

CROSS-EXAMINATION EARLIER OR LATER: WHEN IS IT ENOUGH TO SATISFY *CRAWFORD*?

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The revolution in confrontation jurisprudence brought by the decision in *Crawford v. Washington*¹ changed many things, but it did not change one important part of the law, namely the doctrine that cross-examination can make everything right, as far as the Confrontation Clause is concerned. Simplifying for a moment, *Crawford* affirms the old rule that the Confrontation Clause is satisfied by both prior and deferred cross-examination.

That is to say, a statement may be admitted if the speaker testified before trial, typically in a preliminary hearing but sometimes in a deposition, and was cross-examined then (or could have been), which is what is meant by prior cross-examination. And a statement may be admitted if the witness testifies at trial and can be cross-examined then, which is what is meant by deferred cross-examination.

In either case, the cross-examination is not quite what lawyers usually have in mind when they think about cross-examination and what it can do. The reason is that in both cases the actual statement being admitted against the accused was made “off stage” so to speak, and not in court where a defense lawyer can press the witness by putting the questions that cross-examination allows.

In the case of prior cross-examination, there is always the question about motivation: Did the defense lawyer really have the same incentive back then to pursue the witness?

In the case of deferred cross-examination, there is always the question whether the testing process can be fully effective, since it goes forward long after the statement was made, and since the witness almost always retreats into evasions and claims of lack of memory now. The witness often never quite concedes that the earlier statement was mistaken or false, so it is possible that the deferred chance to challenge the witness is not really good enough. If it wasn’t good enough, then a

* Henry S. Lindsley Professor of Law, University of Colorado School of Law. The author wishes to thank the staff of Regent University Law Review, and particularly Editor in Chief Kerry Hodges, Symposium Director Amber Dina, and my own host at the conference, Jeremy Pryor, as well as our gracious faculty host, James Duane, for their work in putting together the symposium of which this article is a part. I also wish to thank my longtime friend and co-author Laird Kirkpatrick who was a symposium participant, for his helpful comments on the subject addressed in this article, and I wish to thank Professor Duane for comments he made in many conversations that led to this piece. Final responsibility for the positions taken in this article rest, of course, with me.

¹ 541 U.S. 36 (2004).

statement that ought never to have counted in the case survives and may well count after all.

There are three reasons to revisit this subject now. First, *Crawford* requires exclusion of some statements that courts admitted before, which means that prosecutors have new incentives to try to avoid the barrier of *Crawford*-based objections by taking advantage of the old rule that prior or deferred cross-examination suffices. Included in this category are statements to police that fit the excited utterance or against-interest exception, testimony before grand juries that was sometimes admitted under the catchall exception, and statements in plea proceedings that were sometimes admitted under the against-interest exception. Second, the old rule was never fully fleshed out, and the Court has been, to put it mildly, casual in explaining why prior or deferred cross-examination removes objections under the Confrontation Clause. Third, the old rule is manipulable, and courts face real issues as to what it actually means to provide an opportunity for prior or deferred cross-examination.

It merits mention that the task at hand is not to attack *Crawford*. The good work done by the Court in that case deserves our respect, even admiration, and this article does not seek to derail the project that *Crawford* set out for courts.² *Crawford* was right to shift the focus of the Confrontation Clause away from reliability and to look instead at the nature of statements offered against the accused, and especially at the intent or expectations of witnesses who make them and the role of police who gather or generate them. Under the older *Roberts* approach,³ the Confrontation Clause was a kind of “super standard” of reliability that turned for the most part on the same factors that already count in applying hearsay exceptions. The dominant theme of *Roberts* was that essentially all hearsay that satisfied traditional (“firmly rooted”) exceptions had a free pass. In that doctrinal environment, the Confrontation Clause almost disappeared, and there was something profoundly unsatisfactory about looking at hearsay doctrine as imposing one set of reliability criteria and the Confrontation Clause as imposing substantially the same standard, only different.

As conceived in *Crawford*, the Confrontation Clause is an independent check on the conduct of police and prosecutors in preparing and trying cases. To be sure, *Crawford* does not operate in the same

² The author, along with other participants in this symposium, was invited to join an amicus brief submitted in *Crawford*, and did so gladly. The leading role on the brief was played by Professor Richard Friedman of the University of Michigan Law School (he also appeared in oral argument). See Brief for Law Professors Sherman J. Clark, James J. Duane, Richard D. Friedman, Norman Garland, Gary M. Maveal, Bridget McCormack, David A. Moran, Christopher B. Mueller, and Roger C. Park as Amicus Curiae Supporting Petitioner, *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754958.

³ *Ohio v. Roberts*, 448 U.S. 56 (1980).

manner as other quasi-evidentiary doctrines associated with the decisions in *Mapp*, *Miranda*, and *Massiah*, which apply the Fourth, Fifth and Sixth Amendments, respectively.⁴ These doctrines criticize or condemn certain police tactics as violating various protected rights—as invading aspects of personal privacy and security that are protected by the Fourth Amendment, failing to respect the will and dignity of suspects that are protected by the Fifth Amendment, and undermining the right to counsel that is protected by the Sixth Amendment.

In contrast to *Mapp*, *Miranda*, and *Massiah*, the *Crawford* doctrine does not criticize or condemn any police tactic. *Crawford* does, however, make the Confrontation Clause into a regulating principle that governs the manner of preparing for trial and the manner of conducting the trial itself, and in this way *Crawford* serves a regulatory or prophylactic purpose that is of a piece with the other doctrines. *Crawford* insures that prosecutors will not merely gather and offer pretrial hearsay statements, but will also take care to bring those witnesses to appear and actually to testify.

The work begun in *Crawford*, however, remains unfinished. What is needed is more nuanced doctrines relating to the real meaning of cross-examination, which can apply in situations in which the speaker was subject to prior or deferred cross-examination. The task of this article is to further the discussion of this subject.

I. PURPOSES OF CROSS-EXAMINATION

A. *The Academic and Judicial Model: Cross as Testing*

Courts and commentators are as one in calling cross-examination a “testing mechanism.” In Wigmore’s much-quoted phrase, cross-examination is “the greatest legal engine ever invented for the discovery of truth,”⁵ and the Supreme Court has said very much the same thing, stressing the role of cross-examination in the truth-finding enterprise,

⁴ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence seized illegally under Fourth Amendment must be excluded). Well before *Mapp*, the Court adopted a similar rule for evidence illegally seized by federal officers in violation of the Fourth Amendment and offered in federal courts. *Weeks v. United States*, 232 U.S. 383, 398 (1914). See also *Miranda v. Arizona*, 384 U.S. 436, 498–99 (1966) (stating that police must read a suspect his rights before custodial questioning, otherwise what he says in response to questioning is inadmissible under the Fifth Amendment); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (holding that certain post-indictment statements are excludable under Sixth Amendment right to counsel).

⁵ 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourn ed., rev. ed. 1974).

and holding that protecting the right to cross-examine is central to the purpose of the Confrontation Clause.⁶

In the testing model, the cross-examiner delves into word meaning, truthfulness, memory, and perception.⁷ These “hearsay risks,” as we call them in explaining the reason for the famous evidence doctrine that excludes at least those out-of-court statements that do not fit some exception, are controlled and substantially reduced by the testing process that cross-examination advances.

It is worth considering these points in more detail:

In connection with word meaning, the cross-examiner can help get at what the witness is really trying to convey in the words that the witness chooses. Does “blue” in her account really mean blue, or could it mean silver? Does “fast” mean 40 MPH, or does it mean 75 MPH? When she says the defendant had a knife, does she mean he had the knife in his hand, ready to use, or does she mean that it was resting in a scabbard? In talking about reasons to mistrust hearsay, we speak of these issues in terms of ambiguity, or narrative ambiguity, and cross-examining a percipient witness can reduce and perhaps minimize these risks.

In connection with truthfulness, the cross-examiner can get at specific motivational factors that affect what the witness says. Has he reached an understanding with the prosecutor in connection with possible charges against him, or the disposition of pending charges, or the conditions of incarceration? Does he have something to gain or lose if the case comes out one way or another? Does he have a relationship with one of the parties that will naturally incline him to testify favorably for one or unfavorably to another? Of course the cross-examiner can also get at points that reflect more generally on truthfulness, such as prior instances of misrepresentation, as happens if someone inflates a resume by inventing experiences or educational credentials. And the cross-

⁶ See *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (stating that the “primary interest” secured by the Confrontation Clause is “the right of cross-examination,” and “an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation”).

⁷ *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) (“[Cross] is essentially a ‘functional’ right designed to promote reliability in the truth-finding functions of a criminal trial.”); *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (stating that cross is “the principal means by which the believability of a witness and the truth of his testimony are tested”); *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (stating that cross gives the defense “an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief”).

examiner can, of course, go into prior convictions, a practice much criticized by commentators, including the author of this piece.⁸

It would be saying too much to claim that points such as these can identify a witness who simply enjoys lying—indeed, how many such people have any of us ever met? A more plausible idea is that a witness who gives in to the temptation to lie when it will do him some good may lie in his testimony, even though more conventional attacks for bias have not uncovered a particular motivation, or perhaps when they *have* uncovered a motivation, in which case the witness who is easily tempted into falsehood on other occasions is for that reason even more likely to be tempted in that direction now. Whether or not everyone has a “price,” the very pragmatic underlying idea is that some people can, in fact, be bought, and indeed some can be bought more cheaply than others. We speak, in this context, of exploring “character for truth and veracity.”⁹

In connection with memory, the cross-examiner can get at the question whether the witness really remembers the acts, events, or conditions that he describes. Since almost every witness has spoken to others about his proposed testimony, and especially to the lawyer who will ask him questions on direct, there is always the possibility that what the witness remembers is “what he has said before” rather than the underlying acts, events, or conditions. And of course there is the possibility that he remembers saliently some major points but has forgotten others, or maybe he never knew them, and is just “filling them in” by a process of ordinary inference that might even be unconscious. In connection with hearsay, we speak of the risk of failed or faulty memory.

The cross-examiner also tests perception. Can the witness see or hear well? Was he in a good position to see or hear what he describes? Was he distracted by other sights or sounds, or by his thoughts or engagements? In connection with hearsay, we speak of the risk of misperception.

The testing model is afflicted with one great difficulty. This difficulty stems from the fact that cross-examination cannot, and certainly should not, succeed in shaking every witness or undermining confidence in what she has said. The model must accommodate the possibility that the witness gets it right the first time, that she is both honest and painstaking in what she says. It is not too much to hope that in most cases the witness will take care, and will spend time organizing her thoughts and searching her memory. Hence the possibility is real

⁸ See generally Christopher Mueller, *Of Misshapen Stones and Compromises: Michelson and the Modern Law of Character Evidence*, in EVIDENCE STORIES 75 (Richard Lempert ed., 2006).

⁹ See, e.g., FED. R. EVID. 608(b) (authorizing cross-examination on specific instances of misconduct); FED. R. EVID. 609(a) (authorizing the use of convictions to impeach); FED. R. EVID. 611 (speaking generally about cross-examination).

that the adverse party will see that there is nothing to be gained by an attack and will not cross-examine at all. Or he will sense, after a few probes, that defeat is coming and give up the game after cursory questions that can be passed off as constructive efforts to clarify, rather than a failed attack. Or perhaps the cross-examiner will be forced—because lawyers have a very different model of cross-examination on their mind, taken up below—to pursue diversionary tactics, finding fault or making the witness look bad on some minor or peripheral point. What is of course the worst possible outcome is an attack that fails utterly.

For these reasons, appraising cross-examination may involve looking at something that did not happen at all, in which case one can only ask whether the *opportunity* to cross-examine was adequate, or whether the lawyer's choice not to pursue it reflects incompetence or dereliction of duty. Appraising cross-examination may involve looking at questioning that appears timid, or seems to have gone off on a tangent, or seems to have failed. We can try to dig out from this difficulty by saying that what we promise is process: The parties—and in the setting of the constitutional guarantee of confrontation we are concerned with defendants in criminal cases—are entitled to have a go at the witness. “You can cross-examine every witness,” we say, but we don't promise success. “You aren't entitled to dislodge every story or discredit every witness,” we say. But this kind of statement is window dressing: To know whether there was an opportunity that means something, we must pay attention to what happened. If we won't look, or if we blame lawyers when the procedural opportunity does not yield any progress, then we are simply hoping that only true stories survive and that only credible witnesses are believed.

Appraising cross-examination that did not achieve full success (or an opportunity that was not seriously pursued) is perhaps made a little bit easier by the fact that not many witnesses will be as perfect as the one imagined above. We can expect that most witnesses will not find exactly the right words, and indeed the very idea of perfect verbal expression may be incoherent, given the complexity of language, the imprecision of meaning, and the vagaries of communicating by word of mouth. Hence almost any cross-examiner can make at least some progress in uncovering a misimpression or misspoken phrase, or can at least succeed in limiting or expanding the implications of some thought ventured on direct, or in uncovering some hesitation or uncertainty on some point, or at the very least in pointing out that a witness who is sure of everything has assumed an attitude that is itself suspicious.

It is for these reasons that the Supreme Court has said, in a phrase that has become almost as familiar to modern litigants as Wigmore's description of cross-examination is familiar to virtually everyone in the profession, that defendants in criminal cases are entitled only to “an

opportunity” for cross-examination. They are emphatically not entitled to cross-examination that is “effective in whatever way, and to whatever extent” that they “might wish.”¹⁰

B. The Lawyers’ Model: Cross as Drama

Practitioners seem to live on a different planet from courts and academic commentators. Not surprisingly, practitioners tell us that cross-examination is about winning, and not about testing as such, and certainly not about truth as such. Lawyers speak to one another in terms of drama, theatre, and rhetoric. In terms of drama and theatre, practitioners use cross-examination to show that the witness is actually bad, not to prove as a matter of logic that he is incorrect. To put it another way, cross-examination involves persuading juries to reject testimony, which requires not simply a logical appeal, but an emotional appeal as well. In terms of rhetoric, cross-examination resembles a political contest, in which the point is not merely to prove some error in the position taken by the other side, but to find words that encapsulate for an audience the proposition that the other side is morally flawed, even corrupt. And speaking of drama, theatre, and rhetoric, the cross-examiner who attacks the witness must also show that she herself is good, and by extension that her client is good, and by further extension that the cause of her client is good. It is not enough merely to prove that her client and her cause are right or correct.

In the practitioner’s vision of cross-examination, focusing now on the situation to which the Confrontation Clause is addressed, the defendant questions witnesses called by the prosecutor. It is of course the prosecutor who would prove a proposition that the defendant denies, and the prosecutor is the sponsoring party, the one who transparently chooses to advance his side of the case by means of the witness. While the Rules take the view that sponsoring (or calling) a witness does not involve “vouching” for her testimony,¹¹ it is nevertheless the case that neither the prosecutor nor the defendant can be seen to sponsor (or call) a witness with whom it can make no headway, whose testimony—meaning virtually every word of it—is favorable to the other side.

A defendant may be able to afford to cross-examine a witness called by the other side even if the cross-examination does not prove very much, because merely modifying or clarifying what the witness says can be viewed as contributing to the task at hand, and amounts to a kind of lesser drama or demonstration, and there are few witnesses whose testimony cannot be at least challenged in terms of the degree of certainty in which it is expressed, or thrown into doubt by suggestive

¹⁰ Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

¹¹ See FED. R. EVID. 607 (providing that any party may impeach a witness).

questions about interest or viewpoint or problems in perception or word choice.

To get what is needed from cross-examination, practitioners argue that the critical point is *controlling* the witness. Even in common usage, the term cross-examination conveys this idea. To cross-examine someone is to subject him to the third degree, to interrogate or engage in relentless verbal pursuit. Practitioners say that the cross-examiner must control the witness without *appearing to do so* because jurors identify more with witnesses than with lawyers, more with people than with causes, and jurors are prepared to believe that trial lawyers do anything to win. Practitioners say “never take your eyes off the witness” and “never let her get away with an evasive answer,” and always “intimidate the witness to bring him under your control.” In his famous *Ten Commandments of Cross-Examination*, Irving Younger said that lawyers should ask only leading questions, should never let the witness repeat his direct testimony, and should never let him explain an answer.¹² In the context of cross-examining even expert witnesses, where one might think that the testing function would be paramount and that a lawyer would go into the factors made familiar by the *Daubert* case,¹³ such as the risk of error or false positives, or the perils of mishandling samples, or the limits of statistical inference, we are told that what really happens is much different. Even here, the lawyer’s job on cross is not to test, but to make the expert look like a liar. Jurors, we are told, don’t care about things like error rates.¹⁴

The film version of *Anatomy of a Murder* presents more than one vivid illustration of cross-examination as drama in the setting that concerns us here, which is defense cross-examination of prosecution witnesses.¹⁵ A justice of the Michigan Supreme Court wrote the novel on

¹² Henry W. Asbil, *The Ten Commandments of Cross-Examination Revisited*, CRIM. JUST., Winter 1994, at 2.

¹³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *see also infra* note 49 and accompanying text.

¹⁴ James M. Shellow, *The Limits of Cross-Examination*, 34 SETON HALL L. REV. 317, 319 (2003) (discussing how the cross-examiner must make the expert look “morally deficient,” and how the combination of judge unable or unwilling to assess reliability and jury with no understanding of scientific method leads to cross-examination that is “more style than substance”).

¹⁵ The popular black-and-white film ANATOMY OF A MURDER (Carlyle Prods., Inc. 1959) was directed by Otto Preminger. James Stewart starred as the defense counsel Paul Biegler, and George C. Scott starred as the prosecutor Claude Dancer. Lee Remick played Laura Manion (wife of the defendant). Ben Gazzara played Lieutenant Frederick Manion, who was accused of murdering Barney Quill because he made a pass at his wife. Eve Arden played Maida Rutledge, secretary to Paul Biegler, and Arthur O’Connell played an older beaten-down friend and helpmate of Biegler’s, named Parnell Emmett McCarthy. Don Ross played the jailed surprise witness Duane (“Duke”) Miller. Joseph N. Welch played the patient and world-weary presiding officer, Judge Weaver. Welch was by this time famous—

which the film was based,¹⁶ so perhaps it is not surprising that the courtroom scenes are so vivid and so convincing, and the screen performances by James Stewart (who played defense counsel Paul Biegler) and George C. Scott (who played prosecutor Claude Dancer) are star quality, by any measure. To take just one example, Biegler cross-examines a jailed prisoner named Duane Miller, whose cell is beside that of the defendant (Lieutenant Manion).¹⁷ Led by the prosecutor Dancer (Scott), Miller tells the jury that the defendant said things in his cell that would be destined to offend the jury and convince any doubter of his guilt in murdering his wife's apparent lover. According to Miller, Manion said the following: "I got it made, Buster. I fooled my lawyer and I fooled that head shrinker and I'm going to fool that bunch of corn cobbers on the jury!" And Miller finished with the coup de grace: "He said when he got out the first thing he was going to do was kick that bitch from here to kingdom come." "To whom was he referring?" asks prosecutor Dancer. "To his wife," Miller replied. "Your witness," says Dancer.

Now what kind of cross-examination could hope to test a witness who has said such things? Certainly not questions probing memory or perception or word meaning, or even questioning probing bias: Who else would a defendant on trial for murder talk to during a trial? Another jailed person, of course, so regardless how "tainted" such a witness might be on account of self-interest, one can understand that the prosecutor must call him if the jury is to hear what the defendant "really" thinks. So what does Paul Biegler (Stewart) do in this disastrous situation? He makes the choice that many lawyers make in such circumstances, and many politicians fearing for their political future—he engages in a blatant *ad hominem* attack. In the movie, the defendant Manion expresses outrage in court over Miller's testimony, and here is what Biegler says: "I apologize for my client, Your Honor. Yet, his outburst is almost excusable since the prosecution has seen fit to put a felon on the stand to testify against an officer in the United States Army."

in real life he was the lawyer who represented the Army in the televised Army-McCarthy hearings in 1954. It was Welch who asked the dramatic question that put an end to Joseph McCarthy's "witch hunt" for Communists in the Army. Defending Fred Fisher (a young lawyer in his office), Welch asked the following devastating rhetorical question: "Have you left no sense of decency sir, at long last? Have you left no sense of decency?" The famous exchange can be viewed in *POINT OF ORDER!* (Point Films 1964), Emile de Antonio's famous documentary of the hearings.

¹⁶ ROBERT TRAVER, *ANATOMY OF A MURDER* (St. Martin's Press 1958). Traver was the pen name used by John D. Voelker, who served on the Michigan Supreme Court from 1957–1959.

¹⁷ The quoted passages in the ensuing paragraphs are taken from Wendell Mayes, *Screenplay for Anatomy of a Murder*, from the novel by Robert Traver, at 181–85 (Feb. 25, 1959), which can be viewed on the Internet at http://www.dailyscript.com/scripts/anatomy_of_a_murder.pdf.

And what comes next? Biegler asks Miller, “What are you in jail for?” and “How many other offenses have you committed?” which produces the answer “I was in reform school when I was a kid.” Then Biegler, looking at the record of the witness, essentially testifies for him:

Mr. Miller, this record shows you’ve been in prison six times in three different states. You’ve been in three times for arson, twice for assault with a deadly weapon, once for larceny. It also shows you’ve done short stretches in four city jails for the charges of indecent exposure, window peeping, perjury, and committing a public nuisance. Is this your true record?

“Well, them things never are right,” replies Miller. Biegler follows up, asking, “How did you get the ear of the prosecution?” and learns that the prosecutor Dancer had gone to the jail, where he spoke separately with the inmates. “Were you promised a lighter sentence,” asks Biegler, “if you would go on the witness stand?” Miller denies the suggestion. “Perhaps you just thought it might help your own troubles if you dreamed up a story that would please the D.A.?” says Biegler, and here the screenplay finishes with a question mark, although Biegler’s line reads more like a naked assertion. Miller denies dreaming up anything, and Biegler asks whether he’s “sure that’s what Lieutenant Manion said.” “Yep, I’m sure.” “Just as sure as you were about your criminal record?” “Well, I kind of flubbed that I guess.” Biegler makes his exit: “I don’t feel I can dignify this creature with any more questions.”

Put most starkly, the difference between courts and academic commentators on the one hand, and practitioners on the other hand, including the fictitious Paul Biegler in *Anatomy of a Murder*, involves almost a contradiction. A trial, one might argue, is not all what we usually say about it—it “is not, in fact, a search for truth,” one academic commentator writes in sympathy with practitioners, and the trial lawyer is not an investigator seeking the truth, but “first and foremost a seller of a story.”¹⁸ In this account, it is almost hard to avoid the conclusion that the trial lawyer is a salesman, a politician, a talk show host. His job is to “sell” a line, to sell himself as the good guy and the opposition as a bad guy, which includes using cross to draw from every witness “any concession” that can be parlayed into winning support for the lawyer’s version of the case. In short, practitioners are from Mars and cross is warfare, while judges and academics are from—well, not Venus, perhaps, but at least Mercury, who was not only the messenger god, but also the god of knowledge.

Of course this realpolitik vision of the role of trial lawyers can be discounted for three reasons. To begin with, part of it is simply bravado. Trial lawyers experience risks, gains and losses, wins and defeats, in a

¹⁸ Richard H. Underwood, *The Limits of Cross-Examination*, 21 AM. J. TRIAL ADVOC. 113, 121 (1997).

more vivid way than courts and commentators, and more vividly than lawyers in other branches of the profession (“transactional lawyers”). To venture into a trial arena takes a special kind of personality, a kind of ego strength that manifests itself in hyperbole. It is no accident that real practitioners like Gerry Spence write books with titles like *Gunning for Justice*, or that fictional trial lawyers like Rumpole remember their past successes (*The Penge Bungalow Murders*) in inflated and dramatic terms.¹⁹

Perhaps equally importantly, cross-examination goes forward under the constraint of Evidence Rules and the unspoken conventions of human discourse that the presence of the jury and the judge require lawyers to bear in mind. The Rules are designed to check adversarial excesses, and to enable courts to check them, and thus for example the Rules (if administered right) block trial lawyers from asking groundless questions simply aiming to imply something horrendous but false about the witness.²⁰

Finally, most trial lawyers are in some respects ordinary mortals, which is to say that they are people of conscience and scruples, and they do not in fact “do anything to win.” Rather, they fear the wrath of juries and judges if they are perceived to be doing that, so the system is not quite as much “dog eat dog” as the more exaggerated accounts suggest.

C. A Standard Emerges: *The Decision in Green*

In its decision in the *Green* case almost forty years ago,²¹ the Supreme Court spoke definitively to the question whether prior cross-examination satisfies the Confrontation Clause, and also to the question whether deferred cross-examination satisfies the Clause, answering both questions in the affirmative.

In *Green*, we should recall that Melvin Porter was the main witness, and the theory was that the defendant recruited this sixteen-year-old boy to sell marijuana. Porter made a stationhouse affidavit and testified fulsomely at the preliminary hearing. At trial, however, he waffled. There he would only say that Green called and asked him “to sell some unidentified ‘stuff,’” and that after this conversation Porter got twenty-nine plastic baggies of marijuana and sold some. But Porter said he had

¹⁹ See, e.g., GERRY SPENCE, *GUNNING FOR JUSTICE* (1982) (describing career of its famous author and commenting on the Silkwood trial and others); GERRY SPENCE, *THE SMOKING GUN* (2003); JOHN MORTIMER, *RUMPOLE AND THE PENGE BUNGALOW MURDERS* (2004).

²⁰ See 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 6:54 (forthcoming 3d ed. 2007) (stating that under FED. R. EVID. 608, cross-examiner cannot properly ask witness about prior bad acts suggesting untruthfulness without having a reasonable basis for the question).

²¹ *California v. Green*, 399 U.S. 149 (1970).

taken LSD before Green phoned, and said that he couldn't remember how he got the marijuana, and said as well that he couldn't tell fact from fantasy. The prosecutor used Porter's earlier statements to refresh memory, and Porter then "guessed" he got the marijuana from Green's house, and paid Green the money that Porter collected when he sold it.

The Court approved use of both the preliminary hearing testimony and the stationhouse affidavit.

Porter's preliminary hearing testimony, said the Court, was given in "circumstances closely approximating" those of trial because Porter was under oath, a judge presided, and a verbatim record was kept. Also defendant had a lawyer, and most importantly the lawyer "had every opportunity" to cross-examine Porter. Hence what Porter had to say would have been admissible at trial even if Porter had been "actually unavailable" to testify at trial.²² In short, prior cross-examination satisfies the Confrontation Clause. Indeed, the position of the Court in *Green* was that a mere prior opportunity to cross-examine satisfies the Confrontation Clause, regardless whether the defense pursued that opportunity. It was not until the *Roberts* case was decided in 1980 (ten years after *Green*) that the Court considered the possibility that an "opportunity" to cross-examine might not be enough, inasmuch as refraining from doing so might be a reasonable decision that could not be construed as waiver.²³ In *Green*, that thought did not occur, and *Green* says that an opportunity suffices.

Similarly the stationhouse affidavit could be used at trial because deferred cross-examination at the time of trial also satisfies the Confrontation Clause. After all, said the Court in *Green*, the fact that the witness now tells a "different, inconsistent story" that is "favorable to the defendant" does as much as "successful" cross might accomplish earlier. The witness has not become "hardened" by the delay between the statement and the opportunity to question him at trial, and indeed the statement has "softened to the point where he now repudiates it." Of course the atmosphere at trial is not quite what we normally experience. The witness in the case under consideration has become "favorable to the defendant" and is now "more than willing" to explain the inaccuracy of what he said before, which might stem from "faulty perception or undue haste."

Green set the standard for measuring the adequacy of cross-examination. The question, said the Court in *Green*, is not whether contemporaneous cross would be better. Rather, the question is whether delayed cross affords the trier "a satisfactory basis" to appraise the prior

²² *Id.* at 165 (likening the preliminary hearing to a prior trial).

²³ *Ohio v. Roberts*, 448 U.S. 56, 70 (1980); see also *infra* notes 91-94 and accompanying text.

statement. The absence of contemporaneous cross-examination does not matter if the defendant can engage in “full and effective cross-examination” at trial—“full and effective” is the standard, although “full and effective” does not mean contemporaneous cross-examination.

In reaching this conclusion, the Court had to do three things in *Green*:

First, it played *up* the extent to which Porter had become the friend of the defendant John Green. Porter was, after all, still damaging to the defense. He did not, in any realistic account, turn from being the main witness against John Green to being his main defender—Porter still said that Green was his supplier. The only difference was that Porter had become less certain at the time of the trial, and vaguer in details, which is surely a difference in degree but not kind. In short, Porter remained the principal witness against the defendant.

Second, the Court in *Green* played *down* the extent to which cross was impeded in testing what Porter had said. A witness who keeps saying he doesn’t remember the acts, events, or conditions reported in his prior statement can’t very well be asked whether his words were accurate, or whether his perceptions were accurate. Perhaps he can be asked whether his memory was better at the time—the memory that he says he does not now have—but the answer to that question is of little use. In the analogous case in which the proponent invokes the exception for past recollection recorded, the witness must affirm that his memory on the prior occasion was good and that he spoke while the matter was fresh in his mind, and the witness on that occasion usually (although not always) participates in actually creating the prior statement by writing it down.²⁴ But in the present setting, there is no such involvement, nor any such assurance that prior memory was right or that the statement was accurate, and indeed the stance of a witness like Porter is that the statement was not accurate. These points the Court all but ignored.

Third, the Court in *Green* ignored the practitioner’s view of cross—the extent to which it was impeded as drama. Instead, *Green* adopted the usual judicial and academic view of the purposes and virtue of cross-examination as a testing mechanism. The opinion does comment that the task of the cross-examiner is “no longer identical to the task he would have faced if [the witness] had not changed his story” because the cross-examiner is not facing a “hostile” witness. But the Court was simply making the point that cross-examination involves testing, and it said that the difference brought about by the change in the story “may actually enhance” defendant’s ability “to attack” the prior statement

²⁴ See 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:76 (discussing FED. R. EVID. 803(5)).

because the witness is “more than willing” to explain it as the product of “faulty perception” or “undue haste.”

There is, however, little or no drama, little or no theatre, little or no rhetoric, hence little or no appeal to the emotions, in attacking a witness who is trying to help without becoming a perjurer.

II. ADEQUACY OF LATER CROSS

A. Rules Requiring Deferred Cross-Examination

In three places, the Federal Rules of Evidence (FRE) require that the speaker be cross-examinable about what he said before, but they set a low standard: They only require that she be cross-examinable about the statement itself, not about the acts, events, or conditions reported in her statement.

First, FRE 801(d)(1)(A) provides that a prior inconsistent statement is admissible as substantive evidence if it was made under oath in proceedings and if the witness is cross-examinable “concerning the statement” being offered. From looking elsewhere in the Rules, we learn that the framers could easily have required that the speaker answer about the acts, events, or conditions described in the statement. In the definition of unavailability in FRE 804(a), the framers include language defining a person as “unavailable as a witness” if she does not remember “the subject matter” of her statement. That phrase obviously refers to the acts, events, or conditions described in it, and the same language could also have been used in FRE 801(d)(1). The Court concluded in the *Owens* case that the language actually used in FRE 801(d)(1) means what it seems to mean—that the witness must be cross-examinable about the statement, not that he must be cross-examinable about the acts, events, or conditions reflected or reported in the statement.²⁵

Second, the Rules contain a similar provision dealing with prior consistent statements. Under FRE 801(d)(1)(B), these are admissible as substantive evidence if offered to rebut a claim of influence or motive and if (once again) the speaker is cross-examinable “concerning the statement.” Again both the language and the decision in *Owens* suggest that cross-examinability about the acts, events, or conditions reported in the statement is unimportant. In cases where the live testimony essentially tracks what he said before, so the prior statement adds no new information to the testimony, it is hard to imagine a witness who doesn’t remember the acts, events, or conditions reported in both narratives. To testify at all, a witness must have personal knowledge, and testimony that represents guesswork or simply reports what

²⁵ United States, v. Owens, 484 U.S. 554, 561–62 (1988).

another has said to the witness would be excludable on those grounds alone.

We learn from cases like *Tome*, however, that prior consistent statements may say far more than the witness says at trial. In *Tome*, a girl aged six testified about acts that occurred when she was four, mostly saying yes or no to leading questions put by the prosecutor, and saying nothing at all on cross. If a prior statement in such circumstances is “consistent” with trial testimony, it fits this description in much the same way that the definition of justice offered in the early going of Plato’s *Republic* (giving “every man his due”) was consistent with what Socrates develops over the whole dialogue, describing in detail the upbringing and education of children, and the operation of a government run by philosophers.²⁶ Perhaps a broad generality is consistent with a detailed account, but the detail is critical and a witness who cannot be cross-examined on details in an earlier statement that is offered as “consistent” with later testimony is escaping altogether any realistic testing of what he has said.²⁷

Third, a statement of identification of a person is admissible as substantive evidence under FRE 801(d)(1)(C) if (once again) the witness is cross-examinable concerning the statement. Again the language of the Rule, and also the holding in the *Owens* case, tell us that cross-examinability about the facts doesn’t matter. In *Owens* itself, a prison guard beaten by an inmate—a man who may never have seen his assailant—was found to be adequately cross-examinable about a hospital statement identifying the defendant in a conversation that the speaker barely remembered. It should be noted that *Owens* did not resolve constitutional issues, limiting its discussion to the question whether the Rule was satisfied.

Of course there are other places where the Rules allow a prior statement by a testifying witness. The exception for past recollection recorded in FRE 803(5) is an obvious example. Here it is assumed that the witness cannot be cross-examined in the usual way, and we make do with a substitute: He must testify that he once had knowledge, that the statement accurately reflects that knowledge, and that it was made when the matter was fresh in his mind. More importantly, many common hearsay exceptions, such as those for personal admissions by co-offenders or excited utterances, could be invoked in cases where the speaker testifies, and often are invoked in this setting. When such

²⁶ See generally PLATO, *THE REPUBLIC* 327a–354c, at 3–43 (Robin Waterford ed. & trans., Oxford Univ. Press 1993).

²⁷ *Tome v. United States*, 513 U.S. 150, 153 (1995) (stating that the child described sexual assault in “one- and two-word answers to a series of leading questions,” and on cross was “reluctant at many points to answer,” leading to “lapses of as much as 40–55 seconds between some questions and the answers”).

statements are testimonial under *Crawford*, as is often true when such statements are made to police or law enforcement, the fact that the speaker testifies could remove objections under *Crawford* and under the *Bruton* doctrine.²⁸

B. "Full and Effective" Cross-Examination: What Should It Mean?

Recall that the standard set in *Green* is that the defense must have an opportunity for "full and effective" cross-examination. Of course opportunity really is the right word in this setting. We could not require actual cross-examination as part of the standard, which is to say that we cannot very well take the position that later cross satisfies *Crawford* only if the defendant actually cross-examines. If we did, defendants could require exclusion of prior statements, at least those that amount to testimonial statements under *Crawford*, by refusing to cross-examine. At least when the prosecutor has done what is developed more fully in the next paragraphs, it seems fair to view a defense decision not to cross-examine as waiver.²⁹

Let us consider for a moment what "full and effective" cross-examination means in a setting in which it cannot mean quite what it means in the usual setting in which the questioner confronts the witness about the testimony he has just given—the kind of confrontation that occurs whenever the lawyer for the "other side" cross-examines a percipient witness. It cannot quite mean that, because time has passed and the prior statement is a matter of history, and because the Court in *Green* must have meant that this fact by itself is not enough to mean that the Confrontation Clause is not satisfied. Let us, however, imagine the conditions in which cross-examination is as full as we can imagine it to be without the element of being contemporaneous with the statement itself.

First, it seems that "full and effective" cross-examination should mean that the prosecutor has called the witness whose statement is to be offered, and has presented his testimony about some or all of the acts, events, or conditions that count in the case. Second, it seems that "full and effective" cross-examination should mean that the prosecutor has raised the prior statement in questioning the witness, putting its

²⁸ *Bruton v. United States*, 391 U.S. 123, 126 (1968) (holding that the Confrontation Clause blocks use in evidence of statement by one defendant incriminating another by name, even if court instructs jury not to use statement against the latter, unless declarant testifies).

²⁹ *Commonwealth v. Almonte*, 829 N.E.2d 1094, 1102–03 (Mass. 2005) (admitting R's pretrial identification of defendant; R testified and identified defendant at trial, and neither defense nor prosecutor questioned R about his pretrial statement identifying defendant; since R testified at trial and was "available for cross-examination," admitting his pretrial statement did not offend *Crawford*).

substance into evidence by asking the witness about it or by offering some other form of evidence that proves the statement, such as testimony by another witness or a transcript of the statement, or a recording or writing that embodies the statement. Third, it seems that “full and effective” cross-examination should mean that the witness has answered questions about both the acts, events, or conditions reported in the prior statement and about the statement itself.

Is it important, if cross-examination is to be “full and effective,” that the prosecutor call the witness who has made the prior statement? Is it also important that the prosecutor adduce the testimony by the witness about the acts, events, or conditions that count in the case, and about the statement? The answer is yes under the practitioners’ model of cross-examination as drama because it is these elements that set up a situation in which the defense can challenge the witness. Calling the witness makes her the prosecutor’s witness, and for that reason the defense is not responsible for her testimony. If the prosecutor does not call the witness, the defense would take a significant risk in calling her—one that defendants mostly cannot afford to take because the defense cannot seem to sponsor her. It seems important as well that the prosecutor adduce testimony about acts, events, or conditions that count, or at the very least that the prosecutor adduce the statement itself. Otherwise the defense has nothing that it can attack, and cross-examination again becomes a high-risk undertaking because the defense cannot be seen to engage in an attack that has no point of importance to refute, or one that fails, which means for the most part that defendants cannot afford to cross-examine at all.

Is it also important that the witness answer questions on cross about the acts, events, or conditions, and also about the statement? Viewing cross as logical testing, answering questions about the acts, events, or conditions is important as a means of testing memory, perception, and candor of the witness now as she testifies. Answering questions about the statement itself can test these qualities and can also test the meaning of the statement, by exploring any ambiguities and by getting at what the witness (and speaker) actually meant in the words that she used. Under the model of cross-examination as drama, answering questions on these points may be critical as well. It is only when the witness answers such questions that the cross-examiner might be able to show that the witness is mistaken or false in what she says now or what she said before. A witness who answers questions about the events can be forced to face up to any disparity between what she now says about them and what she said before. A witness who answers questions about the statement itself can be required to explain what she really meant.

In fact, some modern cases exemplify this description, and decisions approving the use of testimonial hearsay under *Crawford* are on firm ground in this setting because cross-examination really can be “full and effective.”³⁰ Something slightly less than ideal may suffice, as may occur if the witness is mostly responsive to questions and only occasionally retreats into claims of lack of memory.³¹ By only slight extension, it is arguable that the opportunity to cross-examine may sometimes be adequate even if the prosecutor calls the witness and adduces his testimony about acts, events, or conditions without asking about the prior statement itself.³²

In an unusual scenario, witnesses who have made out-of-court statements that incriminate defendants actually give trial testimony that exonerates them. In the *O’Neil* case, which came down a few years after *Green*, the Court found that cross could be full and effective in this setting too. In *O’Neil*, defendant Runnels made a statement that incriminated both himself and codefendant O’Neil in car theft and kidnapping. At trial, the prosecutor called only three witnesses, namely the victim and two police officers. During the defense case, Runnels took the stand and testified favorably for himself and O’Neil, telling a story depicting innocent possession of the car as a loan from a friend and denying the kidnapping, which was consistent with what defendant

³⁰ *United States v. Garcia*, 447 F.3d 1327, 1335–36 (11th Cir. 2006) (explaining that expert C testified on use of coded language by drug traffickers, including fact that “shirts” means cocaine or meth, by quoting drug operative M, who testified to same statement; *Crawford* was satisfied because defendant had “ample opportunity” to confront and cross-examine M and because his statement was offered to explain basis of C’s expert opinion); *Miller v. State*, 893 A.2d 937, 953 (Del. 2006) (in trial for sexual abuse of minor, admitting her written statement; she testified and “her direct examination touched on the written statements themselves,” and defense cross-examined about statements) (no *Crawford* violation).

³¹ *State v. McKinney*, 699 N.W.2d 471, 479–80 (S.D. 2005) (in abuse trial, holding that child victim was adequately cross-examinable despite answering that she “did not know” or “could not remember” in response to twenty questions; of these, one question was withdrawn, and another was irrelevant; eight were rephrased and answered later, and six involved recollections of prior statements; only four related to the abuse; on this point jury had her prior statements; victim did “affirmatively” answer 403 questions, including 122 questions on cross and recross).

³² See *United States v. Price*, 458 F.3d 202, 209 n.2 (3d Cir. 2006) (holding that B’s statements to investigators were admissible because he “testified at trial and was available for cross-examination”); *People v. Argomaniz-Ramirez*, 102 P.3d 1015, 1019 (Colo. 2004) (holding that it was error to exclude videotaped deposition of child victims; prosecutor represented that they would testify; based on fact that they would appear and be subject to cross, deposition was admissible); *Flonnory v. State*, 893 A.2d 507, 521–22 (Del. 2006) (holding that statements by witness who actually testified and was “present and subject to cross-examination” could be admitted as defense had “opportunity to cross-examine” about statements); *State v. Corbett*, 130 P.3d 1179, 1189 (Kan. 2006) (admitting deposition witnesses who testified at trial and could have been cross-examined; this opportunity satisfied *Crawford*).

O'Neil himself said. Although Runnels denied making the prior statement, O'Neil's cross-examination could be full and effective. The Court said that O'Neil would have been "in far worse straits" if Runnels had owned up to the statement because then O'Neil would have had to show that Runnels "confessed to a crime he had not committed" or "fabricated" the part implicating O'Neil.³³

In the setting of *O'Neil*, it would still be helpful to cross-examine the statement, but perhaps it is less important. The reason is that Runnels's testimony was positively helpful, and codefendant O'Neil needed not be seen as the sponsor of Runnels. Not surprisingly, such a case is most likely to arise where a codefendant testifies, as in *O'Neil* (or at least a co-offender). At least one post-*Crawford* case comes out the same way where the speaker claimed at trial that what he had said before was false.³⁴

C. Suboptimal Cross: The Sandbagging Prosecutor

Suppose now a different situation. In most of the cases considered so far, the witness testifies and the prosecutor examines, adducing or trying to adduce testimony about acts, events, or conditions that count, and examines the witness about his statement. Suppose, however, that the prosecutor offers other proof of a statement, such as a transcript or signed writing or testimony by another witness, and at some point calls the person who made the statement, but without putting questions to him about the acts, events, or conditions described in the statement, and without questioning him about the statement either. The prosecutor tenders the person who made the statement, who is now at least nominally a testifying witness, to the defense: Is the opportunity thus presented for cross-examination sufficient, assuming that the witness can answer questions on these subjects?

The answer should be no. The most important reason is that defendants are usually not in a position to cross-examine if they must shoulder the risk of opening the subject because usually they cannot afford to make an effort that fails, and the risk of failure is huge. Taking

³³ *Nelson v. O'Neil*, 402 U.S. 622, 628–30 (1971) (rejecting claim that cross was constitutionally inadequate where declarant denied making a prior statement incriminating the defendant; result of taking this position was "more favorable to [O] than any cross-examination by counsel" could produce).

³⁴ See *Commonwealth v. Clements*, 763 N.E.2d 55, 57 (Mass. 2002) (admitting prior grand jury testimony by witness who recanted at trial, saying "he had been drunk at the time of the shooting," and that "it was dark and he really had not seen the shooter's face," and that he was "repeating what he had heard from others" and was "pressured to identify the defendant by the victim's family" and had not been "thinking straight" when he identified the defendant or "appreciated the seriousness of his accusations") (rejecting defense claim that there was no opportunity for cross because statement was offered after cross was completed; no discussion of effectiveness of cross).

seriously the model of cross-examination as drama, defendants usually cannot be seen as trying to discredit a witness or a statement and failing completely at the task. Somewhat obliquely, standard legal doctrine supports this point: The burden of persuasion is of course on the prosecutor to prove the elements of the crime, and this burden includes the burden of calling witnesses whose evidence is being offered. Shifting this burden to the defense is not allowed, and such a shift occurs when the prosecutor leaves it to the defendant to call a witness or to broach with a witness the subject of a statement that he has made that the prosecutor has offered as evidence.

In its 2006 decision in the *Vaska* case, the Alaska Supreme Court reversed a conviction for child sexual abuse largely for such reasons. In *Vaska*, the prosecutor offered the child's testimonial statement describing abuse. Later the prosecutor called the child as a witness, but asked her only the most basic identifying information, and then tendered her to the defense. The reviewing court concluded that the opportunity for cross was not sufficient. The court relied on Alaska Rules 613 and 801(d)(1)(A). Now the latter differs from its federal counterpart in two important ways. To begin with, it allows the substantive use of all prior statements if the speaker is cross-examinable, which was of course the proposal advanced by the Federal Rules Advisory Committee in 1975, which Congress was ultimately to reject in favor of the present provision allowing only the substantive use of statements given "in proceedings under oath." The language of the Alaska Rule also requires that the witness be "examined about his statement while testifying," so as to permit the witness "to explain or to deny" his prior statement. The decision in *Vaska* holds that the Alaska State Rules require the proponent to offer the statement through the speaker herself, and these foundational requirements must be met before defense is given the "burden" of cross-examining.³⁵

Although FRE 801(d)(1)(A) contains no similar language requiring that the witness be examined about his statement while on the stand, pretty clearly that model was the one that the framers of the federal

³⁵ *Vaska v. State*, 135 P.3d 1011, 1016 (Alaska 2006) (holding that it was error to admit statements by young victim of sexual abuse, age three at time of abuse and ten at time of trial, who testified only about her experiences in fourth grade, her age and birthday, and her parents, and not at all about her prior statement or the abuse; Alaska's Rule 801(d)(1)(A) allows substantive use of a prior inconsistent statement regardless whether sworn or given in proceedings, but requires as well that the witness be "so examined while testifying" as to have a chance "to explain or deny" the statement before she is "excused" from the case; these foundational requirements should be met before statement is admitted, and "full foundation" must be laid before witness is dismissed; to shift to defendant the foundational burden would leave defendant with "an untenable choice," forcing him to choose between cross-examining the speaker and relying on state's burden of proof).

language had in mind,³⁶ and other decisions reach results similar to that reached in *Vaska* in insisting that prosecutors call declarants and adduce their testimony about both statements and events.³⁷

Suppose the prosecutor does not even call the declarant to the witness stand, offering proof of out-of-court statements by means of written documents or transcripts or testimony and never calling the speaker as a witness. Of course sometimes this tactic is improper: The provisions in FRE 801(d)(1), for example, clearly require that the declarant be called as a witness at some point, for they cover only statements by a witness who is “subject to cross-examination” at trial “concerning” prior statements. Also one of the subdivisions of that Rule relates to impeachment (covering “inconsistent” statements) and another relates to repair (covering “consistent” statements), and these provisions are even more clearly tied to the fact that the speaker testifies. In this setting, should it suffice that the prosecutor calls the witness at some point? The answer surely is no, at least in most cases, and the reason is that this tactic does not provide an adequate opportunity for defense cross-examination. As a matter of doctrine, the burden of presenting a case includes the burden of calling witnesses to support the case.³⁸

D. Suboptimal Cross: Faulty Memory or Refusal to Testify About Events

Often a witness who has made a statement about the acts, events, or conditions in play in a criminal trial either cannot testify about them or refuses to testify, and often it is not clear whether *cannot* or *will not* is the more accurate description. *Green* exemplifies this phenomenon, as Melvin Porter looks very much like a witness who claimed not to remember, even though he actually did.³⁹ Often in such cases, it looks very much as though the witness has waffled because of personal regret

³⁶ See 4 MUELLER & KIRKPATRICK, *supra* note 20, § 8:37.

³⁷ *State v. Rohrich*, 939 P.2d 697, 700–01 (Wash. 1997) (in abuse trial, holding that child did not testify as required by statute where she was not asked about the events in issue or her prior statement; “opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court . . . [and] requires the State to elicit the damaging testimony . . . so the defendant may cross examine,” and declarant must be cross-examinable generally and about the prior statement specifically; “State’s failure to adequately draw out testimony from the child witness before admitting [her] hearsay puts the defendant in ‘a constitutionally impermissible Catch-22’ of calling the child for direct or waiving” confrontation) (reversing).

³⁸ Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 604 (1978) (arguing that “[w]hat distinguishes a witness ‘against’ the accused from a witness ‘in his favor’ is not the content of the witness’ testimony but the identity of the party relying on his evidence,” and that one “is a witness ‘against’ the accused if he is one whose statements the prosecution relies upon in court in its effort to convict the accused,” in which case the prosecutor “must take the initiative in identifying and producing him at trial” (emphasis omitted)).

³⁹ See *California v. Green*, 399 U.S. 149, 152, 168–70 (1970).

over being the instrument of another person's destruction, or out of fear because the witness cannot be sure at the time when he testifies that the other will go to jail. In addition, there is always a risk that an unsuccessful prosecution will lead to revenge, and of course the witness may be afraid of other things too, if the defendant has friends who might cause trouble or if "snitching" can itself lead to retribution in the community to which the witness must return. Sometimes in such cases the witness has simply over-promised what he can deliver, bargaining with the prosecutor in exchange for leniency and going further in his pretrial conversations than he is willing to go in the bright light of day when the defendant and the defense lawyer are there looking at him.

Somewhat less commonly, it appears that the witness has genuinely forgotten critical acts, events, or conditions, as occurred in the *Owens* case in which a prison guard, apparently assaulted by an inmate, seemed to have suffered from amnesia as a result of the blows he suffered in the criminal attack.⁴⁰

Should it suffice, for the purpose of confrontation, that the witness is available for cross-examination, in the sense of being there and being a little bit cooperative, if he cannot or will not shed any more light on the acts, events, or conditions described in the crucial statement? Parenthetically, it is worth noting that the event recounted in a prior statement by a testifying witness may itself be a statement of some kind, and very often it is something that the defendant has said (his admission). Here, of course, remembering the event recounted in a prior statement entails merely remembering the fact that the defendant spoke and the substance of what he said.⁴¹

Here cross-examination cannot seriously be considered to be "full," in the usual sense of that term, although cross might still be "effective." The problem is that such a witness cannot be tested on the memory or perception behind his prior statement, or on the ambiguities or meaning of the statement. These are not minor drawbacks, but major stumbling

⁴⁰ *United States v. Owens*, 484 U.S. 554, 556 (1988); see also *infra* notes 50–51 and accompanying text.

⁴¹ See *State v. Pierre*, 890 A.2d 474, 498, 501 (Conn. 2006) (in murder trial, admitting statement by witness describing conversation involving defendant that included grisly and detailed account of murder; declarant was cross-examinable, even though he "claimed that he could not remember ever having heard any of the information recounted in the written statement, that he never had substantively reviewed" and signed "only to stop the police from harassing him," because he "answered all questions posed by defense," including several about "motives and interest" in talking to police, and fact that "he had charges pending against him in an unrelated matter" that were resolved when he agreed to testify; he said "he had signed the written statement despite the fact that it was not accurate . . . to get [police] to stop bothering him"; he "confirmed several other pieces of information" in the statement, even though he claimed no memory) (no *Crawford* violation).

blocks, regardless whether we view cross-examination as testing or as drama. It is true enough that such lack of memory might not completely stifle cross: One who will not or cannot answer questions about acts, events, or conditions might still answer enough questions about his life and circumstances to shed light on the prior statement. And the answers to such questions can also shed light on general truthfulness, on bias, and on the pressures that may have been working on him on account of potential charges or other influences. Also the witness might still answer questions about the statement itself, so the cross-examiner can get at the specific circumstances in which the witness found himself at the time, which might uncover or include proving that the witness was himself under suspicion and facing charges.

In such settings, post-*Crawford* cases unfortunately continue to approve the use of statements by a witness despite these impediments, and these decisions seem to follow pre-*Crawford* authorities that are examined more fully and critically below.⁴²

*E. Suboptimal Cross: Faulty Memory or Refusal to
Testify About Statement*

Often the witness has forgotten the statement and cannot testify about it, or he simply refuses to, and again it is often not clear whether “cannot” or “will not” is the better term. The witness who waffles in this way is likely once again to be acting out of regret or fear, and again the possibility arises that he has over-promised in exchange for leniency. Should it suffice, for purposes of confrontation, that he is available for cross-examination but cannot or will not shed any more light on the critical statement?

Here once again it is hard to take seriously the idea that there is a “full” opportunity for cross, although here too cross might be “effective.” Here is the problem: If a witness cannot or will not testify about the statement itself, it is hard to get at the pressures or influences that affected him at the time when he spoke, and once again it is hard or impossible to test the meaning and ambiguities in the statement itself.

If the witness is fully responsive when asked about the acts, events, or conditions described in his prior statement, the cross-examiner can at least cover some of the ground covered in the statement. If, for example, the prior statement says that the defendant entered the store and returned with the proceeds, but the witness does not remember (or he denies) making the statement, he might still answer questions about

⁴² See *id.* at 501; *Commonwealth v. Le*, 828 N.E.2d 501, 506–07 (Mass. 2005) (admitting victim’s statement identifying defendant as perpetrator of assault; “memory loss about prior events would not impermissibly undermine the opportunity to cross-examine”; “substantive content” of answers on cross does not constitute deprivation of right to cross-examine).

what the defendant did. These questions at least test the perceptions that are also found in the statement, and it might seem that little can be lost in the fact that the statement itself remains hidden in mystery. But if the defense has succeeded in showing that the witness is himself subject to serious charges and that he is testifying under an agreement that would reduce those charges or the likely punishment, then not being able to get at the reasons for the statement may be critical, particularly if the statement was made in some other setting that might falsely appear to avoid the doubts created by the fact of pending charges.

In such settings, post-*Crawford* cases unfortunately continue to approve the use of statements despite these impediments, again following pre-*Crawford* authorities that are examined critically below.⁴³

F. Egregious Inadequacy: Not Remembering or Refusing to Testify About Everything

In perhaps the most egregious case, the witness turns aside questions about both the acts, events, or conditions reported in a prior statement and about the statement itself.

Post-*Crawford* cases approve use of prior statements and say the opportunity for cross at trial was adequate, despite evasion or lack of memory about both the statement and the event recounted, and a few decisions come close to saying that the witness is adequately cross-examinable even if she claims to be completely unable to remember anything relevant to the case, including her prior statement.⁴⁴

⁴³ *Johnson v. State*, 878 A.2d 422, 427–28 (Del. 2005) (in murder trial, admitting W's statement recounting conversation between two defendants, under state exception for statements by testifying witness regardless whether consistent or inconsistent with testimony, despite fact that the W repeatedly said she could not recall the statement) (*Crawford* satisfied).

⁴⁴ *See Mercer v. United States*, 864 A.2d 110, 113–14 (D.C. Cir. 2004) (admitting testimony from first trial by witness who later suffered head injuries and strokes and could not “remember the case at all,” as well as grand jury testimony; since she testified that “she had no memory of what happened the night of the murder,” but before the grand jury she said defendant shot the victim, inconsistency requirement was met, and witness was cross-examined on prior knowledge; she gave affirmative answer “when asked whether she recalled testifying at the first trial that she had not seen Mercer shoot the gun,” which contradicted grand jury testimony; “it is possible, and in fact not uncommon, for a witness . . . at trial to be . . . unavailable for some purpose,” but subject to cross) (*Crawford* was satisfied); *State v. Gorman*, 854 A.2d 1164, 1177 (Me. 2004) (admitting grand jury testimony in murder trial by defendant's mother recounting his confession, even though she claimed no memory of confessing and no memory of testifying to grand jury; mother had selective memory loss, recalling conversations with defendant both before and after the one in which he confessed, but agreed that if she had testified before grand jury under oath, she was truthful; rejecting claim that mother was incompetent because at time of grand jury appearance she was “under the influence of psychiatric medications and had a history of delusional thought that demonstrated an inability to separate fact from fantasy”); *State v. Jaiman*, 850 A.2d 984, 985–86, 988–90 (R.I. 2004) (in second murder

Here it is hard to say that cross could be either “full” or “effective,” and the “opportunity” in this setting is simply not good enough.⁴⁵

G. Egregious Inadequacy: Other Cases

One can of course imagine circumstances in which cross-examination is even more egregiously constrained. If, for example, the witness claims a lack of memory about both the prior statement and the acts, events, or conditions reported in it, or refuses to answer questions in these areas, then all that is left for the cross-examiner is a frontal assault on the character or motivations of the witness. Here cross-examination is clearly not “full,” and it is hard to imagine it could be called “effective,” although there may be cases in which the witness is thoroughly discredited as a disreputable person with such a checkered past that nobody would believe anything he says on a serious matter.

It should go almost without saying that if a statement is offered after the witness has left the stand, then cross-examination that went forward before that time is likely to be inadequate. Once again it is imaginable that a witness has been so thoroughly discredited that this fact pales in importance, but obviously a defendant cannot be faulted for not asking questions about a statement that has not yet been offered, and it is hard to see any justification for expecting otherwise. For reasons examined below, it should not be up to the defendant to call a witness whose statement has been offered by the prosecutor, and if the

trial, admitting statement to police by alleged co-offender M who engaged in “testimonial double-cross of the state” after pleading to charges, signing seven-page statement and agreeing to testify against defendant; in second trial, M claimed he had to testify only once, which he had already done, and M then “suffered a convenient failure of memory,” declaring that he could not remember the events because “of the passage of time and the stress of his incarceration”; state rule does not require prior inconsistency to be in proceedings under oath, and M “did testify and was, in fact, cross-examined,” and prosecutor can resort to statement by witness who reneges on cooperation agreement; decision in *Green* raised this issue, but California court approved use of testimony on basis that jury “could disbelieve the witness’s alleged lack of memory based on his apparent reluctance to testify,” and Confrontation Clause is satisfied here; there is no requirement “that the witness possess perfect recall concerning the basis of his or her prior statement or current testimony, nor does it entitle the cross-examiner to an effective examination” (not reaching constitutional issues); *State v. Price*, 146 P.3d 1183, 1192 (Wash. 2006) (stating that the purposes of confrontation are satisfied, even when witness is “unable to recall” so if she is asked questions about events and prior statements, but cannot remember either, defendant has “sufficient opportunity for cross-examination,” and “inability to remember does not implicate *Crawford* [or] foreclose [use] of pretrial statements”).

⁴⁵ See *United States v. DiCaro*, 772 F.2d 1314, 1323 (7th Cir. 1985) (stating that the requirement that witness be cross-examinable at trial should not be made “effectively meaningless,” as would be the case if witness suffers “total memory lapse concerning both the prior statement and its contents”; but here witness suffering amnesia answered questions about his situation and life in crime, which was adequate cross).

statement is “testimonial” in nature, the Confrontation Clause should not permit this tactic.⁴⁶

H. Court’s Lenient or Relaxed Standard

Recall that “full and effective” is the standard that grew out of the decision in *Green*. Both there and in later decisions, the Supreme Court has said that this standard is in fact far more lenient or relaxed than one might assume. In *Crawford*, the Court underscored the point by saying that the Confrontation Clause “places no constraints at all” on the use of testimonial hearsay in cases where the declarant “appears for cross-examination at trial” (the words of *Crawford*), as if to say that this fact alone suffices, regardless what cross might yield.⁴⁷

Fensterer is the source of the statement previously quoted, along with the comment that the statement is almost as famous as Wigmore’s observation about cross-examination. Here it is again: A defendant, said the Court in *Fensterer*, is not entitled to cross-examination that is “effective in whatever way, and to whatever extent” the defendant “might wish.” But *Fensterer* was a special case, and a peculiar case at that, and *Fensterer* did not involve hearsay. Hence it is strange that *Fensterer* has become the iconic statement in cases explaining why problems with cross-examination do not block the use of hearsay.

In *Fensterer*, an expert apparently forgot which of four possible bases underlay his conclusion about a hair having been forcibly torn from the head of a victim, and the Court said cross could still be adequate. Now it is surprising and troublesome enough that an expert on such a technical subject as the forensic examination of a hair sample should give important testimony in a case without being able to defend or even provide the basis for his conclusion.⁴⁸ It is open to question whether such a witness should be allowed to give a conclusion of this sort under the modern *Daubert* standard and amended Rule 702.

⁴⁶ *United States v. Nunez*, 432 F.3d 573, 581 (4th Cir. 2005) (stating that it was error to admit investigative report summarizing statement by defendant J implicating defendant C, where preparer of report had testified and submitted to cross-examination at a point in time when court had ruled the report inadmissible; it was later admitted, but earlier appearance of preparer did not provide opportunity to cross-examine).

⁴⁷ *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004) (adding, however, that the Clause does not bar a statement “so long as the declarant is present at trial to defend or explain it,” which is arguably a little more than simply being present and subject to cross).

⁴⁸ *See Delaware v. Fensterer*, 474 U.S. 15, 16–17, 20 (1985) (stating that assurances of reliability are present “notwithstanding the witness’ inability to recall the basis for his opinion [because] the factfinder can observe the witness’ demeanor under cross-examination,” and witness testifies under oath in presence of accused; here, cross showed that the agent “could not even recall the theory on which his opinion was based,” and the defense expert suggested that the agent “relied on a theory which the defense expert considered baseless”; expert who testified that hair was forcibly removed from the victim could not recall which of three possible reasons underlay that conclusion).

Paraphrasing, the latter requires courts to appraise the basis underlying expert testimony, and to admit such testimony only if it rests on sufficient facts or data and on reliable principles and methods that have been reliably applied, and an expert who cannot remember the basis for his conclusion cannot satisfy such a standard.⁴⁹

In two ways, *Fensterer* is too thin a reed to support the weight that it is asked to carry in modern opinions. In the first place, defendants have lots of room to complain seriously that the opportunity for cross was inadequate without having to claim that they are entitled to what amounts to egg in their beer: Defendants are entitled to “full and effective” cross, and asking for that is not the same thing as asking for cross that yields all they might wish for. The comment in *Fensterer* is rhetorical overkill that cannot be taken seriously as a way of describing some rational limit on the plea that an adequate opportunity for cross-examination must be afforded. In the second place, *Fensterer* did not involve a fact witness whose statement was used to prove what the defendant had done, but an expert shedding meaning on physical evidence that had been offered in the case. As noted above, his lapse was appalling enough in the case as we have it, but he did proffer four possible bases for his conclusion, which is a far cry from the situation of a fact witness who cannot or will not answer questions about acts, events, or conditions described in a statement, or about the statement itself.

Perhaps the second most prominent decision is *Owens*, where a prison guard was apparently victimized in a vicious attack by an inmate. At trial, he could not recall what happened to him, and he may not even have seen his assailant (he remembered being struck and seeing his own blood on the floor). Still, the Court said he was cross-examinable. He did recall making the statement at the hospital, although he was hazy about that as well. The only explanation that the Court offered for its conclusion was that the Confrontation Clause does not guarantee that a witness will not forget, evade, or become confused, and it quoted from an earlier opinion that the adverse party “is not without ammunition” in attacking the speaker because the jury will learn that his memory has failed, and may well conclude that his testimony is unreliable too.⁵⁰ It is hard to know what to make of the comment about the Confrontation Clause: Taken literally, it is just silly. Taken as a description of a limit—the Confrontation Clause does not protect the accused against an unremembering witness—the comment makes one wonder. If witnesses

⁴⁹ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590–91, 595 (1993) (stressing reliability and setting out standards to assess this point; also stressing “fit” and authority to exclude under FRE 403).

⁵⁰ *United States v. Owens*, 484 U.S. 554, 558 (1988).

can testify when they don't remember enough to be tested, how serious are we about testing?

Easily the most enthusiastic opinion is *Green*, where the Court assumed that the witness would answer the most fulsome and searching questions. Taking a cue from comments made by the Court in *Green* and *Owens*,⁵¹ modern opinions have gone so far as to make a virtue out of the circumstance of the unremembering witness. The suggestion is that if the witness does not remember, then the cross-examiner has accomplished just what he has set out to do. It may well be right that almost any witness, including any of us, if examined about a trip we have taken and what we saw or a movie that we have seen, will quickly run out of memory on many points of interesting detail. Hence a cross-examiner cannot plausibly argue that a witness who doesn't remember points of detail that are unimportant to the main issues in the case has evaded or frustrated the purposes of cross-examination, whether we stress the testing model or the model of cross as drama. It is another matter altogether if the witness cannot remember points that are central to the case, or if the witness has forgotten so much that one begins to wonder whether he could have seen what he does remember.⁵²

I. Faint Words of Warning: Sometimes Cross is Inadequate

Three times the Court has said that the forgetfulness on the part of a witness might stifle cross to the point that it becomes inadequate, but the remarkable point is that these suggestions have never borne fruit.

In *Green*, the Court acknowledged a "narrow question" lurking in the case, which was whether Porter's lack of memory rendered cross inadequate.⁵³ On remand, however, the California Supreme Court thought that Porter's behavior on the stand did not prevent effective cross-examination. The case had been tried to a judge without a jury, and the California Supreme Court carefully analyzed Porter's behavior and answers on the stand, quoting them at length. What emerged was a

⁵¹ See *id.* at 559 (stating that defense was free to cross-examine on "bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory" (citation omitted)).

⁵² *Bugh v. Mitchell*, 329 F.3d 496, 505, 508 (6th Cir. 2003) (admitting child victim hearsay by witness who "was not willing to testify about the statements at trial and did not remember" even making them; while cross "may not have yielded the desired answers," and child may not have remembered "circumstances surrounding her previous statements," still defense "had the opportunity to expose such infirmities" by stressing youthfulness of witness and lack of memory, and jury could see her demeanor and "draw its own conclusions" on her credibility).

⁵³ *California v. Green*, 399 U.S. 149, 168-70, 170 n.19 (1970) (noting "narrow question" whether "apparent lapse of memory" on events made critical difference; issue is "not insubstantial" because conviction rested heavily on this testimony; vacating to allow California court to consider the matter).

picture of a reluctant youngster, and the trial judge had enough to go on: Acting as factfinder, the trial court could “disbelieve Porter’s claim that he no longer remembered” how he got the marijuana. In his hesitant replies to questions, Porter “unmasked his apparent motive” by commenting that he had “a conscience” and implying that he didn’t want to send his friend to jail (“I don’t want to . . .”). He took the course of not “flatly denying” critical points, instead “evading” questions with “equivocations” (“I’m not positive.”). In the end, then, the court could conclude from his behavior on the stand that he really did remember and that his claimed memory lapse was false.

Here is the heart of the California court’s analysis, on remand in *Green*:

The [Supreme Court in this very case] pointed out that the three-fold purpose of confrontation is (1) to insure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh his demeanor. As to the first of these functions, the court observed that “If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny, or qualify the truth of the prior statement under the penalty of perjury . . .” Here Porter was recalled for further cross-examination after Officer Wade had testified to his extrajudicial statement. When asked, under oath, if he gave a statement to the officer on the subject of acquiring and selling marijuana, Porter replied, “Yes, I did.” Counsel then inquired as to the contents of the statement, and Porter admitted that “it had to do with buying it from John [i.e., defendant], yes, sir.” Although he hastily added—reverting to his technique of deliberate equivocation—that “I mean, I couldn’t say exactly what went on or not,” he nevertheless grudgingly conceded making the two principal factual assertions reported in the statement. . . . [T]he danger of faulty reproduction was therefore negligible and the trier of fact could be confident that it had before it conflicting statements of the same witness.

Turning to the second function of confrontation in this context—cross-examination of the declarant—we observe that defense counsel asked Porter only one question on the topic: “Now, at the time that you made this statement to the officer, did you believe that you were telling the truth?” Porter replied, “Yes, sir,” and counsel accepted the answer. It is true that in the common situation envisaged by the [Court in *Green*] the witness takes the occasion to repudiate or qualify his prior inconsistent statement, whereas here Porter reaffirmed it. But in either event it is the cross-examiner’s task to “rehabilitate” the now-friendly witness by providing him with “the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event.” In the present

case, however, defense counsel made no attempt to explore the inconsistency thus laid bare. Yet Porter was on the stand and under oath, and had just admitted making the statement in question. Defendant thus had the opportunity to cross-examine him, but in effect declined to do so. Whether or not a witness is actually cross-examined, the fact the defendant has an adequate opportunity to carry out such an inquiry satisfies the confrontation clause. Moreover, as the United States Supreme Court explains, “The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant.”

Finally, the function of confrontation in subjecting the witness’ demeanor to the scrutiny of the trier of fact was undoubtedly served in the case at bar. Porter’s manner of testifying on the subject of his prior statement to Officer Wade was, we have seen, no different from his behavior on the stand throughout the trial; and as noted above, that performance was closely observed and carefully weighed by the trial court.⁵⁴

In *Fensterer*, the Supreme Court again noted that lapse of memory might “so frustrate” cross-examination that the opportunity would be inadequate for purposes of the Confrontation Clause.⁵⁵ Finally, in *Owens* the Court acknowledged that court-imposed “limitations on the scope of examination” or “assertions of privilege” might “undermine the process to such a degree that meaningful cross-examination” no longer occurs.⁵⁶

J. Waiving Confrontation Right, and Stretching the Waiver Concept

As noted above, tactical decisions to forgo cross-examination clearly amount to waiving the right secured by the Confrontation Clause. It seems fair to expect even more of defendants. If refraining from questioning a witness amounts to waiver, half-hearted attempts to question witnesses should also be seen as waiving the rights that could be exercised in a bolder and more determined pursuit. Hence it seems fair, in cases where the defense puts questions that the witness fobs off with refusals to answer or unresponsive answers, to infer a waiver of confrontation rights if the defense fails to seek the aid of the court in compelling answers or demanding fuller responses from the witness.⁵⁷

⁵⁴ *People v. Green*, 479 P.2d 998, 1003–04, 1004 n.9 (Cal. 1971) (first alteration in original) (citations omitted) (emphasis omitted) (footnote omitted).

⁵⁵ *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985) (stating that the Court “need not decide” whether lapse of memory might “so frustrate” cross as to make it inadequate under Confrontation Clause; expert witness who “cannot recall” basis for opinion invites jury to find that “his opinion is as unreliable as his memory”).

⁵⁶ *Owens*, 484 U.S. at 561–62.

⁵⁷ *See Fowler v. State*, 829 N.E.2d 459, 470 (Ind. 2005) (in domestic battery case, finding that defense waived *Crawford* objection to use of her prior statements; she

Prosecutors, and sometimes courts, have faulted defendants for failing to cross-examine in circumstances in which any notion of fault or shortcoming is far more attenuated. In effect, the waiver concept is sometimes stretched far beyond its ordinary meaning, and indeed far beyond any defensible construction. Suppose, for example, that the declarant is in some sense “available” as a witness and could be called to testify, but that the prosecutor does not call the declarant and offers his statement instead. In this setting, can it be said that the defendant waives any right to cross-examine by failing to call the witness? It takes a Humpty Dumpty definition of waiver to answer this question by saying yes,⁵⁸ but some courts have indeed said yes.⁵⁹ One opinion, which was obviously very much affected by the fact that the defendant did not raise appropriate objection at trial, went even further by saying that the defendant had to show that the government would not have called the speaker to testify if an objection had been made.⁶⁰ Fortunately, the greater number of decisions have concluded that defendant does not waive objection under the Confrontation Clause by failing to call the witness.⁶¹

appeared and refused to answer questions, making no claim of privilege; defense did not seek court order; defendant has choice of seeking such order or forfeiting *Crawford* objections).

⁵⁸ See LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 60 (Philip M. Parker ed., ICON Classics 2005) (1872) (“When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master—that’s all.’” (emphasis omitted)).

⁵⁹ *People v. Cookson*, 830 N.E.2d 484, 490 (Ill. 2005) (admitting statements by child describing sexual assault; statutory requirement that child “be available to testify at the proceeding” satisfies *Crawford*); *Peak v. Commonwealth*, 197 S.W.3d 536, 543–44 (Ky. 2006) (codefendant M waived Fifth Amendment rights, demanded that prosecutor use unredacted tape of his statement naming codefendant P; judge ruled that P could call M and ask leading questions, but P did not; using M’s statement did not violate P’s confrontation rights, which he waived by declining to call M and cross-examining him).

⁶⁰ See *United States v. Hadley*, 431 F.3d 484, 508 (6th Cir. 2005) (stating that if defense had raised objection under Confrontation Clause, government “might well have elected to respond” by calling speaker as a witness, and jury would still have heard that defendant had a gun on occasion of crime; to prevail in showing effect on substantive rights, defense must show why this outcome would not likely have occurred).

⁶¹ See *State v. Cox*, 876 So. 2d 932, 938 (La. Ct. App. 2004) (rejecting claim that confrontation rights were satisfied where court offered defense “right to subpoena Sykes as a witness,” which “begs the issue” because calling her “would hardly render the statement admissible” and defendant “should not be required to call” her “simply to facilitate the State’s introduction of evidence”; there might be “a whole host of reasons” why defendant would not want to call her; if state wanted to introduce statement, it could call her); *State v. Blue*, 717 N.W.2d 558, 566 (N.D. 2006) (rejecting argument that “opportunity to cross-examine” is assured by “mere presence at a preliminary hearing,” which “is not an adequate opportunity” as required by Confrontation Clause; videotaped child victim hearsay is not admissible, but might be if child testifies at trial); *Bratton v. State*, 156

So what's wrong with burdening the defense with calling a declarant when the prosecutor has offered proof of his testimonial statement? By now the answer should be clear: As a matter of litigation strategy, best captured in the idea of cross-examination as drama, defendants simply cannot afford to call a witness in the hope that they can mount a successful cross-examination that will in some way succeed in discrediting a person whom the other side has not even called. As a matter of doctrine, there is something profoundly wrong, in the nature of a sleight of hand, to say that prosecutors bear the burden of persuasion on points relating to guilt, but that defendants bear the burden of calling the witnesses on whom the prosecutor chooses to rely in offering testimonial hearsay.⁶²

But wait a moment. We should at least acknowledge here that sometimes defendants are blameworthy. They may claim the right to confront witnesses when their real aim is simply to exclude their evidence altogether. In the setting of child victim hearsay, for example, the last thing a defendant may actually want to see is a child on the witness stand describing what happened to her. Claiming the right to confront in this circumstance can resemble a game of "chicken" in which the question is whether the prosecutor will, to mix the metaphor, call the bluff, or will simply give up the best source of proof and enter a bargain with the defendant for a plea of guilty on lesser charges. In such cases, a court may be sorely tempted to give the defense what it says it wants. Still, this course is the proper one, and admitting the testimonial hearsay over objection on the theory that the defense does not actually want what it claims to want is one trick too many.

It is worth noting in this setting that there are substitutes for calling child abuse victims and expecting them to testify in the courtroom setting. Under the *Craig* doctrine, which was not altered by *Crawford*, a child victim who would suffer serious trauma from the ordeal of giving public testimony may instead testify from a remote setting, aided by video monitor, which assures something pretty close to "face-to-face" confrontation with the accused.⁶³

S.W.3d 689, 694 (Tex. Crim. App. 2005) (holding that prosecutor must call witness or prove that he was previously subject to cross-examination; defense failure to call witness does not waive confrontation claims).

⁶² See Westin, *supra* note 38, at 604.

⁶³ *Maryland v. Craig*, 497 U.S. 836, 858 (1990) (authorizing use of two-way video monitors for child testifying from remote location); see also *United States v. Bordeaux*, 400 F.3d 548, 552 (8th Cir. 2005) (holding that *Craig* requires finding that child fears defendant, not a finding that she fears testifying in court; statute is unconstitutional to the extent it requires lesser finding) (reversing).

III. PARTICULAR RECURRENT SITUATIONS

A. Forensic Lab Reports

In most states, statutes pave the way to admit reports by forensic laboratories on a wide range of topics, from DNA to blood alcohol content, to ballistics tests to fingerprints, and, of course, analyses of bags of white powder to determine whether they contain cocaine or methamphetamine, and many other similar matters. The reason is not far to seek: Much that a laboratory can do is routine and non-controversial. Even in the case of routine tests, however, the mechanics and the theory may be complicated and hard to explain to a lay jury, and delivering lectures on these matters would be needlessly time-consuming and expensive.

Yet it is also the case that these materials can be crucial in a case, and it is not always true that they are noncontroversial. Mistakes in such materials can lead to unjust convictions, and sometimes defendants have more than theoretical grounds for challenging the findings of such reports—they have real indications that some kind of misconduct occurred, or real indications that errors are commonplace or likely on the particular facts of the case. Hence it can be critical for defendants to be able to cross-examine laboratory technicians who are informed not only about the substance and theory of the tests, but about the actual conduct of the test that produces the results being offered in the case.⁶⁴

In the states, mostly this matter is governed by special statutes, of which there are two kinds in common usage. One is what we might call a “notice statute,” which places the burden on the prosecutor to call the laboratory technician if the defense raises an objection to the use of a laboratory report or asks the prosecutor to call the technician.⁶⁵ The other is what we might call a “shortcut statute,” which eases the burden on the prosecutor by requiring the defendant to call the technician, but in these cases the prosecutor is obligated to have the technician available to the defense, and presumably the laboratory report is excludable if the prosecutor does not do at least this much.⁶⁶

In federal courts, the Rules leave the status of forensic laboratory reports uncertain. There is no statute covering this matter, and the public records exception to the hearsay doctrine, codified in FRE 803(8), seems to apply. In this exception, clause (B) authorizes use of public

⁶⁴ See generally Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 OHIO ST. L.J. 671 (1988) (discussing comprehensively hearsay and confrontation issues).

⁶⁵ See, e.g., COLO. REV. STAT. § 16-3-309(5) (2006) (stating that crime lab reports “shall be received in evidence,” provided that any party may request preparer to “testify in person” by giving ten days notice).

⁶⁶ See, e.g., LA. REV. STAT. ANN. §§ 15:499–:501 (2005 & Supp. 2007).

reports to prove “matters observed,” which could reach lab reports, but there are two problems. One is that these words are not very appropriate as terms describing write-ups of tests performed in a laboratory. They are far more at home as descriptions of entries describing simpler everyday observations, such as tag numbers of cars crossing the border between California and Mexico or temperature or wind speed.⁶⁷ The second problem is that clause (B) excludes reports by “police officers and other law enforcement personnel.” The landmark federal decision in *Oates* concluded that government crime lab reports are embraced by this restriction because technicians in such labs are part of the prosecution team and should be treated like police.⁶⁸ The other two clauses in the public records exception obviously cannot be stretched to cover laboratory reports offered against the accused.⁶⁹

The business records exception in FRE 803(6) might apply to reports prepared by both private labs and public or official labs. Some courts do apply this exception, but the result seems wrong.⁷⁰ The reason is that taking this approach sidesteps the language of limitation in FRE 803(8). Forensic laboratory reports should be viewed as reports prepared by police or law enforcement officers because the laboratories that prepare such reports, and in all likelihood the technicians actually involved in their preparation, are very likely to know roughly what is at stake in any given test that finds its way into a report, and are likely to “identify with” the cause of the prosecution, which is invested in developing or proving a case in much the same way that police and other law enforcement officers are invested in the cause. When forensic laboratories are publicly owned and operated, as is often the case, their

⁶⁷ *United States v. Orozco*, 590 F.2d 789, 793–94, (9th Cir. 1979) (tag numbers recorded by customs inspector at border). See also the following pre-Rules decisions applying the common law antecedent of FRE 803(8): *Evanston v. Gunn*, 99 U.S. 660, 666–67 (1878) (meteorological observations of Signal Service); *Minnehaha County v. Kelley*, 150 F.2d 356, 361 (8th Cir. 1945) (records of Weather Bureau with data on rainfall in Sioux Falls).

⁶⁸ *United States v. Oates*, 560 F.2d 45, 84 (2d Cir. 1977) (prolix but thorough and insightful opinion by Judge Waterman).

⁶⁹ FRE 803(8)(A) embraces public records reflecting the activities of a public office or agency, and of course lab reports do reflect such activities, and indeed virtually every public record reflects such activities in some way. Obviously, however, the intent of this provision is to pave the way for using such records to prove the activities of the public office or agency, and that is not the purpose of laboratory reports offered in criminal cases. Finally, FRE 803(8)(C) embraces fact findings made on the basis of an investigation, but in criminal cases it can be used only “against the Government.” See generally 4 MUELLER & KIRKPATRICK, *supra* note 20, §§ 8:87, 8:89 (discussing FRE 803(8)(C)).

⁷⁰ *United States v. Ellis*, 460 F.3d 920, 925–26 (7th Cir. 2006) (admitting hospital blood work-up showing that defendant had methamphetamine in his system; report prepared at police request, but fit business records exception and was nontestimonial under *Crawford*).

records and reports are obviously public records within the meaning of FRE 803(8). When police or prosecutors commission private laboratories to prepare such reports, such laboratories should be treated as public offices under ordinary notions of agency law because their “principal” is the public office that retains their services and their interests are to perform well, which means that they are aligned on the side of police or law enforcement officials in much the same way as public laboratories. The limiting language in clauses (B) and (C) of FRE 803(8) was intended to exclude police reports, not simply to act as a limit on the exception, and the same principle ought to apply to forensic laboratory reports prepared on behalf of police or prosecutors.⁷¹

Given the various approaches taken by the states, and the situation in federal courts, it is worthwhile to pause here to consider where we should end up. Certainly laboratory reports should ordinarily be admissible if they can be trusted, and surely it is often the case that they can be. The information contained in such reports is often technical, and no one is likely to carry around in his head all the details that underlie the conclusions reached in any given test, so insisting on live testimony by a percipient witness is likely to be unproductive and costly. It also seems, however, that a technician should be available if there is any real fight or disagreement on the conclusion expressed in the report. Defendants may want to explore (a) the limits of the technique used in preparing the report, such as how many false positives or false negatives there are;⁷² (b) the meaning of the conclusions, such as what twelve concordances mean in a fingerprint comparison,⁷³ and what a match of five factors means in a DNA test, and what databases were used in generating what are always astronomical numbers indicating a very high probative value of “matches”;⁷⁴ (c) the opportunities and risks of

⁷¹ Compare *Oates*, 560 F.2d at 83–84, with *State v. Forte*, 629 S.E.2d 137, 144 (N.C. 2006) (admitting state crime lab report on DNA, which was nontestimonial and fit public records exception despite restrictive language because Congress did not change the practice in this area).

⁷² See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (mentioning error rates as a factor bearing on reliability). See also DAVID L. FAIGMAN, DAVID H. KAYE, MICHAEL J. SAKS & JOSEPH SANDERS, *SCIENCE IN THE LAW* § 1-3.4.2 (2002) (discussing methods of analyzing error rates).

⁷³ See generally *United States v. Mitchell*, 365 F.3d 215 (3d Cir. 2004) (approving fingerprint evidence as satisfying *Daubert* standard but upholding right of defendants to call experts to testify about the limitations of fingerprint evidence). See also Tara Marie La Morte, *Sleeping Gatekeepers: United States v. Llera Plaza and the Unreliability of Forensic Fingerprinting Evidence Under Daubert*, 14 ALB. L.J. SCI. & TECH. 171 (2003).

⁷⁴ See D.H. Kaye, *Behavioral Genetics Research and Criminal DNA Databases*, *LAW & CONTEMP. PROBS.*, Winter/Spring 2006, at 259; D.H. Kaye, *The Relevance of “Matching” DNA: Is the Window Half Open or Half Shut?*, 85 J. CRIM. L. & CRIMINOLOGY 676 (1995).

error that come with doing the tests that produce the result;⁷⁵ and (d) the proficiency of the lab or the technician or tests that were used.⁷⁶

In federal courts, one way to get to a sound result in the treatment of forensic laboratory reports would involve limiting prosecutors to the exception for past recollection recorded, found in FRE 803(5). Taking this approach would reach something approximating what happens under state notice statutes, except that prosecutors would always be burdened with calling the technician who prepares such reports, and would be required to lay the standard foundation for invoking this exception, which includes showing that the technician does not recall the specific test and the result reached, but that he took care in preparing the report to get it right. Some decisions do allow resort to this exception for public records that would otherwise be excludable under the language of limitation found in FRE 803(8)(B) and (C).⁷⁷ This approach is distinctly “second best,” however, as it should not be necessary to call technicians in cases where the defense does not plan to challenge the test results, and also because the real point is not so much to call an unremembering witness, but rather to insure that the defense has ready access to the right person for purposes of confronting and cross-examining her.

In the states, it seems that the shortcut statutes described above, that simply allow defendants to call the technician, should not be viewed as adequate for reasons already considered. First, defendants cannot afford to call witnesses where they have little or no chance of making progress in impeaching or cross-examining them. Second, putting this burden on defendants involves shifting to them the burden that belongs on the prosecutor: The report is part of the prosecutor’s case, and the prosecutor should bear the risk that the technician might be unavailable, that the report was badly prepared, or that the tests were inconclusive or botched.⁷⁸

⁷⁵ See generally Simon A. Cole, *The Prevalence and Potential Causes of Wrongful Conviction by Fingerprint Evidence*, 37 GOLDEN GATE U. L. REV. 39 (2006); Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985 (2005); Robert Epstein, *Fingerprints Meet Daubert: The Myth of Fingerprint “Science” is Revealed*, 75 S. CAL. L. REV. 605 (2002).

⁷⁶ See William C. Thompson, *Tarnish on the ‘Gold Standard’: Understanding Recent Problems in Forensic DNA Testing*, THE CHAMPION, Jan.-Feb. 2006, at 10.

⁷⁷ *United States v. Marshall*, 532 F.2d 1279, 1285–86 (9th Cir. 1976) (admitting police chemist’s analysis of heroin as past recollection recorded).

⁷⁸ *Wigglesworth v. Oregon*, 49 F.3d 578, 581 (9th Cir. 1995) (stating that to satisfy confrontation rights, a statute must require the state to subpoena the technician; allowing the defense to do this puts the defendant in a “Catch-22” situation [in which the choice is to] call the criminalist who prepared the report during the defendant’s own case and possibly bolster the [state’s] case, or forego [sic] examination of the criminalist and perhaps lose an opportunity to expose a defect”); *State v. Hancock*, 854 P.2d 926, 929 (Or. 1993) (construing OR. REV. STAT. § 475.235(4)–(5) (2005) to mean that prosecutor must subpoena preparer on defense’s request in connection with lab reports on controlled substances). *But*

Far better are the state notice statutes, and it would be reasonable to augment these with a requirement that defendants must carry at least some burden before prosecutors should have to call the technician. It seems fair, for example, to require defendants to make some preliminary showing that the test was improperly run, or that it carries a risk of error that is substantial, or that the laboratory that performed the test has had proficiency problems or has not been subjected to any kind of proficiency standard.⁷⁹

Where the defense raises any kind of substantial objection, the burden should then be cast on the prosecutor to call a knowledgeable witness. A common question is whether it suffices to produce an expert who works in the lab but did not actually prepare the report. In *Oates*, the prosecutor called a chemist who was an associate of the person who prepared an analysis of cocaine, and the reviewing court was plainly not satisfied. In the 2006 decision by the Maryland Supreme Court in the *Rollins* case, the prosecutor called an associate in the state medical examiner's office because the doctor who prepared the autopsy report no longer worked there, and the reviewing court was satisfied. Pretty clearly the fact that a laboratory technician who prepares a test has died or become unavailable should not by itself be enough to require exclusion of a report, but on the other hand the defense should be entitled, upon raising suitable objection, to cross-examine a witness who can reply knowledgeably on the science and techniques of testing, and on the protocols followed in the particular laboratory. (The decision in *Oates* concluded that the report could not be admitted under any hearsay exception. In *Rollins*, the court concluded that the report was nontestimonial for purposes of the *Crawford* doctrine, and it did fit a statutory exception.⁸⁰)

see *State v. Cunningham*, 903 So. 2d 1110, 1121–22 (La. 2005) (approving lab report proving that substance was marijuana, where statute entitled defense to request subpoena of technician, which complied with *Crawford*); *State v. Campbell*, 719 N.W.2d 374, 378 (N.D. 2006) (approving use of state crime lab report on drug and alcohol content; defendant waived *Crawford* objection by failing to call technician); *State v. Craig*, 853 N.E.2d 621, 640 (Ohio 2006) (approving coroner's report to prove cause of death where medical examiner other than one who prepared report testified and could be cross-examined).

⁷⁹ *See* *City of Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (approving statutory scheme in DUI trial, which enabled defense to object to use of affidavit to prove blood alcohol level, and required the affiant to appear for cross-examination if defendant raises a "substantial and bona fide dispute" on substance of affidavit; this scheme comports with *Crawford*); *see also* LA. REV. STAT. ANN. § 15:501 (2005 & Supp. 2007) (stating that when defense subpoenas lab technician, defense shall certify that it "intends in good faith to conduct the cross-examination").

⁸⁰ *Rollins v. State*, 897 A.2d 821, 839 (Md. 2006) (admitting state medical examiner's autopsy report to show cause of death in murder trial); *see also* *Schoenwetter v. State*, 931 So. 2d 857, 870–71 (Fla. 2006) (admitting testimony in murder trial by medical

One thing that we do not want is a system that allows prosecutors to offer laboratory reports without any realistic way of cross-examining the preparer. Another thing we do not want is a system in which the defendant could require prosecutors always to bring in the laboratory technician, even in cases where the report is completely uncontroversial and there is no intent on the part of the defense to challenge the report in any way.

Somewhat astonishingly, some modern decisions hold that lab reports are not testimonial.⁸¹ Fortunately, however, at least some modern opinions reach the more plausible conclusion that such reports are testimonial for purposes of *Crawford*.⁸²

Many modern opinions approve the use of certificates to prove ministerial points, such as the qualifications of the technician or the calibration of the machine used in testing. It seems that these somewhat pedestrian matters should be provable in this way, without calling a live witness, at least in the absence of any significant objection by the defense.⁸³ Arguably, more generalized lab reports should be admissible as well, where they bear more generally on the case in providing context

examiner as to cause of death, based on report prepared by another examiner who was unavailable; no violation of confrontation rights under *Crawford*).

⁸¹ See *United States v. Feliz*, 467 F.3d 227, 234–35 (2d Cir. 2006) (holding that medical examiner's autopsy report was nontestimonial business record); *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006) (finding that hospital blood test reporting use of methamphetamine, made at behest of police, was business record and nontestimonial); *State v. Musser*, 721 N.W.2d 734, 750–51 (Iowa 2006) (admitting state lab test reporting that defendant was positive for HIV); *Rollins v. State*, 897 A.2d 821, 839 (Md. 2006) (admitting state medical examiner's autopsy report to show cause of death in murder trial); *Commonwealth v. Verde*, 827 N.E.2d 701, 705 (Mass. 2005) (allowing public lab test on cocaine, which was not "discretionary nor based on opinion," but describes "well-recognized scientific test"); *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004) (admitting lab report of blood alcohol); *State v. Craig*, 853 N.E.2d 621, 639 (Ohio 2006) (holding that medical examiner's autopsy report was a nontestimonial business record).

⁸² See *State v. Caulfield*, 722 N.W.2d 304, 310 (Minn. 2006) (holding that state lab test reports are testimonial); *People v. Rogers*, 780 N.Y.S.2d 393, 396 (App. Div. 2004) (in a rape trial, holding that it was error to admit report on victim's blood, which was testimonial; although prepared by private lab, it was at police request, so not a business record); *State v. Crager*, 844 N.E.2d 390, 397 (Ohio Ct. App. 2005) (holding that state crime lab report on DNA was testimonial); see also *State v. Clark*, 964 P.2d 766, 772–73 (Mont. 1998) (admitting state lab report in DUI case as public record, without producing technician, violated defense right under state constitution to confront accuser).

⁸³ See *Bohsancurt v. Eisenberg*, 129 P.3d 471, 475 (Ariz. Ct. App. 2006) (holding that maintenance and calibration records for breath-testing machine were not testimonial under *Crawford*); *State v. Carter*, 114 P.3d 1001, 1006 (Mont. 2005) (in DUI case, admitting certificates indicating that Intoxilizer was working properly, which was nontestimonial foundational evidence under *Crawford*).

and background, as opposed to direct support for elements in a charge or defense.⁸⁴

B. Child Victim Hearsay

One might read *Crawford* as ending the use of child victim hearsay to prove abuse, but in fact the cases point toward the opposite conclusion. Child victim hearsay is still admitted routinely under the exceptions for excited utterances, statements to physicians, and under state catchalls and rifle-shot child victim hearsay provisions.

Should we tolerate a situation in which it is up to the defense to call children as witnesses? Arguably the answer should be no, and for much the same reasons outlined above—defendants usually cannot afford to call child victims in hopes of discrediting them, and prosecutors should bear this burden.

Sometimes defendants do not want child victims to testify because they are sympathetic witnesses and the case against the defendant is pretty strong. Instead, defendants hope that by insisting on confrontation they can achieve a bargaining advantage. Perhaps for this reason, courts sometimes invoke the waiver notion, saying defendants who do not themselves call child victims have waived confrontation rights.⁸⁵ The Maryland Supreme Court's 2005 decision in the *Snowden* case seems right, however, in rejecting this approach.⁸⁶

⁸⁴ See *United States v. Scholle*, 553 F.2d 1109, 1124–25 (8th Cir. 1977) (printouts on drugs seized across country, including lab analyses).

⁸⁵ *In re Pamela A.G.*, 134 P.3d 746, 751 (N.M. 2006) (in proceedings related to four-year-old adoptive child, admitting her statements describing abuse and identifying abuser under child victim hearsay provision, and rejecting claim of *Crawford* violation; the court noted that “[n]either parent called [the c]hild . . . nor . . . ask[ed] permission of the court to allow them to question” her and instead “simply sought to exclude [her] statements”; they “did not indicate . . . what questions they might ask,” making it hard to decide “what value . . . cross-examination . . . would have offered”).

⁸⁶ *State v. Snowden*, 867 A.2d 314, 331–33 (Md. 2005) (holding that it was error to admit child victim's interview with investigator and rejecting claim that defense failed to raise *Crawford* issue by failing specifically to object “to the State's failure to place the children in the witness box,” which “ignores the fundamental principle” that the state bears the “threshold burden to produce a prima facie case” of guilt; also rejecting argument that Confrontation Clause is satisfied if defendant had “opportunity to call” the declarant, which approach has “significant constitutional shortcomings” with respect to the burden of production that rests on the state “to produce affirmatively the witnesses needed for its prima facie showing” of guilt; state must “place the defendant's accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine,” and burden is on the state to prove its case through production of witnesses and evidence; “[i]mplicit” in defendant's objection to hearsay was “the demand that the withheld declarants testify”); *Lowery v. Collins*, 996 F.2d 770, 771 (5th Cir. 1993) (“Forcing a defendant to call a child [victim] . . . unfairly requires a defendant to choose between his right to cross-examine a complaining witness and his right to rely on the State's burden of proof in a criminal case.”).

Courts routinely admit child victim statements describing abuse where the child testifies and can be cross-examined at trial, without further discussion.⁸⁷ And they approve the use of their statements even if they are unresponsive on cross in cases where they do testify.⁸⁸

Testifying from a remote setting by means of a two-way video monitor, with defense cross-examination conducted from the courtroom in a situation in which neither the defendant nor defense counsel actually confronts the child physically, is permissible when the *Craig* standard is satisfied, meaning that the trial court finds specifically that fear of the defendant prevents the child from testifying. More generalized findings, however, based on fear of the courtroom or testifying in public, do not justify this approach because it cuts off the usual mechanism of face-to-face cross-examination and confrontation.⁸⁹

IV. PRIOR CROSS-EXAMINATION

In connection with prior cross-examination, there is one big issue and a second issue that has gone unnoticed. Here is the big issue: If the defense had a prior opportunity to cross-examine but did not take advantage of it, when if ever does this tactic waive an objection based on the Confrontation Clause? Here is the unnoticed issue: Does the prior cross pave the way not only for the prior testimony that was given at the earlier time, but also for statements that were made even earlier?

A. Big Issue: The Opportunity Untaken

One might think that an opportunity to cross-examine at an earlier time suffices, even if the defense did not take advantage of the opportunity. Just as later cross really means later opportunity to question the declarant, prior cross might mean prior opportunity to question the declarant. But different considerations apply when we speak of the earlier opportunity for cross, and it is not at all clear that a mere prior opportunity should suffice.

⁸⁷ *Gaxiola v. State*, 119 P.3d 1225, 1231 (Nev. 2005) (admitting child's statements describing abuse to mother, uncle, detective, and member of sexual abuse investigative team; child testified and was cross-examinable, removing *Crawford* objection).

⁸⁸ *United States v. Kappell*, 418 F.3d 550, 554–55 (6th Cir. 2005) (in child abuse trial, admitting statements by children aged three and six, given to psychotherapist and pediatricians, under medical statements exception; children testified and were cross-examined; defense agreed to let them testify by closed circuit television; they were sometimes "unresponsive or inarticulate," but cross satisfied *Crawford*).

⁸⁹ *See Maryland v. Craig*, 497 U.S. 836, 860 (1990); *United States v. Bordeaux*, 400 F.3d 548, 552 (8th Cir. 2005) (holding that it was error to let child testify by two-way video monitor on basis of finding that she was frightened of defendant and testifying before jury; *Craig* requires finding of fear of defendant, not fear of courtroom, and statute is unconstitutional to extent that it requires lesser finding) (reversing).

1. Preliminary Hearings and Depositions

In a common scenario, a witness testifies at a preliminary hearing (or less often in a deposition), but becomes unavailable at trial. Should the prior testimony be admissible against the defendant? Does it matter whether the defendant took advantage of the chance to cross-examine, or purposefully declined to do so, or engaged only in brief cross?

Notably, the former testimony exception in FRE 804(b)(1) would allow the use at trial of testimony given in a preliminary hearing if the declarant is unavailable at trial and if the defendant had “opportunity and similar motive” to cross-examine at the preliminary hearing. It is also notable that the Supreme Court has twice approved use of the exception to admit preliminary hearing testimony at trial, and in *Crawford* the Court seemed to take pains to indicate that its new approach would not change anything in this area. In *Green*, the Court gave its approval in a case in which the witness also testified at trial, but pointedly added that it would have approved this use of the preliminary hearing testimony even if the declarant had not been cross-examinable at trial.⁹⁰ In *Roberts*, the Court said the defense had engaged in “the equivalent of” cross-examination in the preliminary hearing, and approved use of testimony given in that setting where the witness was unavailable to testify at trial.⁹¹ And in *Crawford*, the Court cited *Roberts* and *Green* in suggesting that preliminary hearing testimony remains admissible at trial, provided that the declarant is unavailable to testify.⁹²

Influenced by *Roberts* and *Green*, many states approve the use of preliminary hearing testimony against the accused, under the former testimony exception,⁹³ and similar logic extends to depositions.⁹⁴ Even

⁹⁰ *California v. Green*, 399 U.S. 149, 165 (1970) (approving use of preliminary hearing testimony given in equivalent setting of trial; defense had “every opportunity” to cross-examine).

⁹¹ *Ohio v. Roberts*, 448 U.S. 56, 70 (1980) (approving use of preliminary hearing testimony by unavailable witness; defense engaged in functional equivalent of cross).

⁹² *Crawford v. Washington*, 541 U.S. 36, 58–59 (2004) (citing *Roberts* as one among the “recent cases” whose “outcome[]” is consistent with the “traditional line” to which the Court now returns, and noting that testimonial statements by absent witnesses have been admitted “only where the declarant is unavailable” and defense “had a prior opportunity” for cross-examination).

⁹³ *People v. Jurado*, 131 P.3d 400, 428 (Cal. 2006) (in conditional examination in murder case, holding that defense could cross-examine co-offender, even though defense did not know about statements he later made indicating that he knew of and agreed with defendant’s plan to commit murder); *People v. Carter*, 117 P.3d 476, 516 (Cal. 2005) (approving use of preliminary hearing testimony by unavailable declarant; motive to cross-examine in preliminary hearing is not identical because purpose is only to determine probable cause, but motive was “closely similar” because defense sought to discredit the state’s theory by showing that the witness saw defendant with the victim “several hours prior to the time” that other witnesses put them together, which was “sufficiently similar” to satisfy former testimony exception and the federal constitutional standard); *State v.*

when later events bear on questions that the defense might put, arguably indicating that the prior opportunity for cross was inadequate, courts have rejected challenges to the use of such testimony.⁹⁵

Of course testimony given in a preliminary hearing is quintessentially “testimonial” under *Crawford*. That is to say, such testimony satisfies most of the criteria mentioned in *Crawford* for distinguishing testimonial from nontestimonial statements: The speaker intends (and certainly expects) his statements to be used in investigating and prosecuting crimes; the state is very much involved in the production of these statements; such statements possess all the formal indicia of testimony—because that is exactly what they are.⁹⁶

Nevertheless, decisions approving use of the former testimony exception seem wrong as a matter of hearsay law. There is only one issue in preliminary hearings: Is there probable cause to think a crime was committed and that the defendant is the perpetrator? In this setting, there is little or no hope of knocking out a facially adequate case, and defendants know it. Even the most aggressive cross-examination ordinarily leaves room for a jury to believe the witness, and judges in preliminary hearings almost always turn these cases over for trial rather than dismiss. Hence lawyers for the accused usually conclude that there is no point in cross-examining, except to the extent that it might be necessary to clarify testimony in order to be informed about the worst thing that could happen at trial. Most defense lawyers think it is better to hold back, and to save the most searching questions for cross-examination at trial. In short, perhaps there is an opportunity for cross at the preliminary hearing, but the opportunity is not inviting—there is

Skakel, 888 A.2d 985, 1040 (Conn. 2006) (approving use of testimony from probable cause hearing where speaker had died, and the defense had questioned him “extensively” in the hearing, pointing out his “drug addiction, his prior acts of misconduct, his prior inconsistent statements about the subject matter of his testimony, his lack of recollection due to the passage of time and ongoing drug abuse, and his failure to report the defendant’s alleged confession” to authorities).

⁹⁴ Rice v. State, 635 S.E.2d 707, 709 (Ga. 2006) (admitting deposition by deceased witness who was dying at the time; defense knew witness was in ill health and he died during the course of the deposition; defense did not cross-examine; right was waived); Howard v. State, 853 N.E.2d 461, 469 (Ind. 2006) (admitting child victim’s deposition, where defense conducted “vigorous and lengthy examination” and had adequate opportunity).

⁹⁵ See State v. Estrella, 893 A.2d 348, 360 (Conn. 2006) (admitting R’s preliminary hearing testimony even though defense did not then know of later letter by R retracting that testimony; defendant knew whether R was lying about defendant’s conduct and “readily could have challenged [R’s] credibility even without the letter”).

⁹⁶ *Crawford*, 541 U.S. at 51 (mentioning “*ex parte* in-court testimony or its functional equivalent,” such as affidavits, custodial examinations, and prior testimony that “defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” and also mentioning “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”).

no motive to take advantage of the opportunity. To say that a defendant has an opportunity to do what most defense lawyers would choose not to do because the odds overwhelmingly favor the proposition that “saving the ammunition until trial” presents the best chance to defend the client is to engage in a kind of fiction. Waiver becomes a “crap shoot” in which the lawyer’s understandable decision comes back to hurt his client. Influenced by these realities, a few states wisely exclude preliminary hearing testimony, even when the speaker is unavailable at trial.⁹⁷

What about the constitutional standard? *Crawford* contemplates a continuation of tradition and stresses that the declarant must be unavailable at trial and that there must have been an opportunity for cross-examination on the prior occasion. There is, however, at least some reason to doubt that preliminary hearing testimony should be admitted as a constitutional matter. There is one principle that underlies modern confrontation jurisprudence that predates both *Roberts* and *Crawford*: That principle holds that cross-examination is a trial right, which suggests that it should be up to the defendant whether to cross-examine prior to trial, and that a decision not to do so cannot waive the right to cross-examine at trial.⁹⁸ *Roberts* seemed attentive to this point in suggesting that it is very hard to decide whether not cross-examining at a preliminary hearing can be viewed as a waiver.⁹⁹

2. Prior Trials

Testimony given at prior trials on the same or related offenses differs considerably from testimony given in preliminary hearings and depositions. To begin with, the difference in what is at stake—establishing probable cause as against establishing guilt or innocence—profoundly affects the incentive to cross-examine. A defendant who would be foolish to cross-examine at a preliminary hearing or deposition cannot afford to hold back at trial, and must do his best to attack the

⁹⁷ See *People v. Fry*, 92 P.3d 970, 979–80 (Colo. 2004) (holding that it was error to admit testimony from preliminary hearing; defendant does not enjoy adequate motive and opportunity); *State v. Elisondo*, 757 P.2d 675, 677 (Idaho 1988) (stating that defense has little reason to cross-examine at preliminary hearing; most consider it a “tactical error”); *State v. Stuart*, 695 N.W.2d 259, 265–66 (Wis. 2005) (in homicide trial, holding that it was error to admit preliminary hearing testimony by unavailable witness; cross at preliminary hearings tests “plausibility, not credibility” so opportunity at that time does not satisfy *Crawford*) (reversing).

⁹⁸ *Barber v. Page*, 390 U.S. 719, 725 (1968) (holding that confrontation is “basically a trial right” that includes the right to cross-examine and the opportunity to let the jury consider the demeanor of the witness); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 52–53 (1987); *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972) (quoting *Barber* on this point).

⁹⁹ *Ohio v. Roberts*, 448 U.S. 56, 70 (1980) (stating that the question whether defense waives right to cross-examine at trial by not cross-examining at preliminary hearing is “truly difficult to resolve under conventional theories” (quoting Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1211 (1979))).

witness and his testimony if it counts in some serious way in the case. More importantly, there is no room for strategic guessing about later opportunities and holding back one's best shots at trial. A defendant cannot anticipate a second trial and must assume that the first trial is the last one. The defense must do all that can be done, within the constraints of the Rules and the obligations of professional responsibility, to raise a reasonable doubt or prove some defense.

Hence it is not surprising that the Supreme Court has approved the use of statements that constituted testimony given in a prior trial of the same offense,¹⁰⁰ and it is not surprising that post-*Crawford* cases are in accord.¹⁰¹ Of course the government can invoke the former testimony exception to admit testimony from a prior trial, but as always this exception can be used only if the witness is unavailable, as *Crawford* itself observed.¹⁰² Although the government cannot invoke the exception if it "procures" the unavailability of the witness,¹⁰³ it seems that deporting an illegal alien does not constitute procurement, and the government can first deport and then invoke the former testimony exception.¹⁰⁴ Prior testimony, given in other trials in which the defendant against whom the testimony is offered did not have a chance to cross-examine, is not admissible. The former testimony exception does not reach such testimony (because the current defendant did not have a chance to cross-examine), and such testimony is "testimonial" for purposes of the *Crawford* doctrine.¹⁰⁵

Changes in the evidence presented, as between the first and second trials, may implicate the nature of cross-examination that the defense

¹⁰⁰ *Mancusi*, 408 U.S. at 216 (admitting testimony given in prior trial on same charges); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (admitting testimony given at defendant's first trial by witness who died by time of second trial).

¹⁰¹ See *Epperson v. Commonwealth*, 197 S.W.3d 46, 55 (Ky. 2006) (approving use of prior trial testimony by witness who claimed lack of memory at second trial, thus becoming unavailable; witness appeared for cross-examination at prior trial, so *Crawford* did not stand in the way); *Farmer v. State*, 124 P.3d 699, 705 (Wyo. 2005) (approving use of prior trial testimony despite defense claim that counsel in first trial asked "relatively few questions" and was generally inadequate).

¹⁰² *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (summing up with the observation that testimonial hearsay has been admitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine").

¹⁰³ See FED. R. EVID. 804(a) (stating that one is not unavailable if the proponent has procured his absence).

¹⁰⁴ See *Williams v. United States*, 881 A.2d 557, 565 (D.C. Cir. 2005) (in a second murder trial, admitting testimony from first trial by witness whom government had deported as illegal alien before second trial; witness satisfied unavailability requirement).

¹⁰⁵ See *Willingham v. State*, 622 S.E.2d 343, 345-46 (Ga. 2005) (holding that it was error to admit testimony by since-deceased witness in trial of co-offender, which was testimonial under *Crawford*, and current defendant had no opportunity to cross-examine) (reversing).

pursues or would want to pursue, and potentially such changes could mean that even testimony given in prior trials of the defendant cannot be admitted in later trials. So far, however, this fact has not led to the conclusion that prior cross-examination was inadequate to satisfy the Confrontation Clause.¹⁰⁶

B. The Unnoticed Issue: Statements Other than Testimony

Prior cross (or maybe the opportunity) might pave the way to admit testimonial hearsay other than the testimony given when the prior cross (or opportunity) occurred.

Suppose *X* says “I was struck on the head and robbed on the street by a fellow in jeans and a Seahawks hat” in an excited statement to a police officer in July. In August, *X* appears in a preliminary hearing on charges that *Y* committed the robbery. *X* testifies that *Y* is the assailant/robber. The prosecutor either does or does not offer *X*’s prior statement. Defense counsel representing *Y* either does or does not cross-examine at the preliminary hearing. The question is: Can the prior statement can be admitted?

If *X* never testifies at trial, the prosecutor might argue that the prior statement to the police officer, even if testimonial, should be admissible as an excited utterance. The prosecutor might also add that no *Crawford* problem exists because, in the preliminary hearing, the defendant could have cross-examined *X* about his earlier statement.

To start with, it is not clear whether the cases envision prior cross-examination as a basis to admit something other than the previously cross-examined testimony itself. As noted in the foregoing discussion, the first problem is to determine whether the opportunity to cross-examine at the preliminary hearing, if it was not actually pursued by the defense, justifies admitting even the preliminary hearing testimony itself. If the defense did not cross-examine, and the opportunity is viewed as inadequate as to the testimony itself, then seemingly the “opportunity” is inadequate as to the prior statement as well.

Assuming that the opportunity, not taken by the defense, is adequate as to the testimony itself, it still should not be viewed as

¹⁰⁶ See *State v. Hannon*, 703 N.W.2d 498, 507–08 (Minn. 2005) (admitting testimony given by since-deceased witness at defendant’s first trial and rejecting claim that prior opportunity to cross-examine was inadequate; defense argued that his confession was excluded from the second trial, so the cross-examination in the first trial rested on a “completely different theory” than would animate cross-examination in the second trial, but it was not clear that cross in the second trial would address “any ‘new material line of questioning’” inasmuch as the state’s theory was “the same at both trials” and the evidence was “largely the same,” even though second trial “featured more emphasis on the testimony of informants”; *Crawford* requires “a prior opportunity to cross-examine,” and “[t]he opportunity need not actually be seized”; but it is possible to imagine a prior opportunity that is not adequate “due to substantial circumstantial differences” (emphasis omitted)).

adequate for a statement that the prosecutor never mentioned. For reasons that apply more generally when prosecutors use prior statements as evidence, it seems that the prosecutor should at least present the statement in order to make an adequate opportunity for defense cross-examination.

Assuming that the defense does cross-examine at the preliminary hearing, and goes into detail on acts, events, or conditions reported in the testimony and in the prior statement, arguably the cross-examination requirement is satisfied. This position is plausible even if the prosecutor does not mention the statement, although obviously the case to admit the statement over an objection under the Confrontation Clause is better if the statement was raised by the prosecutor.

V. CONCLUSION

It is high time to revisit the meaning of the constitutional standard, established in the jurisprudence of the Confrontation Clause, that assures the accused an adequate opportunity for “full and effective” cross-examination. One reason is that the coming of *Crawford* means that some statements that courts admitted under the old *Roberts* doctrine as reliable hearsay are no longer admissible unless the right of cross-examination is provided for. Another reason—and the more important one—is that the doctrine of “full and effective” cross-examination has not been adequately developed. In the common setting of a witness at trial who retreats into claims of memory loss, *Green* was overly sanguine in appraising the effectiveness of delayed cross-examination. The memorable comment in *Fensterer* suggesting that defendants cannot expect to get everything they want in cross-examination cannot function as a useful standard when defendants are convicted after cross-examination has been stymied.

At the very least, “full and effective” cross-examination that is delayed until trial can occur only if prosecutors actually call witnesses whose statements are offered, and examine them both about the acts, events, and conditions reported in their statements and about the statements themselves. Even when these conditions are satisfied, “full and effective” cross-examination envisions a witness who actually replies in some substantive way to questions put by the defense about those acts, events, and conditions, and about the statements being offered.

At the very least, “full and effective” cross-examination that occurred prior to trial means that the witness was once again called by the prosecutor, and that the defendant had not only an opportunity but an incentive to cross-examine.

Dealing constructively with these issues requires courts to appreciate not only the customary view that cross-examination is a testing mechanism, but also the view that cross-examination is drama,

theatre, and rhetoric. Pretending that cross-examination is only the former amounts to ignoring the realities that confront trial lawyers and to deciding cases on an unrealistic basis.