizing that the forfeiting conduct need be proved only by a preponderance of the evidence<sup>71</sup> and that it need not be the defendant on trial who procured the declarant's unavailability.<sup>72</sup> Although the United States Supreme Court has limited forfeiture to cases where the prosecution can prove that it was the defendant's intent to procure the witness's unavailability,<sup>73</sup> a majority of the Court believes intentionality can be found in a pattern of abuse showing that the accused "intended to dissuade a victim from resorting to outside help, and includ[ing] conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions."<sup>74</sup>

This forfeiture paradigm had previously been advanced by scholars, who sought to elasticize the range of conduct that would be found to have procured the declarant's unavailability, with particular emphasis on the dynamics of prolonged spousal or child abuse as satisfactory causes for a finding of forfeiture:

[I]n many, if not most, cases of victimless domestic violence prosecution, a batterer's conduct *over time* has caused the victim's unavailability. . . . It may well be that, if forfeiture is rightly conceptualized, domestic violence prosecutors will

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70. "[I]the 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." *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

71. *See, e.g., United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002) ("[W]e join the other circuits which have held that the preponderance-of-the-evidence level is correct."); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004) ("[W]here waiver by misconduct is an issue, the burden of proving that the defendant procured the absence of the witness is upon the State by a preponderance of the evidence."); *but cf. People v. Giles*, 19 Cal. Rptr. 3d 843, 849 (Cal. Ct. App. 2004) (applying a clear and convincing evidence standard but leaving open whether the preponderance standard is all that is constitutionally required); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 809-810 (2005) (endorsing use of forfeiture doctrine in domestic violence cases with a preponderance standard).

72. This doctrine of implied waiver has been applied to co-conspirators with no actual involvement in, or pre-event knowledge of, the act that ensured the declarant's unavailability. *See, e.g., United States v. Thompson*, 286 F.3d 950, 965 (7th Cir. 2002) ("By limiting coconspirator waiver-by-misconduct to those acts that were reasonably foreseeable to each individual defendant, the rule captures only those conspirators that actually acquiesced either explicitly or implicitly to the misconduct.").

73. *See Giles v. California*, 128 S. Ct. 2678, 2689 (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 . . . the testimony was excluded unless it was confronted or fell within the dying-declaration exception.").

74. *Id.* at 2693. Concurring in part, Justices Souter and Ginsburg emphasized that "the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help[.]" *Id.* at 2695 (Souter, J., concurring). The dissenters in *Giles* agreed with Justice Souter's domestic violence forfeiture thesis. *Id.* at 2708 (Breyer, J., dissenting).

frequently be able to prove to a judge's satisfaction that the defendant's misconduct procured the victim's unavailability. This would suggest, however, not that the principle of forfeiture is being incorrectly applied but, rather, that the law is properly accounting for the realities of the uncooperative domestic violence victim.<sup>75</sup>

This article does not purport to assess the constitutional, evidentiary, or social value of these developments and theories in forfeiture doctrine.<sup>76</sup> They are noted for the single purpose of establishing a trend line in cross-examination practice: as with the expansive approach to defining nontestimonial hearsay and the abrogation of the reliability test for such hearsay, more trial evidence will be presented without benefit of cross-examination.

### C. Cross-Examination in the Age of Electronic Media

The United States has a significant portion of its population devoted and acclimated to receiving information electronically in a visual format. At the end of 2006, "[t]he average American viewer watche[d] 4 hours and 35 minutes of TV each day, according to a 2006 report from Nielsen Media Research."<sup>77</sup> By contrast, reading time is one-fourth of that.<sup>78</sup>

There is some support for a conclusion that this correlates with shorter attention spans<sup>79</sup> and a greater preference and/or capacity to obtain information visually rather than aurally. Neuroscience shows that the brain

75. Deborah Tuerkheimer, *Crawford's Triangle: Domestic Violence and the Right of Confrontation*, 85 N.C. L. REV. 1, 49-51 (2006) (footnote omitted); see also Andrew King-Reis, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441 (2006).

The same theoretical paradigm has been proposed for a child abuse/assault cases. Laurie E. Martin, *Child Abuse Witness Protections Confront Crawford v. Washington*, 39 IND. L. REV. 113, 142 (2005) ("Arguments for application of the forfeiture doctrine in cases where the abuse itself is shown to have procured the child victim's absence are strong. Abusers will commonly tell victims not to tell, threaten the victim, their family, or even pets if the child tells; or abusers will ask others, like family members, to keep the child from telling.")

76. Concerns have been expressed over whether the expansion of forfeiture doctrine will lead to trial by unreliable (as well as un-cross-examined) evidence. See Kelly Rutan, Comment, *Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(B)(6) and the Due Process Implications of the Rule's Failure to Require Standards of Reliability for Admissible Evidence*, 56 AM. U. L. REV. 177 (2006).

77. Michael Wamble, *Stud Spud Man Wins His Second Straight Ultimate Couch Potato Title*, CHI. DAILY HERALD, Jan. 4, 2007, at 3.

78. Surveys indicate that "51 percent of the American population never reads a book over 400 pages after they complete their formal education . . . [and t]he average American reads only eight hours (books, newspapers, magazines, Yellow Pages, etc.) every week." Harvey Mackay, *Smartest People Have Something to Learn*, ALBANY TIMES UNION, Dec. 31, 2006, at E1.

79. See, e.g., Dimitri A. Christakis et al., *Early Television Exposure and Subsequent Attentional Problems in Children*, 113 PEDIATRICS 708, 708-13 (2004) (documenting significant attention span deficits in seven-year-olds who engaged in substantial television watching years earlier); Renee Hobbs, *Television and the Shaping of Cognitive Skills*, in VIDEO ICONS AND VALUES 33, 36-38 (Alan M. Olson et al. eds., 1991) (describing television's ability to shorten viewers' attention spans).

may favor such information delivery, as "the physiological predominance of the sense of sight is indicated by the fact that there are more neurons involved in the visual functioning of the nervous system than in the rest of the senses put together."<sup>80</sup>

Where the science is soft is in identifying quantitatively whether and how this visual focus (and its consequential reduction in attention span) affects juror reception and retention of orally-presented proof.<sup>81</sup> It is contended "that juries remember 85 percent of what they see as opposed to only 15 percent of what they hear."<sup>82</sup> Separately, there is a strong capacity to remember "iconic" visual images.<sup>83</sup>

Separate from worries over the impact on cross-examination of an audience with a more visual focus and its correlated limited attention span are concerns about television *content*. The most discussed fear for trials, the "CSI effect," has anecdotal support for its claim that certain types of programming have altered the expectations of jurors in criminal cases and, for prosecutors, raised the burden of proof by requiring seemingly infallible (e.g., DNA) proof.<sup>84</sup> These experiences have not been borne out in controlled studies,<sup>85</sup> but the concern over television impacting on jurors' beliefs continues to motivate

80. Irvin C. Rutter, *Law, Language, and Thinking Like a Lawyer*, 61 U. CIN. L. REV. 1303, 1329 n.55 (1993) (citing Louis N. Ridenour, *Electronics and the Conquest of Space*, in AN OUTLINE OF MAN'S KNOWLEDGE OF THE MODERN WORLD 279, 287 (Lyman Bryson ed., 1960)).

81. The ultimate source for this contention is often a communications specialist or jury consultant. See, e.g., Fred H. Cate & Newton N. Minow, *Communicating With Juries*, 68 IND. L.J. 1101, 1114 (1993) (relying for this thesis on the contention of the President of Litigation Communications, Inc).

82. Kristin L. Fulcher, Note, *The Jury as Witness: Forensic Computer Animation Transports Jurors to the Scene of a Crime or Automobile Accident*, 22 U. DAYTON L. REV. 55, 72 (1996) (quoting I. Neel Chatterjee, *Admitting Computer Animations: More Caution and New Approach Are Needed*, 62 DEF. COUNS. J. 36, 43 (1995)). See also Cate & Minow, *supra* note 81, at 1114 ("It should come as no surprise that as much as ninety percent of verbal testimony is misunderstood or forgotten completely.").

This phenomenon is significantly altering law school teaching, where the information recipients are the next generation of jurors and the traditional mode of presentation has been oral. Fred Galves, *Will Video Kill the Radio Star? Visual Learning and the Use of Display Technology in the Law School Classroom*, 2004 U. ILL. J.L. TECH. & POL'Y 195, 202-03 (2004). Galves reiterates that "[i]t is clear that people remember more of what they see than what they hear. Therefore, people retain information communicated through sight and sound better than information conveyed through sound alone." *Id.* (footnote omitted).

83. H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 493 (2001). Citing to studies on visual image retention, the authors conclude that "our ability to recall a picture is astounding. Whereas even memorized verbal information is subject to forgetting, iconic (visual) images are relatively permanent, and our capacity for them seems virtually unlimited." *Id.* (footnote omitted).

84. Kit R. Roane, *The CSI Effect*, U.S. NEWS & WORLD REP., Apr. 25, 2005, at 48; Richard Willing, *"CSI Effect" Has Juries Wanting More Evidence*, USA TODAY, Aug. 5, 2004, at 1A.

85. See Kimberlianne Podlas, *"The CSI Effect:" Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2006).

lawyers in designing jury strategy and seeking particular jury instructions. Should such a correlation be proved, cross-examination may require reconfiguring, or CSI-category cases may join the ranks of those<sup>86</sup> where the leading question has diminished utility.

The transformation to a visual-information, abbreviated-attention-span society (or a society in which a significant portion of adults has these attributes) does not forecast or imply that cross-examination is in an “at-risk” status. However, it does mandate study of whether these factors require that cross-examination be reconfigured. Such study may require significant adaptation of this art, an evolutionary response that re-imagines cross-examination to be cognizant of the limits of aural reception and the expectations of a visual-information-receptor factfinder. Increased brevity in presentation,<sup>87</sup> incorporation of visuals,<sup>88</sup> and dramatics,<sup>89</sup> may prove essential

86. See *supra* Part II (discussing the inutility of cross-examination in mistaken identification cases).

87. The link between the television-information generation and trial presentation is beginning to appear in advocacy writing. Gary S. Gildin, *Reality Programming Lessons for Twenty-First Century Trial Lawyering*, 31 STETSON L. REV. 61, 63 (2001). Noting that members of “generation X” continue to make up an ever-larger plurality of jurors, Professor Gildin advises that

the assessment of new strategies for shaping trial presentations to Generation X jurors is accompanied by acknowledgment of the second galvanizing change in society—the rapid rise of new technologies to accumulate and convey knowledge. . . . [W]hile the ultimate object of the trial has remained constant, the twenty-first century lawyer must adapt his or her advocacy to accommodate the new audience, as well as to employ new means of information delivery.

*Id.*

88. The ABA currently lists six vendors with trial presentation software. ABA Legal Tech. Res. Ctr., *Presentation Software: Comparison Chart* <http://www.abanet.org/tech/ltrc/charts/presentationcomparison.html>. See Caldwell et al., *supra* note 83, at 509 (calling for “the liberal use of visual aids . . . to make the substance of a case easier for the jury to understand and remember”). Litigators have clearly received this message. In today’s courtroom, the PowerPoint presentation is only the beginning. Courts have developed principles of and procedures for the admissibility of computer-generated animations. See, e.g., *State v. Swinton*, 847 A.2d 921, 945 n.30 (Conn. 2004); *Pierce v. State*, 718 So. 2d 806 (Fla. Dist. Ct. App. 1997); *Cleveland v. Bryant*, 512 S.E.2d 360 (Ga. Ct. App. 1999); *State v. Clark*, 655 N.E.2d 795 (Ohio Ct. App. 1995); *Harris v. State*, 13 P.3d 489, 495 (Okla. Crim. App. 2000); *Commonwealth v. Serge*, 896 A.2d 1170, 1178 (Pa. 2006); *Mintun v. State*, 966 P.2d 954, 959 (Wyo. 1998).

Computer software for managing and presenting documents, photos and other exhibits is readily available and in use. According to a 2004 American Bar Association survey of lawyers,

[t]he most readily available evidence presentation device was a laptop equipped with presentation software (22%). On the other hand, the availability of barcode readers (5%), evidence cameras (10%), and integrated lectern/evidence presentation units (13%), was limited. . . .

Although it would be desirable for the courts to provide hardware, larger firms (over 100 attorneys) are taking matters into their own hands. Digital

in ensuring that cross-examination retains some capacity to elucidate and inform, if not to be the "great[] engine" in the search for truth. As one writer has cautioned,

The twenty-first century may dictate that we now structure our speeches (and perhaps our witness examinations as well) not only to place first what we want the jurors to recall, but also to open our presentations by instantly unveiling information that will cause the jurors to become sufficiently interested and refrain from pressing their mental remote control button to tune in to another "station."<sup>90</sup>

Reconfiguring the trial presentation's organization and content is essential not only for attentiveness but for comprehension. Studies have shown that visuals, particularly juror notebooks with copies of expert witness slides and glossies, enhance juror comprehension of complex scientific evidence, such as mitochondrial DNA.<sup>91</sup> The National Center for State Courts has recommended that judges consider providing juror notebooks including "photographs of key witnesses" and "copies of key exhibits" in complex or lengthy cases.<sup>92</sup> Cross-examination will not work by words alone.

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slide projectors (54%), notebook/laptop with presentation software (82%), and overhead projectors (76%) seem to be a part of the trial attorney[']s arsenal. Growing in availability are evidence cameras (34%) and digital audio recording devices (26%). Even for solo attorneys, a laptop with presentation software (21.4%) is becoming a standard tool of the trade.

ABA Legal Tech. Res. Ctr., *Anatomy of Trial Technology*, <http://www.abanet.org/tech/ltrc/publications/trialtech.htm>.

89. One writer has described the "legal management of dramatic effect" that was choreographed in the Timothy McVeigh trial as responsive to the fear of jurors' attention spans waning. Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 674 (1999). Rapping quotes a lawyer who observed the McVeigh trial as opining that "[l]awyers are convinced they need drama and entertainment in an age when attention spans have been diminished by television." *Id.* (quoting Andrew Cohen, *Lessons from the Timothy McVeigh Trial*, MEDIA STUD. J., Winter 1998, at 11.)

90. Gildin, *supra* note 87, at 69. Gildin's urgings do not stand in isolation. James McElhaney's "On Litigation" column admonishes lawyers to "[s]how the jurors—don't just tell them—the story of your case." James McElhaney, *Language Has Its Limits*, A.B.A. J., Feb. 2007, at 18,

91. B. Michael Dann, et. al., *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?*, NAT'L INST. JUST. J., Nov. 2006, available at [http://www.ojp.usdoj.gov/nij/journals/255/trial\\_innovations.html](http://www.ojp.usdoj.gov/nij/journals/255/trial_innovations.html).

92. NAT'L CTR. FOR ST. CTS., JURY TRIAL INNOVATIONS 102-03 (G. Thomas Munsterman, et al. eds., 2nd ed. 2006).

## IV. CONCLUSION

The mythic power of cross-examination remains enshrined in the American adjudicative process, both criminal and civil.<sup>93</sup> What courts have yet to address are two concerns: the demonstrated limits (if not inutility) of this tool in specific contexts such as mistaken identification cases; and the cost to the truth-determining process if cross-examination is no longer required/permitted in increasing categories of cases with the more expansive use of hearsay.

Lawyers have to reckon with even more. Where cross-examination is no longer available, new skills (investigative and persuasive) will be required to adequately test evidentiary reliability, the *sine qua non* of the paradigmatic search for the "discovery of the truth" envisioned and extolled by Wigmore. Where cross-examination is to be practiced, it must occur with an awareness of the needs and limits of its audience, one that may prove to be markedly different in capacities and expectations than the factfinders for whom this art was originally developed.

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93. Although much of the discussion above focuses on Confrontation analysis, a purely criminal trial concern, the trend lines shown there will impact clearly and consistently in civil litigation as evidence codes expand or judicial decisions expand the admissibility and role of hearsay proof. In addition, the developments noted in Part III.C—the expectations and modes of learning engendered by the role of television and electronic media—have equal applicability to litigation styles in civil practice.