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Confrontation as a Rule of Production

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CONFRONTATION AS A RULE OF PRODUCTION

Pamela R. Metzger*

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INTRODUCTION

The Confrontation Clause is cost blind; the Supreme Court is not. In 2004, in *Crawford v. Washington*,¹ the Supreme Court trumpeted its commitment to a procedural Confrontation Clause that required the prosecution to produce its witnesses in court, regardless of the cost or inconvenience.² In 2009, in *Melendez-Diaz v.*

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¹ 541 U.S. 36 (2004).

² *Id.* at 61–69.

Massachusetts,³ the Court retreated, offering courts, legislatures, and prosecutors an easy way to avoid confrontation-laden trials. On the one hand, the Court warned that legislatures and courts could not “suspend the Confrontation Clause,” even if there were “other ways—and in some cases better ways—to challenge or verify” the prosecution’s evidence.⁴ On the other hand, the Court declared that states were “free to adopt procedural rules” that require a defendant to demand, or forfeit by inaction, the protections of the Confrontation Clause.⁵ As a result, despite *Crawford*’s promise, legislatures continue to minimize, or eliminate, the prosecution’s burden of producing its testimonial witnesses.

This Article explores and critiques the Supreme Court’s puzzling production-minimizing approach to the Confrontation Clause. It does so, in part, by analyzing the Court’s ambivalence about the value of production as an ongoing battle over constitutional costs. This battle pits the enforcement of constitutional structure against the management of criminal justice costs. Of course, positing a conflict between constitutional structure and constitutional cost is itself a false dichotomy, one that fundamentally misunderstands the architecture of adversarial criminal procedure. Nevertheless, between 1965 and 2004, the Supreme Court embraced that dichotomy and a resultant jurisprudence of costs drove the Court’s confrontation jurisprudence. Under this pre-*Crawford* jurisprudence, the Supreme Court held that the Confrontation Clause did not bar the admission of an out-of-court statement if it fell within a firmly rooted exception to the hearsay rule.⁶

Since 2004, the Court claims to have rejected a cost-centric jurisprudence. *Crawford* held that “[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”⁷ *Crawford* claimed to have restored confrontation as a rule of production: the Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”⁸ Confrontation’s costs, however, still preoccupy the Court; the Court simply sells that old, cost-conscious wine in new, *Crawford*-approved bottles. The result has been a withered confrontation jurisprudence that undermines the Confrontation Clause and the core structural premises of constitutional criminal procedure.

Because the Confrontation Clause’s production mandate has been all but forgotten by the Court and most scholars, Part I describes the Confrontation Clause’s burden of production. Critically, before the Confrontation Clause bestows any rights upon the accused, it *burdens* the prosecution by requiring it to produce its witnesses

³ 557 U.S. 305 (2009).

⁴ *Id.* at 318.

⁵ *Id.* at 327.

⁶ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

⁷ 541 U.S. at 59.

⁸ *Id.* at 61.

at trial.⁹ Witness production—*not* cross-examination—is the threshold procedural demand of the Confrontation Clause.¹⁰ Confrontation’s burden of production regulates the prosecution’s presentation of testimonial evidence at every criminal trial. In contrast, the accused’s confrontation rights (face-to-face confrontation and cross-examination) are contingent; they depend for their existence upon the prosecution’s presentation of its witnesses’ testimony.¹¹

Part II chronicles the erosion of a pre-incorporation, production-centric confrontation jurisprudence and the development of a production-minimizing confrontation jurisprudence. In its earliest Confrontation Clause opinions, the Court acknowledged confrontation’s primary goal of regulating the prosecution’s presentation of evidence.¹² However, following the Court’s incorporation of the Confrontation Clause, the Court developed a reliability-focused Confrontation Clause jurisprudence.¹³ The Court began to balance confrontation’s alleged production costs against confrontation’s unequivocal production mandate. The Court justified this extra-constitutional balancing test by disparaging or dismissing the importance of confrontation’s production imperative.¹⁴ The Court further rationalized its restrictive Confrontation Clause with a myopic focus on cross-examination and a corresponding deprecation of face-to-face confrontation.¹⁵ By elevating cross-examination over production, the Court justified the admission of “reliable” out-of-court declarations in lieu of prosecutorial production of testifying witnesses.¹⁶ The Supreme Court eviscerated confrontation’s production imperative in order to reduce confrontation’s impact on case outcomes, conserve scarce prosecutorial resources, and advance a wide range of public policy goals.

As Part III explains, since its *Crawford* decision in 2004, the Court has rhetorically embraced confrontation’s procedural mandate of witness production. Yet, the Court has refused to fully enforce confrontation’s rigorous demands. The Court remains deeply ambivalent about the costs of witness production and about the consequences

⁹ Pursuant to *Crawford*, the Confrontation Clause only regulates the production of testimonial witnesses. *Id.* at 68.

¹⁰ As I discuss in Part IV *infra*, confrontation’s production mandate requires more than the witness’s availability. “Because a defendant has the right to be confronted with his accusers, the prosecution consequently has the burden to confront the defendant. This requires that the prosecution subpoena the witness, that the prosecution put that accusing witness on the stand, and that the witness actually testify.” *Peak v. Webb*, 673 F.3d 465, 479 (6th Cir. 2012) (Clay, J., dissenting).

¹¹ Thus, confrontation’s rights are contingent. *See infra* notes 22–39 and accompanying text.

¹² *See, e.g., Mattox v. United States*, 156 U.S. 237, 244 (1895) (“The substance of the constitutional protection is preserved [by] . . . seeing the witness face to face, and . . . subjecting him to the ordeal of a cross-examination.”).

¹³ *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980) (holding that evidence from an unavailable witness may be admitted if it shows adequate “indicia of reliability” (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972))).

¹⁴ *See White v. Illinois*, 502 U.S. 346, 354–57 (1992).

¹⁵ *Id.* at 356–57.

¹⁶ *Id.*

of demanding it. In a trio of post-*Crawford* cases, the Court has suggested that the Constitution permits “notice-and-demand” statutes that require a defendant to make a pretrial motion to confront a state’s witness or waive, by inaction, his right to confrontation.¹⁷ Part III explains this notice-and-demand phenomenon as a product of a jurisprudential battle that pits the enforcement of criminal procedure mandates against the management of criminal procedure costs. By trivializing the constitutional significance of prosecutorial witness production, the Court has rationalized a continued noncompliance with the prosecutorial obligation to produce testimonial witnesses.

Part IV offers an in-depth critique of the Court’s claim that the Constitution permits a demand-waiver theory of confrontation. Neither precedent nor logic support an interpretation of the Confrontation Clause in which a defendant must demand, or forfeit by silence, the enforcement of confrontation’s production imperative. When the Court balances confrontation’s costs against the Constitution’s unequivocal production mandate, it undermines the integrity of the adversary system of justice. Legislatures, police, and prosecutors can consider confrontation’s costs in deciding whether and how to prosecute crime; the Supreme Court cannot and should not. Confrontation’s production imperative is non-negotiable.

I. A CRISIS FOR CONFRONTATION’S RULE OF PRODUCTION

The Confrontation Clause is composed of two parts: a prosecutorial burden and a defense right. The prosecutorial burden is a rule of witness production: the prosecution must produce its witnesses and elicit their testimony at trial in the presence of the defendant and the jury.¹⁸ The defense right is an entitlement to confrontation and examination of testifying witnesses.¹⁹ Confrontation’s rule of production regulates the prosecution’s presentation of testimonial evidence.²⁰ Confrontation’s right to confrontation and examination guarantees the defendant’s right to face his accuser before the jury, to hear the allegations against him, and to challenge those allegations through cross-examination.²¹ The rule of production is the Confrontation Clause’s mandate; the right to confrontation and examination is its privilege.

¹⁷ See *Williams v. Illinois*, 132 S. Ct. 2221 (2012); *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

¹⁸ Pursuant to *Crawford*, the Confrontation Clause only regulates the production of testimonial witnesses. The statements of an absent testimonial witness are inadmissible unless that witness is “unavailable” and the defendant has had a prior opportunity to cross-examine that witness. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). Between 2004 and 2014, the Supreme Court devoted considerable ink to explaining the criteria that distinguish testimonial statements from non-testimonial statements. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143 (2011); *Davis v. Washington*, 547 U.S. 813 (2006). For purposes of this Article, the term “witness” or “witnesses” refers to testimonial witness(es) whose accusations are subject to the requirements of the Confrontation Clause.

¹⁹ See *Mattox v. United States*, 156 U.S. 237, 244 (1895).

²⁰ *Crawford*, 541 U.S. at 68–69.

²¹ *Mattox*, 156 U.S. at 242–44.

This Part discusses confrontation's underexamined and undervalued production mandate. It explains the structural necessity and due process implications of that mandate. It also introduces the crux of the current Confrontation Clause crisis: the burgeoning notice-and-demand phenomenon that undermines confrontation's production mandate.

A. Confrontation's Production Mandate

Confrontation's rule of production guarantees a defendant the right "to be confronted with the witnesses against him."²² The Framers wrote the Confrontation Clause in the *passive* voice; thus, it operates as a rule that requires the prosecution to produce its witnesses. A defendant has the constitutional right to be a *passive* observer of the accusations against him²³: "It is, after all, the prosecution's burden to call the witnesses who will prove its case."²⁴

Confrontation is thus a procedural rule that regulates the prosecution's presentation of evidence by requiring it to place its witnesses before a defendant and his jury. In turn, this mandate of production reinforces two important due process concepts: first, at a criminal trial, the prosecution bears the burdens of production and persuasion; second, a criminal defendant has the right to rely on the prosecution's failure of proof.²⁵ Confrontation's production imperative is the threshold procedural demand of the Confrontation Clause.²⁶

Confrontation's mandate incorporates several underlying rules of production: the prosecution must produce its witnesses at a public trial and elicit their accusations under oath and in the presence of the defendant and the jury.²⁷ Each aspect of this production imperative both advances the due process command that the prosecution bear the burden of production and persuasion and restrains the government from abuses of power and process.

²² U.S. CONST. amend. VI (emphasis added).

²³ As Justice Scalia put it, the right to "be confronted with the witnesses against him" would be a "strange way to express a guarantee of nothing more than cross-examination." *Coy v. Iowa*, 487 U.S. 1012, 1018–19 n.2 (1988) (disputing 5 JOHN HENRY WIGMORE, A TREATISE ON THE AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395, p. 154 (J. Chadbourn rev. ed. 1974)); see also Sherman J. Clark, Essay, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1261 (2003) ("From the defendant's perspective, [the Confrontation Clause] is not so much a right to confront witnesses, as a right to require witnesses to confront you.").

²⁴ John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 227 (1999).

²⁵ Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 521–22 (2006).

²⁶ Confrontation's production mandate requires more than the witness's availability: "[T]he prosecution [must] subpoena the witness, . . . put that accusing witness on the stand, and [have] the witness actually testify." *Peak v. Webb*, 673 F.3d 465, 479 (6th Cir. 2012) (Clay, J., dissenting).

²⁷ See *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

First, confrontation's rule of production prevents the prosecution from bluffing its way to victory.²⁸ The prosecution cannot convict a defendant by promising that it *could* prove the defendant's guilt by proof beyond a reasonable doubt. Instead, confrontation demands a due process showdown: the prosecution must meet its burden of production and persuasion at trial, with live witnesses who confront the defendant and undergo examination before the jury.²⁹

Second, confrontation's rule of production promotes integrity in the investigation and prosecution of criminal cases. The Framers recognized the "unique potential for prosecutorial abuse" when "government officers [are involved] in the production of testimony with an eye toward trial."³⁰ They responded with a production imperative that discourages corrupt officials from manufacturing statements by non-existent witnesses, or "conveniently 'los[ing] track'" of problematic witnesses.³¹ Confrontation's rule

²⁸ See, e.g., Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 524 & n.108 (1999) (when the prosecution "need not present any evidence or witnesses in court, a bluff may result in a conviction" (quoting ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 178 (3d ed. 1996))).

²⁹ *Id.* at 524 n.108.

³⁰ *Crawford v. Washington*, 541 U.S. 36, 56 n.7 (2004); see also Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 509 (1998) (arguing that skepticism about the good faith of government actors was "an important factor leading to the increased importance of cross-examination and the ascendancy of the adversary system").

³¹ Van Kessel, *supra* note 30, at 514.

Except in limited contexts such as police-conducted, post-accusation eye-witness identifications and in-custody interrogations of subjects, the Supreme Court has not imposed even minimal constitutional protections governing the creation of witness statements, whether by the prosecution or the defense.

...

[Without a production mandate, an official] who desires to fabricate a hearsay statement [is] free to choose [a] place and time when no one [is] present but the witness and supposed declarant, such that it would be difficult to show the statement was never made, especially if the declarant [is] no longer available [or never existed at all].

Id. at 503–04; see also Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 586–87 (1992) ("[A]cknowledg[ing] the dangerous ability of the government to shape evidence through inquisition" and that investigative conduct might "prevent the accused's fate from being determined by the police's out-of-court activities rather than by the jury" (citing *United States v. Wade*, 388 U.S. 218 (1967); *Massiah v. United States*, 377 U.S. 201 (1964))); Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297, 298 n.5 (2005) (arguing that "abuse of state power" is the "core concern" of the Confrontation Clause and the justification for "a confrontation procedure not constitutionally required in other types of legal proceedings"); Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992); Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*,

of production also discourages law enforcement from exerting improper or undue influence on a witness's out-of-court statements.³² The production mandate ensures that the prosecution's witnesses appear at trial "to correct and explain" any prior statements attributed to them by law enforcement.³³ This is a powerful incentive for investigative integrity in the collection of witness statements.³⁴ Confrontation's rule of production is thus a critical safeguard against the investigatory excesses and abuses inherent in an adversary system.³⁵

Third, confrontation's rule of production requires that the prosecution's witnesses confront the defendant at trial with *substantive* allegations against him. These allegations must be made under oath or affirmation and under penalty of perjury.³⁶ Conventional wisdom holds that these safeguards increase the reliability of witness testimony by "impressing [the] duty [to testify truthfully] on the witness's conscience."³⁷ When prosecution witnesses make sworn, face-to-face statements in the jury's presence, they provide the defendant with clear notice of the precise testimony the jury will consider.³⁸

17 HASTINGS CONST. L.Q. 383 (1990) (urging a "functionalist" view of the Confrontation Clause as a restraint upon prosecutorial misconduct).

³² Berger, *supra* note 31, at 586 (requiring the prosecution to call its declarant to the stand limits the prosecution's power to "orchestrate [pretrial] proceedings to shape the evidence"); see Park, *supra* note 31, at 298 (defining undue influence as "[p]ressuring the declarant with torture, abuse or intimidation, or taking advantage of vulnerabilities of the declarant"); Van Kessel, *supra* note 30, at 503 (arguing that factual assertions by unproduced prosecution witnesses are "particularly susceptible to creation and manipulation in the context of party-controlled" litigation). Moreover, as Blackstone explains, even without malicious intent, "an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language." 3 WILLIAM BLACKSTONE, COMMENTARIES *373.

³³ BLACKSTONE, *supra* note 32, at *373.

³⁴ See John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797 (2001) (arguing that production of accomplices would encourage witness confrontation and change a prosecutor's pretrial decisions).

³⁵ Van Kessel, *supra* note 30, at 505. "Partisan evidence gathering and presentation aggravates" the risks associated with admitting out-of-court statements of unproduced witnesses. *Id.* The general risk that adversaries will manipulate evidence for presentation at trial increases in criminal cases. See *Crawford*, 541 U.S. at 56 n.7.

³⁶ *California v. Green*, 399 U.S. 149, 158–59 (1970); see also Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1172 (2002) ("[T]estimony must be given under prescribed conditions, among which are that it must be under oath . . .").

³⁷ FED. R. EVID. 603; see also *Green*, 399 U.S. at 158 (stating that the oath helps "guard[] against the lie by the possibility of a penalty for perjury"); Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1119–21 (1994).

³⁸ Clark, *supra* note 23, at 1261. Professor Clark notes that, like the Confrontation Clause, the right to be informed of the nature and cause of the accusation is also phrased in the passive voice: "Perhaps the Information Clause . . . reinforces the meaning of that stretch of Sixth Amendment landscape. The state must inform and the witness must confront." *Id.* at 1266; see also Park, *supra* note 31, at 298 (noting that, if a witness does not make her accusation on the witness stand, she "prevent[s] the defendant from learning facts about the declarant, hearing the declarant's whole story, or learning about the circumstances under which the story was given").

This sworn in-court testimony also enables the defendant to meaningfully exercise the right to cross-examination.³⁹

In sum, confrontation's mandate of production does not depend upon the effectiveness of cross-examination or, indeed, upon whether the defendant conducts cross-examination. Confrontation's rule of production is a deliberate structuring of the adversary process that burdens the prosecution with the affirmative obligation of producing its witnesses at a place and time determined by the court. In some cases, confrontation's production mandate will require the acquittal of a factually guilty defendant because of the prosecution's failure to produce a witness or the trial court's exclusion of testimonial hearsay. In other cases, confrontation's mandate will require police and prosecutors to spend countless hours and thousands of dollars locating and securing their testimonial witnesses. These are the intended consequences of confrontation's rule of production. Yet, as will be discussed, for the past fifty years, the Supreme Court has steadily undervalued confrontation's rule of production and overvalued confrontation's right to cross-examination.

B. A Preview of the Notice-and-Demand Threat to Production

The burgeoning crisis undermining confrontation's burden of production lies in so-called "notice-and-demand" statutes. In dicta in the 2009 case of *Melendez-Diaz v. Massachusetts*, the Supreme Court asserted that notice-and-demand statutes were constitutionally valid rules.⁴⁰ Specifically, the Court stated that the Constitution permits a state to "requir[e] the defendant to give early notice of his intent to confront" a prosecution witness or waive by inaction his right to confrontation.⁴¹ These notice-and-demand statutes require a defendant to make an explicit pretrial demand for enforcement of the Confrontation Clause at trial. A defendant's failure to timely make the demand relieves the prosecution of its burden of production, constitutes consent to the admission of a witness's out-of-court statements, and waives the defendant's right to cross-examination.⁴²

As discussed later in this Article, notice-and-demand rules relieve the prosecution of its burden of production by requiring a defendant to affirmatively invoke the

³⁹ As will be discussed herein, notably, the prosecutorial burden of witness production is what distinguishes the Confrontation Clause from the Compulsory Process Clause. Absent the requirement for prosecutorial production, the Confrontation Clause promises a defendant nothing more than the right to compel the testimony of hostile witnesses. Equating availability with production would ignore the fundamental adversary structures established by the Constitution. The defendant has the right to confrontation of prosecution witnesses *and* to the compulsory process of defense witnesses.

⁴⁰ 557 U.S. 305, 326–27 (2009).

⁴¹ *Id.* at 326.

⁴² *See id.* at 355 (Kennedy, J., dissenting). As I have noted elsewhere, those statutes evolved in order to minimize or evade confrontation's actual and perceived costs. *See Metzger, supra* note 25.

confrontation right.⁴³ *Melendez-Diaz* thus encourages courts and legislatures to do what the Constitution prohibits: conflate confrontation and compulsory process, and shift the Confrontation Clause's burden of production from the prosecution to the defense.⁴⁴ These notice-and-demand provisions mark a radical departure from the Confrontation Clause's rule of production. They present a dangerous threat to the structural protection associated with the confrontation guarantee and with other Sixth Amendment rights: namely, the criminal defendant's right to "do nothing at all" and rely on the government's failure of proof.

What explains the Court's retreat from a confrontation-rich system of criminal justice? How can we understand the Court's systematic devaluation of confrontation's production imperative during the post-incorporation and post-*Crawford* eras? The answers lie in the Court's concerns about the costs of criminal procedure compliance, particularly in the post-incorporation era of exploding criminal justice dockets. However, as set forth below, even *Crawford* did not return the Court toward a more production-centric Confrontation Clause. The Court continues to grapple with the costs of confrontation compliance.

II. CONFRONTATION AND PRODUCTION BEFORE *CRAWFORD*

In its nineteenth century confrontation cases, the Supreme Court embraced confrontation as a rule of production. However, after its 1965 incorporation of the clause, the Court, along with commentators, increasingly characterized production as an incidental aspect of the Confrontation Clause.⁴⁵ Confrontation's production imperative was recast as a costly and cumbersome procedural "means" to confrontation's substantive "end" of a reliable trial verdict.⁴⁶ That analysis overlooked the clause's procedural goal of prosecutorial production and emphasized, instead, its substantive aim of reliability. This focus on cross-examination quickly turned into a myopic commitment to admitting reliable evidence, regardless of whether it was presented by live witnesses. By 2003, the Court had all but eviscerated confrontation's rule of production: if a trial court determined that a witness's statements were reliable, the prosecution had no obligation to produce that witness at trial; even cross-examination was unnecessary as it would not add to the accuracy of the verdict.⁴⁷ This

⁴³ *Melendez-Diaz*, 557 U.S. at 355 (Kennedy, J., dissenting).

⁴⁴ These rules are not solely the creatures of legislatures or criminal rules committees. In 2014, the New Jersey Supreme Court *sua sponte* announced a notice-and-demand requirement for defendants. *State v. Williams*, 95 A.3d 701, 709 (N.J. 2014) (allowing the "State [to] notify the defendant of its intention to call an expert witness who did not conduct, supervise, or participate in a scientific or other such test about which he or she will testify" and requiring the defense "to notify the State [if] it objects to the expected testimony of the expert witness on Confrontation Clause grounds").

⁴⁵ See Richard D. Friedman, Essay, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1014–22 (1998).

⁴⁶ See *Ohio v. Roberts*, 448 U.S. 56, 65–66 (1980).

⁴⁷ See *Crawford v. Washington*, 541 U.S. 36, 60 (2004).

utter disregard for confrontation's rule of production was a dramatic shift from the Court's original understanding of the Confrontation Clause.

A. The Original Understanding of Production

The United States adopted the Confrontation Clause in 1791. Then, as now, the clause promised that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁴⁸ Over the next 174 years, the Supreme Court issued only a handful of opinions on the Confrontation Clause and, because the clause had yet to be incorporated, those cases all arose out of federal criminal prosecutions.⁴⁹ In those opinions, the Court demonstrated a firm commitment to confrontation's demand for witness production.

Witness production was the central tenet of the Court's pre-incorporation understanding of the Confrontation Clause. The requirement of live witnesses who provided testimony at trial animated the Court's enforcement of the Confrontation Clause.⁵⁰ The Supreme Court expected that the prosecution's evidence would come from declarants' sworn trial testimony, not from *ex parte* affidavits, depositions, or third-party hearsay.⁵¹ Facts “which [could] be primarily established only by witnesses” could not “be proved . . . except by witnesses who confront [the accused] at the trial.”⁵² The Court insisted that “testimony for the people in criminal cases [could] only, as a general rule, be given *by witnesses in court, at the trial.*”⁵³

The legal community similarly recognized that the Constitution's requirement of live witnesses affirmatively burdened the prosecution with the obligation of witness production.⁵⁴ The Confrontation Clause meant both that “proof by witnesses was an indispensable condition to an adverse verdict,” and that the prosecution bore the

⁴⁸ U.S. CONST. amend. VI.

⁴⁹ The Court issued its first substantive Confrontation Clause opinion in the 1878 case *Reynolds v. United States*, 98 U.S. 145 (1878). Between 1879 and 1965, when the Court incorporated the Confrontation Clause to the states, the Court relied upon the Due Process Clause of the Fourteenth Amendment to consider state defendants' claims concerning the prosecution's non-production of witnesses or the undue restriction of the rights to face-to-face confrontation and cross-examination.

⁵⁰ See Berger, *supra* note 31, at 568–71, n.58 (citing 2 COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 1, 875–76 (T.B. Howell ed., London, T.C. Hansard 1816)).

⁵¹ *Mattox v. United States*, 156 U.S. 237, 242 (1895).

⁵² *Kirby v. United States*, 174 U.S. 47, 55 (1899).

⁵³ *Motes v. United States*, 178 U.S. 458, 472 (1900) (emphasis added).

⁵⁴ State supreme courts adopted similar interpretations of their respective constitutional provisions concerning confrontation. For example, the Supreme Court of Ohio characterized Ohio's confrontation provision as a “requirement that the accused shall be confronted, on his trial, by the witnesses against him, [which] has sole reference to the personal presence of the witnesses.” *Summons v. State*, 5 Ohio St. 325, 341 (1856).

burden of producing that proof at trial.⁵⁵ Unsurprisingly then, the Court's early confrontation cases assumed that the prosecution must produce its witnesses' testimony at trial or forego admission of those witnesses' statements.

In *Mattox v. United States*, one of its earliest Confrontation Clause opinions, the Supreme Court explained that the only exceptions to confrontation's production mandate were those that would have been acknowledged under common law when the Sixth Amendment was adopted.⁵⁶ The Court adopted those exceptions with considerable reluctance.⁵⁷ Those exceptions were: the dying declarations rule,⁵⁸ the doctrine of forfeiture-by-wrongdoing,⁵⁹ and a common law doctrine of witness incapacity. The witness incapacity rule admitted the statements of absent witnesses if the prosecution proved that the witness was "dead, insane, [or] too ill ever to be expected to attend the trial," and the witness's prior statements were taken under trial-like conditions.⁶⁰ Each of these three exceptions conditioned the admissibility of out-of-court declarations upon the *impossibility* of prosecutorial witness production.⁶¹

These very narrow exceptions did not change the Supreme Court or the lower federal courts' firm belief that the Confrontation Clause imposed a rule of production that the prosecution elicit its witnesses' testimony at trial or forego reliance on its absent witnesses' out-of-court declarations. If the prosecution was unable to locate a witness⁶² or the witness's location rendered him unsusceptible to legal service,⁶³ federal trial judges refused to admit the witness's out-of-court statements:

⁵⁵ *United States v. Bigelow*, 14 D.C. (3 Mackey) 393, 398 (1884).

⁵⁶ *Mattox*, 156 U.S. at 243; *see also* *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) ("The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.").

⁵⁷ *Mattox*, 156 U.S. at 243. In dicta, the *Mattox* Court noted that dying declarations were a common-law exception to the rule of production. *Id.* The Court made no effort to justify them as compliant with the rule of production. *See id.* Rather, the Court criticized the admission of dying declarations as inconsistent with the principles of adversary litigation. *Id.*

⁵⁸ *Id.*

⁵⁹ *See West v. Louisiana*, 194 U.S. 258, 262 (1904).

⁶⁰ *Id.* (noting that, at common law, out-of-court depositions were inadmissible unless "the defendant was present [for the deposition] and . . . the defendant's counsel had had an opportunity to cross-examine").

⁶¹ *Id.* (noting that exceptions exist when "the witness was at the time of the trial dead, insane, too ill ever to be expected to attend the trial, or kept away by the connivance of the defendant").

⁶² *United States v. Angell*, 11 F. 34, 43 (C.C.D.N.H. 1881) (emphasizing that the court could find no case admitting the prior criminal trial testimony of an "absent but living" witness "to be proved at a subsequent [criminal] trial").

⁶³ *See West*, 194 U.S. at 262 (noting that no clear authority permitted the prior sworn

“his testimony cannot be received in criminal cases, *even if he be beyond the jurisdiction of the court or of all the United States.*”⁶⁴ The legal inquiry was not whether a trial without live witness testimony would produce an accurate verdict; rather, the inquiry was whether the prosecution had met its burden of eliciting, at trial, testimonial evidence from its witnesses. As one federal court explained, the accused has a constitutional right “to be confronted with the [living] witnesses against him . . . [n]ot if they can be produced, nor if they be within the jurisdiction, but *absolutely and on all occasions.*”⁶⁵

This production-centered understanding of confrontation emerges clearly in the 1899 case of *Kirby v. United States*.⁶⁶ In the mid-1800s, Congress enacted legislation that facilitated prosecutions for the receipt of stolen government property by reducing the government resources required for such prosecutions.⁶⁷ By statute, the conviction of a “principal felon” who had stolen U.S. government property was admissible in the trial of the property’s alleged receiver as conclusive evidence that the “property of the United States” has been “embezzled, stolen or purloined.”⁶⁸ Instead of transporting the convicted “principal” felon to court, the prosecution could simply introduce his judgment of conviction or the transcript of his guilty plea.⁶⁹ Thus, the statute reduced the costs of prosecutorial production by authorizing an out-of-court declaration to substitute for live witness testimony.

In *Kirby*, the United States Supreme Court emphatically rejected this congressional scheme for evading the prosecution’s burden of production.⁷⁰ The *Kirby* prosecution had introduced the convictions of the principal felons who had been convicted of stealing the goods in question.⁷¹ The trial court then instructed the jury that the hearsay evidence of the convictions was conclusive evidence of the essential element concerning property stolen from the United States.⁷² The Supreme Court reversed *Kirby*’s conviction, holding that the admission of the out-of-court evidence violated the Confrontation Clause.⁷³ *Kirby* declared the Court’s willingness to accept the outcome costs of a Constitutional mandate of production. *Kirby*’s factual guilt or innocence was irrelevant; if the prosecution failed to honor the Confrontation Clause’s procedural mandate, the Constitution demanded reversal.

testimony of prosecution witnesses whose “non-residence” or “permanent absence” from the jurisdiction prevented the prosecution from producing the witnesses at trial).

⁶⁴ *Angell*, 11 F. at 43 (emphasis added).

⁶⁵ *Id.* (emphasis added); *see also* *United States v. Macomb*, 26 F. Cas. 1132, 1133 (C.C.D. Ill. 1851) (No. 15,702) (stating it is “clear” that an absent witness’s pretrial testimony in a criminal prosecution was inadmissible “for, first, the witness was living”).

⁶⁶ 174 U.S. 47 (1899).

⁶⁷ *See id.* at 48.

⁶⁸ *Id.* at 61.

⁶⁹ *Id.* at 50–54.

⁷⁰ *Id.* at 53–54.

⁷¹ *Id.* at 49–50.

⁷² *Id.* at 50.

⁷³ *Id.* at 55.

Considering a murder-conspiracy prosecution in *Motes v. United States*, the Supreme Court similarly declined to modify confrontation's rule of production.⁷⁴ In *Motes*, the prosecution failed to produce its testimonial witness, William Taylor.⁷⁵ Instead, the prosecution offered into evidence a transcript of Taylor's preliminary examination. Although the transcript of the preliminary examination would be "quite sufficient, if accepted by the jury as true, to establish [his] guilt," the Court reversed *Motes's* conviction.⁷⁶ The prosecution's procedural failure to meet its burden of witness production mooted any consideration of the reliability of the verdict. The Court acknowledged that, without Taylor's out-of-court accusations, the prosecution could not establish an essential element of the offense.⁷⁷ Still, the Confrontation Clause required the prosecution to produce Taylor.⁷⁸

The *Motes* opinion emphasized both the physical burden of witness production and the constitutional allocation of that burden to the prosecution. The Court explained that the only exceptions to the burden of production were those "recognized exceptions to the general rule prescribed in the Constitution,"⁷⁹ where the witness was "deceased, . . . insane, or sick and unable to testify," or "summoned [by the prosecution] but . . . kept away by the opposite party."⁸⁰ The *Motes* prosecution faced none of those incapacities. When the prosecution called Taylor to testify, he simply "did not appear."⁸¹ Thus the prosecution was unable to produce its witness and its inability "was manifestly due to the negligence of the officers of the Government."⁸²

Motes reaffirmed the primacy of the production mandate; the Confrontation Clause affirmatively requires the prosecution to "summon" and produce its witnesses at trial.⁸³ In coming decades, however, the Court's dedication to this tenet

⁷⁴ 178 U.S. 458, 467 (1900).

⁷⁵ *Id.* at 468.

⁷⁶ *Id.* at 471.

⁷⁷ Taylor's testimony was necessary to establish the proof of a conspiracy to commit murder. *See id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 474.

⁸⁰ *Id.* at 472 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS *318 (2d ed. 1871)).

⁸¹ *Id.* at 471. Rather, the prosecution had "committed" its witness "to jail without bail," and, after *Motes's* trial began, "the official agent of the United States in violation of law took [the witness] from jail . . . and, strangely enough, placed him in charge . . . of another witness for the Government with instructions to the latter to allow him to stay at a hotel at night with his family." *Id.*

⁸² *Id.* at 471, 474 (stating that the Constitution does not "permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that his absence was due to the negligence of the prosecution").

⁸³ *See id.* at 474 ("We are unwilling to hold it to be consistent with the constitutional requirement that an accused shall be confronted with the witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial . . .").

would wane. The Court's enforcement attention would shift from confrontation as a procedural rule of production to confrontation as a substantive guarantor of reliability. Simultaneously, the Court would develop a jurisprudence of costs, weighing the price of production as a measure of the need to reduce confrontation's burden.

B. Incorporation: Valuing Substantive Reliability over the Structural Constitutional Mandate of Prosecutorial Witness Production

Before incorporation, the Court had seldom addressed the Confrontation Clause. Incorporation caused an exponential increase in the Supreme Court's criminal docket, and its Confrontation Clause docket was no exception.⁸⁴ Incorporation of the Confrontation Clause also coincided with an explosion in state criminal prosecutions and the rapid emergence of formal evidence codes.⁸⁵ The Court's attention soon turned to the practicalities that confronted the states as they attempted to comply with confrontation's rule of production. The result was a steady and ruthless retreat from confrontation's production mandate and toward a cross-examination-centered Confrontation Clause.

Courts and commentators have thoroughly documented the twisted mental gymnastics by which the Court's post-incorporation case law produced the toothless confrontation doctrine that was eventually overruled by *Crawford v. Washington*. What has been overlooked is the extent to which cost consciousness drove the pre-*Crawford* jurisprudence. Recognizing limited governmental resources, prosecutors, police, judges, and politicians argued that confrontation's costs precluded its enforcement.⁸⁶ And the Court, in response, began to attend to the practical consequences of the Confrontation Clause.⁸⁷ Deference to the broad "war on crime" and concerns about highly politicized issues such as a domestic violence and child sexual abuse came to animate the Court's confrontation jurisprudence.⁸⁸ The Court openly attempted "to balance the interests of the accused against the public's 'strong interest in effective law enforcement.'"⁸⁹ As the Court evidenced a willingness to consider these costs,

⁸⁴ As Professor Graham aptly stated, "[W]hen the Court made the federal right of confrontation binding on the states . . . it loosed the demons of Hell." Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 210 (2005).

⁸⁵ The Confrontation Clause was incorporated by the Supreme Court in 1966. *Pointer v. Texas*, 380 U.S. 400 (1965). Over thirty states enacted state rules of evidence between 1966 and 1984. Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 256 (1984). During that same time period, the "war on drugs" caused an explosion in state and federal criminal prosecutions. Note, *Winning the War on Drugs: A "Second Chance" for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1487 (2000) (noting that the prison population increased tenfold between 1980 and 1993).

⁸⁶ See *infra* notes 215–20 and accompanying text.

⁸⁷ See, e.g., *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 341 (2009) (Kennedy, J., dissenting) (discussing "the costs today's decision imposes on criminal trials").

⁸⁸ See *infra* notes 215–20 and accompanying text.

⁸⁹ *Lee v. Illinois*, 476 U.S. 530, 557 (1986) (Blackmun, J., dissenting) (quoting *Ohio v. Roberts*, 448 U.S. 56, 64 (1980)).

prosecutors and their allies grew bolder, urging the Court to limit confrontation's production mandate in order to facilitate faster, cheaper, and easier criminal convictions.⁹⁰ Eventually, confrontation's effects on case outcomes, prosecutorial resources, and larger societal interests came to dominate the Court's confrontation jurisprudence.

1. Incorporation: Production's Last Gasp

The Court incorporated the Confrontation Clause in 1965 in *Pointer v. Texas*.⁹¹ After Pointer's preliminary hearing, but before his trial, one of the prosecution's key witnesses moved from Texas to California.⁹² At trial, the prosecution offered, and the trial court admitted, a transcript of the absent witness's preliminary hearing, the State's only evidence of essential elements of the crime alleged against Pointer.⁹³ Pointer, who had no attorney at the preliminary hearing, had been present for the witness's testimony, but had not asked any questions.⁹⁴

The *Pointer* Court considered whether introduction of the preliminary hearing transcript of a witness's uncross-examined testimony violated Pointer's rights under the Confrontation Clause and held that the prosecution's failure to produce the witness violated the Confrontation Clause.⁹⁵ In so doing, the Court emphasized both the procedural and substantive aspects of the Confrontation Clause.⁹⁶ It affirmed confrontation's right to cross-examination, noting that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him."⁹⁷ However, it also affirmed the essential adversarial function of confrontation's rule of production:

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant *shall come from the witness stand* in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.⁹⁸

⁹⁰ See *infra* notes 215–20 and accompanying text.

⁹¹ 380 U.S. 400 (1965).

⁹² *Id.* at 401.

⁹³ *Id.* In oral argument, Justice White pressed the State's counsel on this point, asking, "[Y]ou don't suggest that the State would have had a case without the testimony of the complaining witness, do you?" The State's counsel reluctantly agreed. Oral Argument at 21:50, *Pointer*, 380 U.S. 400 (No. 577), <https://www.oyez.org/cases/1964/577>.

⁹⁴ *Pointer*, 380 U.S. at 401.

⁹⁵ *Id.* at 400.

⁹⁶ *Id.*

⁹⁷ *Id.* at 406–07.

⁹⁸ *Id.* at 405 (emphasis added) (quoting *Turner v. Louisiana*, 379 U.S. 466, 472–73 (1965)).

To the *Pointer* Court, prosecutorial witness production was “as indispensable an ingredient [of American criminal procedure] as the ‘right to be tried in a courtroom presided over by a judge.’”⁹⁹

In another incorporation-era case, *Barber v. Page*,¹⁰⁰ the Court again held that the prosecution’s failure to produce its witness for trial violated the Confrontation Clause.¹⁰¹ In *Barber*, the prosecution had made “no effort to obtain the presence of Woods” (its witness) to testify at trial.¹⁰² Barber’s counsel had not cross-examined Woods at the preliminary hearing, and the prosecution argued that Woods “unavailable” to testify at trial because he was in prison “outside the jurisdiction.”¹⁰³ Over objections, the trial court permitted the prosecution to introduce Woods’s preliminary hearing testimony.¹⁰⁴

The Supreme Court reversed Barber’s conviction because “the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma.”¹⁰⁵ The Court rejected any argument that “the mere absence of a witness from the jurisdiction [is] sufficient ground for dispensing with confrontation.”¹⁰⁶ Accordingly, the Confrontation Clause precluded admission of the absent witness’s prior testimony.¹⁰⁷

Significantly, the *Barber* Court insisted that it “would reach the same result on the facts of this case *had petitioner’s counsel actually cross-examined Woods* at the preliminary hearing.”¹⁰⁸ In other words, the Barber opinion turned on the prosecution’s

⁹⁹ *Id.* at 410 (Stewart, J., concurring) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963)). Justice Harlan’s concurrence foreshadowed later developments in confrontation law designed to focus on state rules. Specifically, Justice Harlan feared that incorporating the Confrontation Clause might discourage “differences between the methods used to effectuate legitimate federal and state concerns.” *Id.* at 408–09 (Harlan, J., concurring). Interference with the development of evidentiary codes was a concern of the states in subsequent Confrontation Clause cases. *See, e.g.*, Brief of Petitioner, *California v. Green*, 399 U.S. 149 (1970) (No. 387), 1970 WL 116822, at *25; Brief of the United States as Amicus Curiae, *Green*, 399 U.S. 149 (No. 387), 1970 WL 116825, at *3; Brief for the United States as Amicus Curiae at 8, *Dutton v. Evans*, 400 U.S. 74 (1970) (No. 10), 1970 WL 136602.

¹⁰⁰ 390 U.S. 719 (1968).

¹⁰¹ *Id.* at 724–25.

¹⁰² *Id.* at 723.

¹⁰³ *Id.* at 722.

¹⁰⁴ *Id.* at 720.

¹⁰⁵ *Id.* at 723.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 724–25.

¹⁰⁸ *Id.* at 725 (emphasis added) (citing *Motes v. United States*, 178 U.S. 458, 459 (1900)). The *Barber* Court also rejected the argument that the defendant’s failure to cross-examine Woods at the preliminary hearing constituted a waiver of his right to be confronted by Woods at trial: “To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court’s definition of a waiver as ‘an intentional relinquishment or abandonment of a known right or privilege.’” *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (citing *Brookhart v. Janis*, 384 U.S. 1, 4 (1966)).

failure to honor the burden of production; that failure rendered irrelevant the reliability of the testimony admitted at trial.¹⁰⁹ Nevertheless, as the next section demonstrates, the Court quickly began to retreat from its insistence that the prosecution bear confrontation's burden of production.

2. The Post-Incorporation Jurisprudence of Confrontation's Costs

As incorporation exponentially increased the Court's consideration of state court production issues, arguments about "State's rights"¹¹⁰ and the "costs" of production, began to animate the Court's Confrontation Clause cases. Prosecutors argued that enforcing confrontation's production mandate would reduce prosecutions, increase "lenient" plea bargains, and complicate or prevent convictions.¹¹¹ They also insisted that enforcing confrontation's production mandate would drain scarce prosecutorial, law enforcement, and judicial resources.¹¹² Finally, they insisted that enforcing confrontation's mandate would work a host of systemic harms by disrupting the balance of power between the states and the federal government, stunting the growth of evidentiary codes,¹¹³ increasing crime rates, and discouraging victims from reporting those crimes.¹¹⁴

Federal and state prosecutors began to argue about the outcome and resource costs associated with the enforcement of confrontation's production mandate. They insisted that witness production would be both costly and "extraordinarily disruptive to the orderly disposition of criminal proceedings."¹¹⁵ New York prosecutors

¹⁰⁹ Ironically, Barber's brief to the Supreme Court emphasized the right to cross-examination over the prosecution's burden of production and the right to face-to-face confrontation. Brief of Petitioner, *Barber*, 390 U.S. 719 (No. 703), 1968 WL 129320, at *6–7 (citing 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397 (3d ed. 1940) [hereinafter WIGMORE, EVIDENCE]).

¹¹⁰ For example, in the oral argument in the 1968 case of *Dutton v. Evans*, 400 U.S. 74 (1970), the Georgia Attorney General raised systemic concerns about states' rights. Oral Argument at 14:36, *Dutton*, 400 U.S. 74 (No. 10), https://apps.oyez.org/player/#/burger1/oral_argument_audio/15565. Georgia complained that the Court's demand of witness production was "in reality nothing less than a transfer from the legislatures and courts of the States to the *Federal* judiciary" and that "[t]he disruptive effect of this sort of Federal 'I am King' test upon the trial of criminal cases in State courts is not difficult to foresee." Brief of Attorney General of Georgia, *Dutton*, 400 U.S. 74 (No. 10), 1968 WL 129285, at *16.

¹¹¹ See *infra* note 282 and accompanying text.

¹¹² *Id.*

¹¹³ During the late 1960s and early 1970s, states were beginning to develop robust codes of evidence, modeled on the Federal Rules of Evidence, which actively sought to "eliminate the necessity for production of declarants where production would be *unduly inconvenient and of small utility to a defendant*." *Dutton*, 400 U.S. at 96 (Harlan, J., concurring) (emphasis added). Chief Justice Burger urged that the Court allow "the States to experiment and innovate, especially in the area of criminal justice." *California v. Green*, 399 U.S. 149, 171 (1970) (Burger, C.J., concurring).

¹¹⁴ See *infra* note 287 and accompanying text.

¹¹⁵ Brief of Attorney General of Georgia, *supra* note 110, at *24.

complained that, “if strictly and technically applied,” a mandate of witness production would “hamper[] the States both in individual prosecutions, and in formulating procedural rules to cope with the changing times and conditions.”¹¹⁶ Law enforcement and its advocates openly urged instead that doctrine of “prosecutorial necessity” should govern confrontation’s production mandate (and thereby facilitate convictions).¹¹⁷

As will be further discussed, co-conspirator testimony was of particular concern to prosecutors. Federal prosecutors insisted that conspiracy was both uniquely dangerous and uniquely difficult to prove.¹¹⁸ They urged the Court to endorse a co-conspirator exception to the Confrontation Clause, because “group action toward an antisocial end is inherently more dangerous to society than individual movement toward that same end.”¹¹⁹ The arguments were based on pure expediency: the prosecution’s “legitimate need for declarations of co-conspirators in proving crimes involving joint-ventures” made it “essential” that the Court create an exception that would allow prosecutors to avoid calling co-conspirators to the witness stand.¹²⁰

In addition, prosecutors and courts expressed a growing concern about the systemic effects of a vibrant enforcement of confrontation’s production mandate. Urging restraint in the Court’s enforcement of confrontation’s production imperative, federal prosecutors argued that “federal courts—already burdened by a heavy case load of habeas corpus applications seeking to challenge state convictions—should not be called upon to review the minutiae of State rules of evidence in collateral proceedings.”¹²¹ The United States Attorney’s Office cautioned that a procedural “morass

¹¹⁶ Brief of District Attorney of Monroe County, New York, as Amicus Curiae at 2, *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (No. 71-237), 1971 WL 133553.

¹¹⁷ Brief for the United States as Amicus Curiae, *Dutton*, *supra* note 99, at 15–16.

¹¹⁸ *Id.* at 17. Because of the “testimonial witness” requirement, *Crawford* and its progeny do not speak to the constitutionality of introducing co-conspirator statements.

¹¹⁹ *Id.* It would be nearly twenty years before the Court endorsed that position. State prosecutors urged similar arguments. They characterized the post-incorporation era as a “time[] of mass disorder and group lawlessness,” during which states should be permitted to retain the broader concept of the co-conspirator exception. Brief of Attorney General of Georgia, *supra* note 110, at *22.

¹²⁰ Brief for the United States as Amicus Curiae, *Dutton*, *supra* note 99, at 18. In oral argument in *Bruton v. United States*, 391 U.S. 123 (1968), Justice Fortas suggested that systemic impact would be a valid legal consideration, noting that if the problem arose in “most trials in which there are co-defendants that’s one thing[,] if we’re talking about a small percentage of them that’s another thing.” Oral Argument of Solicitor General Griswold at 38:26, *Bruton*, 391 U.S. 123 (No. 705), <http://www.oyez.org/cases/1967/705>. The Solicitor General denied that the prosecution’s proposed approach to the Confrontation Clause was “just a matter of expediency in getting . . . convictions.” *Id.* at 25:44.

¹²¹ Brief for the United States as Amicus Curiae, *Dutton*, *supra* note 99, at 8–9. “[H]abeas corpus litigation ha[d] increased enormously,” and “difficult problems in [federal judicial] administration ha[d] arisen by virtue of the sheer bulk of such litigation.” *Id.* at 27–28. A vocal legal community insisted that “unavoidable practical considerations” warranted “restraint” in the Court’s enforcement of confrontation’s rule of production. *Id.* at 28. State prosecutors also cited court congestion as a significant reason to reverse cases like *Pointer*. *See, e.g.*,

[might] well result if every litigant who is dissatisfied with state resolution of evidentiary matters may automatically term the alleged violation a ‘Sixth Amendment Confrontation issue’ and obtain collateral relief in the federal courts.”¹²²

Although some still conceded that production was confrontation’s elemental command,¹²³ the Court began to emphasize substantive reliability over procedural compliance. In 1970, in *California v. Green*, the Court recast *Pointer* and *Barber* as opinions that addressed only the right to cross-examination, ignoring those aspects of the opinions that addressed the prosecutorial burden of production.¹²⁴ The Court described *Pointer* as a decision based upon the defendant’s right to cross-examine the witness and not upon the prosecutorial failure to produce the witness that made cross-examination impossible.¹²⁵ Similarly, the Court insisted that *Barber* depended not upon the prosecution’s failure to meet its burden of production, but upon the *consequence* of the prosecution’s non-production: the defendant’s inability to cross-examine the absent witness.¹²⁶

Soon, the Court abandoned its commitment to confrontation as a rule that regulated the prosecution’s presentation of evidence, and insisted instead that the purpose of the Confrontation Clause was to make the declarant available to the defendant to cross-examine and place him before the trier of fact in order to afford the jury the occasion to weigh the demeanor of the witness.¹²⁷ As a first step in this retreat, the Court expanded the exceptions it had so carefully delineated in *Mattox*. In dicta in *Green*, the Court replaced the “witness incapacity” rule with a less rigorous, more expansive “unavailable to the government” standard.¹²⁸ The Court held that if the defense had cross-examined a government witness at a preliminary hearing, then that testimony was admissible “wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial.”¹²⁹

Brief of the District Attorney of Monroe County, New York, as Amicus Curiae, *supra* note 116, at 4.

¹²² Brief for the United States as Amicus Curiae, *Dutton*, *supra* note 99, at 28.

¹²³ *California v. Green*, 399 U.S. 149, 174 (1970) (Harlan, J., concurring) (“[T]he Confrontation Clause . . . reaches no farther than to require the prosecution to produce any available witness whose declarations it seeks to use in a criminal trial.” (emphasis omitted)); Brief of the United States as Amicus Curiae, *Green*, *supra* note 99, at 7 (“At its most elemental, the [Confrontation] [C]lause requires that all the evidence submitted to the fact-finder be submitted in open court, during trial, with the accused having the opportunity to attend.”).

¹²⁴ *Green*, 399 U.S. at 155–56.

¹²⁵ *Id.* at 165–67 (stating that the State’s failure to produce its witness against *Pointer* would not have violated the Confrontation Clause if *Pointer* had had “a full-fledged [preliminary] hearing” with “counsel who had been given a complete and adequate opportunity to cross-examine” (quoting *Pointer v. Texas*, 380 U.S. 400, 407 (1965))).

¹²⁶ *Id.* at 162–63.

¹²⁷ *Id.* at 195 (Brennan, J., dissenting).

¹²⁸ *See id.* at 165 (majority opinion). The Court also referred to those as witnesses who were “physically unproducible.” *Id.* at 167.

¹²⁹ *Id.* at 165.

The *Green* Court excused prosecutorial non-production whenever the prosecution could demonstrate *the government's inability to produce* the witness.¹³⁰ Although the Court continued to note that “the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on ‘evidence’ which consisted solely of *ex parte* affidavits or depositions,”¹³¹ *Motes*’s admonition that “testimony for the people in criminal cases [could] only, as a general rule, be given *by witnesses in court, at the trial,*” was fast receding.¹³²

The 1972 case of *Mancusi v. Stubbs*¹³³ demonstrated the Court’s growing sympathies for the difficulties that the Confrontation Clause imposed upon prosecutors. In *Mancusi*, the Court permitted the prosecution to *assume* rather than *prove* the unavailability of a foreign witness.¹³⁴ Suddenly, the prosecution could avoid its burden of production simply by asserting that production would be impossible.¹³⁵ Later that year, the *Dutton* plurality suggested that the Confrontation Clause was simply a rule of evidentiary reliability:

The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that “the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.”¹³⁶

Production and examination of a live witness was simply the traditional means by which trials had provided such a basis.

¹³⁰ *Id.* at 167 & n.16 (“As long as the State has made a good-faith effort to produce the witness, the actual presence or absence of the witness cannot be constitutionally relevant for purposes of the ‘unavailability’ exception.”).

¹³¹ *Id.* at 156–57. Dislocating the basic value of production, the Court instead indicated that witness production was required because it:

(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth’; (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id. at 158 (footnote omitted).

¹³² *Motes v. United States*, 178 U.S. 458, 472 (1900) (emphasis added).

¹³³ 408 U.S. 204 (1972).

¹³⁴ *Id.* at 212–13.

¹³⁵ A plurality of the Court was prepared to eliminate the unavailability doctrine. In the 1970 case of *Dutton v. Evans*, 400 U.S. 74 (1970), four Justices argued that the prosecution should be permitted to introduce testimonial statements made by an absent witness *even if the prosecution could easily have produced the witness* to testify at trial. *Id.* at 94 (Harlan, J., concurring).

¹³⁶ *Id.* at 89 (majority opinion) (alteration in original) (quoting *Green*, 399 U.S. at 161).

By 1974, when the Court decided *Davis v. Alaska*,¹³⁷ the Court had fully embraced the notion that the “main and essential purpose” of the Confrontation Clause was “to secure for the opponent the opportunity of cross-examination.”¹³⁸ Reliability of verdicts was the “true” goal of the Confrontation Clause.¹³⁹ The Court viewed production, without cross-examination, as a pointless procedural game.¹⁴⁰ Absent cross-examination, the production mandate merely facilitated a defendant’s “idle purpose of gazing upon the witness, or of being gazed upon by him.”¹⁴¹

Even this cross-examination centered view of the Confrontation Clause was short-lived, producing a doctrine that completely undermined any remaining production imperative. Having established that reliability was the goal of the Confrontation Clause, it required only a modest extension for the Court to conclude that reliable evidence could satisfy the Confrontation Clause, without production, confrontation, or cross-examination. In 1980, in *Ohio v. Roberts*,¹⁴² the Court formally embraced a theory of the Confrontation Clause in which the admissibility of out-of-court statements turned on their reliability.

Following the trend established in *Green*, *Roberts* expanded the “unavailability” doctrine.¹⁴³ *Mattox* had permitted the admission of a witness’s prior sworn testimony if the witness was *incapable* of testifying; and, the witness’s prior testimony satisfied procedural requisites that marked the declaration with “trustworthiness.”¹⁴⁴ *Green* had replaced the witness incapacity requirement with a requirement that the government demonstrate good-faith efforts to produce the witness,¹⁴⁵ and *Stubbs* had eliminated

¹³⁷ 415 U.S. 308 (1974).

¹³⁸ *Id.* at 315–16 (emphasis omitted) (quoting WIGMORE, EVIDENCE, *supra* note 109, at § 1395, p. 123). At this time, Professor Wigmore’s treatise on evidence became increasingly influential. That treatise urged that “the main and essential purpose” of the Confrontation Clause “is to secure for the opponent the opportunity of cross-examination.” WIGMORE, EVIDENCE, *supra* note 109, at § 1395, pp. 123–25. According to Wigmore, the “personal appearance of the witness” was a second and “subordinate” goal of the Confrontation Clause, designed to permit the judge and the jury to see and hear the witness, and assess the witness’s credibility. *Id.* at pp. 125–26. In this recounting of confrontation’s purpose, the Confrontation Clause’s command that a defendant be “confronted with the witnesses against him,” was nothing more than a poorly worded means of guaranteeing the right to cross-examination. *Id.* at § 1397, p. 127 (emphasis omitted).

¹³⁹ *See Davis*, 415 U.S. at 315–16.

¹⁴⁰ *Id.* at 315 (quoting WIGMORE, EVIDENCE, *supra* note 109, at § 1365, p. 123). In *Davis*, the Court insisted that cross-examination was the Confrontation Clause’s core promise; the rule of production was “a subordinate and incidental advantage” to the defendant. *See id.*

¹⁴¹ *Id.* at 315–16 (emphasis added) (quoting WIGMORE, EVIDENCE, *supra* note 109, at § 1395, p. 123).

¹⁴² 448 U.S. 56 (1980).

¹⁴³ *Id.*

¹⁴⁴ *Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

¹⁴⁵ *See* Brief of Respondent at 30, *Roberts*, 448 U.S. 56 (No. 78-756), 1979 WL 197585.

even the requirement of good-faith efforts when considering the statements of a foreign witness.¹⁴⁶

First, the *Roberts* Court eased the prosecution's burden even further under the "unavailability" prong of the Confrontation Clause test, requiring only that the prosecution "demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."¹⁴⁷ Then, the *Roberts* Court eased the requirements of the second prong of the test: that the out-of-court statement have been made under circumstances that demonstrated its trustworthiness.¹⁴⁸ The *Roberts* Court held that there was no need for procedural requisites such as the oath, confrontation, or cross-examination; instead, the prosecution could establish the necessary trustworthiness of the statement(s) through a showing of any "adequate 'indicia of reliability.'"¹⁴⁹ Among the "adequate 'indicia of reliability'" were the "firmly rooted hearsay exception[s],"¹⁵⁰ authorizing the prosecution to use hearsay in lieu of the live testimony of a competent and capable witness.¹⁵¹

Tellingly, the *Roberts* Court characterized confrontation's mandate of production as a mere "*preference* for face-to-face confrontation."¹⁵² The Court had thoroughly abandoned confrontation's production mandate and its corresponding commitment to confrontation's procedural role in constitutional criminal procedure. For the next twenty-five years the Court's Confrontation Clause cases largely "turned on the question of reliability."¹⁵³ The Court's nineteenth century cases had affirmed that "the primary object" of the Confrontation Clause was to enforce a procedural demand to live testimony rather than "depositions or *ex parte* affidavits."¹⁵⁴ The Court's twentieth century cases treated witness production as nothing more than one means to assure reliable verdicts.

In two subsequent cases, *United States v. Inadi*¹⁵⁵ and *White v. Illinois*,¹⁵⁶ the Court delivered a death blow to confrontation's production mandate. First, in *Inadi*, the Court held that statements made by a co-conspirator "while the conspiracy is in progress" have "independent evidentiary significance of [their] own."¹⁵⁷ Accordingly, cross-examination would not add to the jury's understanding of those statements or increase the

¹⁴⁶ *Mancusi v. Stubbs*, 408 U.S. 204 (1972).

¹⁴⁷ *Roberts*, 448 U.S. at 65; *see also* Douglass, *supra* note 34, at 1801 & n.11 (citing *White v. Illinois*, 502 U.S. 346, 355–57 (1992); *United States v. Inadi*, 475 U.S. 387, 399–400 (1986)).

¹⁴⁸ *Roberts*, 448 U.S. at 56.

¹⁴⁹ *Id.* at 66.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 63 (emphasis added).

¹⁵³ Douglass, *supra* note 34, at 1847 n.218.

¹⁵⁴ *Douglas v. Alabama*, 380 U.S. 415, 418–19 (1965) (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)).

¹⁵⁵ 475 U.S. 387 (1986).

¹⁵⁶ 502 U.S. 346 (1992).

¹⁵⁷ *Inadi*, 475 U.S. at 394–95.

reliability of the trial verdict.¹⁵⁸ As a result, the Court held that unavailability was no longer a precondition to the admission of out-of-court statements made by an absent co-conspirator.¹⁵⁹

In *White*, the Court formally abandoned any requirement of unavailability, regardless of the type of statement at issue. Relying on the *Roberts* canard that the Constitution expressed not a mandate but a “*preference* for live testimony,” the Court scrambled away from any notion of a procedural Confrontation Clause.¹⁶⁰ The *White* Court did not simply deny that confrontation’s rule of production required an unavailability standard; rather, it denied that confrontation required any production of reliable witnesses.¹⁶¹ In support of this position, the Court asserted that a rule of production was not likely, in and of itself, “to produce much testimony that adds meaningfully to the trial’s truth-determining process”;¹⁶² accordingly, the Constitution did not require witness production. Instead, a trial court could admit a non-testifying witness’s out-of-court statements so long as, without cross-examination, the jury could return a reliable verdict.¹⁶³

To arrive at this astonishing elimination of both confrontation’s burden and confrontation’s privileges, the *White* Court engaged in extraordinary jurisprudential gymnastics, conflating confrontation’s rule of production with a defendant’s right to compulsory process. The *White* Court insisted that any Confrontation Clause error occasioned by its eradication of the unavailability rule could be cured by the defendant’s invocation of his Compulsory Process Clause right.¹⁶⁴ Any important witness would be “subpoenaed by the prosecution or defense, regardless of any Confrontation Clause requirement.”¹⁶⁵ If the prosecution failed to produce that important witness, “the Compulsory Process Clause and evidentiary rules . . . will aid defendants in obtaining [that witness’s] live testimony.”¹⁶⁶ This reading of confrontation’s rule of production rendered the clause superfluous; the Compulsory Process Clause would serve just as well. In this upside-down interpretation of the Confrontation Clause, the unavailability requirement simply reflected “the importance of cross-examination.”¹⁶⁷ Since “the Confrontation Clause has as a basic purpose the promotion of the ‘integrity of the factfinding process,’” any evidence that would further that process should be admissible.¹⁶⁸

¹⁵⁸ *White*, 502 U.S. at 356–57 (discussing *Inadi*).

¹⁵⁹ *Inadi*, 475 U.S. at 392.

¹⁶⁰ *White*, 502 U.S. at 356 (emphasis added).

¹⁶¹ *Id.*

¹⁶² *Id.* at 354.

¹⁶³ *See id.*

¹⁶⁴ *Id.* at 355.

¹⁶⁵ *Id.* (citing *United States v. Inadi*, 475 U.S. 387, 396–98 (1986)).

¹⁶⁶ *Id.* (footnote omitted).

¹⁶⁷ *Id.* at 356.

¹⁶⁸ *Id.* at 356–57 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1020 (1988)).

After *White*, the Court viewed the Confrontation Clause as a rule of reliability. Even the defendant's right to cross-examination could be "mooted" if the admission of an out-of-court statement was in "substantial compliance" with the reliability-based goals of the Confrontation Clause.¹⁶⁹ In this Confrontation-Clause-as-a-rule-of-reliability jurisprudence, witness production and cross-examination were just two of many methods that could comply with the Confrontation Clause. The Confrontation Clause had been severed from its procedural moorings and joined, instead, to substantive questions about evidentiary reliability.¹⁷⁰

Inadi and *White* marked the Court's most explicit acknowledgements that its Confrontation Clause jurisprudence was driven by costs, not the Constitution. Unsurprisingly, those opinions coincided with an explosion in legal commentary and argument emphasizing the dire consequences of burdening the prosecution with confrontation's requirement of witness production. The *Inadi* Court was particularly concerned with the costs that the production mandate imposed on the prosecution:

[A]n unavailability rule places a significant practical burden on the prosecution. In every case involving co-conspirator statements, the prosecution would be required to identify with specificity each declarant, locate those declarants, and then endeavor to ensure their continuing availability for trial . . . or run the risk of a court determination that its efforts to produce the declarant did not satisfy the test of "good faith."¹⁷¹

The *Inadi* Court also worried about systemic costs to other law enforcement institutions: "Where declarants are incarcerated there is the burden on prison officials and marshals of transporting them to and from the courthouse, as well as the increased risk of escape."¹⁷²

At oral argument in *Inadi*, the Solicitor General's first substantive claim was that "this may be the most important criminal procedure case" of his tenure in

¹⁶⁹ *Lee v. Illinois*, 476 U.S. 530, 557 (1986) (Blackmun, J., dissenting).

¹⁷⁰ True, the Court paid lip service to the rule of production. It conceded that public confrontation enhanced the legitimacy of case outcomes. *Id.* at 540 (majority opinion) (noting that, in "a system of criminal justice in which the perception as well as the reality of fairness prevails," the Confrontation Clause guarantees that "convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals"). The Supreme Court acknowledged "society's interest in having the accused and accuser engage in an open and even contest in a public trial," *id.*, and the jury's interest in "observ[ing] the demeanor of the witness in making his statement," *California v. Green*, 399 U.S. 149, 158 (1970). But the Court's holdings were clear: reliability mooted production.

¹⁷¹ *United States v. Inadi*, 475 U.S. 387, 399 (1986).

¹⁷² *Id.*; accord *Douglass*, *supra* note 24, at 247 (noting that *White* and *Inadi* relieved the government of its obligation of "produc[ing] all available hearsay declarants" in order to avoid "substantial, and largely unnecessary, burdens on the courts and on the government" that would be caused by a requirement of production).

office.¹⁷³ Why? Because if the Court required prosecutorial witness production, the “effect on the allocation of criminal justice system resources would be dramatic.”¹⁷⁴ The Solicitor General protested that enforcing confrontation’s production mandate and excluding the out-of-court statements of an absent prosecution witness whenever the prosecution “has been negligent” would be an unwarranted “windfall” for the defendant.¹⁷⁵ Prosecutors argued that, as a net result of outcome and resource costs, enforcement of confrontation’s burden of production “would prevent the efficient and effective prosecution” of criminal defendants.¹⁷⁶ The Court agreed.¹⁷⁷

In emphasizing production’s outcome costs, prosecutors, courts, and commentators stressed that these costs would be particularly high in cases of rape, child abuse, or domestic violence, or in cases requiring the testimony of co-conspirators. For example, the lead prosecutor in *White* conceded that if “the State . . . feel[s] that the witness would not be exceptionally effective,” the State will attempt to rely instead, on the witness’s affidavit or other out-of-court statement.¹⁷⁸ In those circumstances, more than any other, prosecutors urged the Court to relieve them of the burden of witness production.¹⁷⁹ Additionally, the Solicitor General in *Inadi* argued that, if “[n]obody thought [the cooperator] would make a credible witness,” the prosecution should be allowed to rely on the witness’s out-of-court affidavit rather than call the witness to testify at trial, where the defense could examine him and the jury could evaluate his credibility.¹⁸⁰ These arguments urging limitation of confrontation’s outcome costs were not covert or subtle. Prosecutors essentially conceded their position: the Court should limit confrontation’s production mandate in order to increase conviction rates.¹⁸¹

The call for eliminating production to increase the likelihood of conviction took on strong emotional overtones as prosecutors invoked the unique unreliability of particularly vulnerable victims, such as children who had allegedly been sexually abused. The *White* prosecution warned that “conviction [rates] for child sex abuse

¹⁷³ Oral Argument at 01:16, *Inadi*, 475 U.S. 387 (No. 84-1580), <https://www.oyez.org/cases/1985/84-1580>.

¹⁷⁴ *Id.* at 01:29.

¹⁷⁵ *Id.* at 17:30.

¹⁷⁶ Brief for Respondent, *White v. Illinois*, 502 U.S. 346 (1992) (No. 90-6113), 1991 WL 527595, at *25–26.

¹⁷⁷ *White*, 502 U.S. 346.

¹⁷⁸ Oral Argument at 27:39, *White*, 502 U.S. 346 (No. 90-6113), <https://www.oyez.org/cases/1991/90-6113>.

¹⁷⁹ Justice Blackmun’s 1986 dissent in *Lee v. Illinois*, 476 U.S. 530 (1986), offers another illustration of a cost-based Confrontation Clause analysis. In his dissent, Justice Blackmun worried about the “significant costs” of forcing the prosecution either to immunize the declarant or forgo use of his testimony. *Id.* at 547–57 (Blackmun, J., dissenting). Given perceived outcome and crime control costs, Justice Blackmun was prepared to relieve the prosecution of its burden of producing the witness. *Id.* at 550.

¹⁸⁰ Oral Argument, *supra* note 173, at 20:12.

¹⁸¹ *See generally id.*

cases will remain low unless the prosecution is able to . . . use . . . a child's out-of-court statements," instead of calling the child to testify.¹⁸²

Worried that these witnesses might present testimony that was too "obviously inaccurate or inadequate" to support a conviction, Illinois urged the Supreme Court to eliminate confrontation's rule of production.¹⁸³ The argument was nothing less than a claim that confrontation's imperative should yield to the prosecution's desire to present the testimony of problematic witnesses through affidavits, depositions, or hearsay, never fearing that a jury might acquit because a prosecution witness "broke down, cried, ignored questions [or] eventually refused to answer."¹⁸⁴ A prosecutorial failure of proof was re-characterized—rather than a constitutionally mandated acquittal, this failure of proof was a loss for society: "the abuser . . . goes free because, without the child's testimony, the evidence is insufficient to convict him."¹⁸⁵ The Confrontation Clause was characterized as "a looming disruption" that would "frustrate the operation of . . . statutes designed to ease the trauma suffered by child victims . . . [and] to aid the prosecutors in bringing . . . sexual abusers to justice."¹⁸⁶

Similarly, in *White*, the prosecution insisted, and the Supreme Court agreed, that production "impose[s] substantial additional burdens on the factfinding process."¹⁸⁷ Production would require the prosecution "to repeatedly locate and keep continuously available each declarant."¹⁸⁸ Adding insult to this perceived injury, confrontation's rule of production required witnesses to come to court "even when neither the prosecution nor the defense has any interest in calling the witness to the stand."¹⁸⁹ Prosecutors fanned the flames of the Court's worst fears about expending prosecutorial resources, demanding:

¹⁸² Brief for Respondent, *supra* note 176, at *25–26. For example, an alleged victim might refuse to comply with the prosecution's subpoena. Since victim-witnesses were particularly likely to forget "details, change[] stories, or present[] inconsistent facts," calling them to the witness stand might undermine the likelihood of conviction. *Id.* at *21–22 (quoting *State v. Sheppard*, 484 A.2d 1330, 1333 (N.J. 1984)). Prosecutors conceded that these witnesses were often prone to freezing in court or remaining silent because their "emotional condition prevents [them] from testifying" at all. *Id.* (quoting *Sheppard*, 484 A.2d at 1333).

¹⁸³ *Id.* at *21–22 (quoting *Sheppard*, 484 A.2d at 1333).

¹⁸⁴ *Id.* (quoting *Sheppard*, 484 A.2d at 1333).

¹⁸⁵ Michael B. Wixom, Comment, *Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?*, 1986 UTAH L. REV. 461, 465–66 (1986).

¹⁸⁶ John A. Mayers, Note, *Coy v. Iowa: A Constitutional Right of Intimidation*, 16 PEPP. L. REV. 709, 710–11 (1989).

¹⁸⁷ *White v. Illinois*, 502 U.S. 346, 355 (1992) (citing *United States v. Inadi*, 475 U.S. 387, 398–99 (1986)). Since the Confrontation Clause occupies a central place in the Bill of Rights, one wonders precisely what "additional" burden is imposed by enforcing a two-century-old right.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

[W]hat happens if we have trouble identifying who the declarant is, or if we have difficulty in locating a declarant who may have made a declaration five years ago that we want to introduce[?] We may not know where he is, how far do we have to go to locate him[?]¹⁹⁰

Accepting the validity of these arguments, the Court rationalized eliminating confrontation's burden of production because witness production would "likely . . . impose substantial additional burdens on the factfinding process" by requiring the prosecution to "locate and keep continuously available each declarant."¹⁹¹ Moreover, the Court was loathe to adopt a rule that required routine judicial assessments of the declarant's availability, since it would "impose a substantial burden on the entire criminal justice system."¹⁹² In the end, the Court was unwilling to insist upon the costs associated with confrontation's production imperative. So, the Court introduced a new, extra-constitutional value—prosecutorial resource conservation.¹⁹³

A still broader—and more speculative—conversation about systemic costs linked production enforcement to decreases in the deterrent effects of prosecution, "unnecessary" victim trauma,¹⁹⁴ and the increased commission of crime. Legislatures sought to limit the confrontation mandate in child abuse cases "with two broad purposes in mind: 'to reduce trauma to the child and to facilitate successful prosecution of child molesters.'"¹⁹⁵ When states enacted hearsay exceptions for child witnesses, the

¹⁹⁰ Oral Argument, *supra* note 173, at 25:33; *see id.* at 24:27 (noting that, although the prosecution might "know who [those witnesses] are, and . . . where they can be found[,] . . . a lot of them will be in jail, and producing them will be quite a costly and burdensome exercise," and "even if they are not in jail, [prosecutors] can subpoena them" only to "find that they have gone fishing, or that they had car trouble, or that they are sick, and they may not appear in response to the subpoena").

¹⁹¹ *White*, 502 U.S. at 355. The Supreme Court rejected this argument in *Melendez-Diaz*. *See infra* notes 258–62 and accompanying text.

¹⁹² *Inadi*, 475 U.S. at 399.

¹⁹³ *Id.* at 398. The Court also noted that "the burden imposed by . . . requiring a determination of availability . . . automatically adds another avenue of appellate review in these complex cases." *Id.*

¹⁹⁴ *See, e.g.*, Oral Argument, *supra* note 178, at 28:03 (arguing that the Court should excuse non-production "in the case of small children" as "the prosecutor would want to keep the child from being put in a traumatic situation"). Some argued that, "[i]f required to testify in court in front of defendant, each child would have to undergo therapeutic intervention to repair the damage brought by simply testifying in that setting." Paula E. Hill & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 829 n.91 (1987) (quoting *State v. Tafoya*, 729 P.2d 1371, 1375 (N.M. Ct. App. 1986)). Child advocates urged that the Court "engage in an analysis which balances the competing interests of the child and the defendant's right to a fair trial." Bruce E. Bohlman, *The High Cost of Constitutional Rights in Child Abuse Cases—Is the Price Worth Paying?*, 66 N.D. L. REV. 579, 585 (1990).

¹⁹⁵ Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 695 (1993) (quoting *Miller v. State*, 517 N.E.2d 64, 69 (Ind. 1987)).

“chief purpose” of those statutes was “to enhance the effectiveness of the state’s proof.”¹⁹⁶ Commentators insisted that witness production was harmful to society because, “as a result of the child’s inability to testify, a guilty perpetrator [will be] improperly released.”¹⁹⁷ To them, the requirement of in-court testimony produced “useless prosecutions which waste court resources, prevent treatment of true sex offenders, and hurt the integrity of the judicial system.”¹⁹⁸ Again, the Supreme Court concurred, limiting the form of confrontation’s mandate in cases involving child witnesses.¹⁹⁹

In sum, the Court had weighed the value of confrontation’s burden of production against the “costs” of constitutional enforcement. In its eagerness to constrain confrontation’s costs, the Court put its thumb firmly on the scales against production. The Court denied that there was any value in production for its own sake.²⁰⁰ Weighed against the “cost” of a defendant’s acquittal, confrontation’s production mandate offered only “marginal protection to the defendant”;²⁰¹ according to the Court, production’s costs to the prosecution easily outweighed confrontation’s “marginal protection.”²⁰² The prosecution’s burden of production had been fully buried by the Court.

III. *CRAWFORD* AND ITS PROGENY: RHETORIC AND RETREAT

In 2004, in *Crawford v. Washington*, the Supreme Court reversed course, rejecting *Roberts*, *Inadi*, and *White*. The *Crawford* opinion established confrontation as a rule of production; however, post-*Crawford* opinions renounced this command. Following *Crawford*, the Supreme Court endorsed notice-and-demand provisions that were designed solely to minimize the prosecution’s burden of production. As a result, criminal defendants must formally demand the prosecutorial production of witnesses, or forfeit forever their Confrontation Clause protections. *Crawford*’s rhetoric is different than *Roberts*’s, but the result has been the same: the Supreme Court undermines and under-enforces confrontation’s rule of production.²⁰³

¹⁹⁶ *Id.* at 693, 696 n.18 (noting “[t]here can be no doubt . . . that facilitating successful prosecutions is an important goal” of legislative reforms addressing witness production).

¹⁹⁷ Hill & Hill, *supra* note 194, at 827.

¹⁹⁸ *Id.* at 827 n.80 (citing Dustin P. Ordway, Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. MICH. J.L. REFORM 133, 148 n.79 (1981)).

¹⁹⁹ Following *Coy v. Iowa*, 487 U.S. 1012 (1988), state courts issued multiple opinions holding that “protection of children is a valid public policy to justify a denial of face-to-face confrontation.” Bohlman, *supra* note 194, at 588.

²⁰⁰ *United States v. Inadi*, 475 U.S. 387, 400 (1986).

²⁰¹ *Id.* at 399.

²⁰² *Id.*

²⁰³ It is beyond the scope of this Article to explore the Court’s decision to exclude non-testimonial statements from confrontation’s ambit. For a thorough critique of that decision, see Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865 (2012).

A. Crawford and the Rule of Production

In *Crawford v. Washington*, the Supreme Court reversed nearly twenty-five years of production-avoiding case law generated by *Ohio v. Roberts*. With Justice Scalia writing for the majority, the Court held that the Confrontation Clause requires the prosecution to produce its testimonial witnesses at trial or forego any reliance on those witnesses' statements.²⁰⁴ *Crawford* returned to a Confrontation Clause that "guarantees a defendant's right to confront those 'who "bear testimony"' against him."²⁰⁵ Under *Crawford*, confrontation once again required prosecutorial witness production: "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."²⁰⁶

Crawford insisted that confrontation mandates a very particular type of trial procedure.²⁰⁷ Proof of the reliability of the prosecution's evidence fails to satisfy confrontation's demand.²⁰⁸ Rather, the Confrontation Clause mandates a trial procedure in which the prosecution produces—at trial—witnesses who give testimony and are subject to cross-examination in the presence of the defendant, judge, and jury.²⁰⁹ This commitment to confrontation's production mandate means that the prosecution must produce its testimonial witnesses at trial, *even if those witnesses have already been thoroughly cross-examined by the defense.*²¹⁰ In short, *Crawford* established confrontation as "a procedural rather than a substantive guarantee."²¹¹

Nevertheless, *Crawford* maintained that the Confrontation Clause was a procedure designed to increase the substantive reliability of trial verdicts.²¹² The Court insisted that the Confrontation Clause's "ultimate goal is to ensure reliability of evidence."²¹³ Prosecutorial production was simply the constitutionally mandated means of obtaining that end; and *Crawford* reinforced the Confrontation Clause accordingly.²¹⁴ However, as set forth below, even this production-promoting *Crawford* doctrine was not long-lived.

Crawford produced an enormous outcry. Police, prosecutors, and politicians joined legal commentators in bemoaning *Crawford*'s costs.²¹⁵ With complaints that

²⁰⁴ *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004).

²⁰⁵ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (quoting *Crawford*, 541 U.S. at 51).

²⁰⁶ *Id.* (citing *Crawford*, 541 U.S. at 54).

²⁰⁷ *Crawford*, 541 U.S. at 54.

²⁰⁸ *Id.* at 61.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 59.

²¹¹ *Id.* at 61 (emphasis added).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See, e.g., Daniel Huff, *Confronting Crawford*, 85 NEB. L. REV. 417, 452 (2006) ("There is a real cost to prosecutors in complying with *Crawford*.").

echoed the arguments raised in cases like *Inadi* and *White*, *Crawford*'s detractors argued that enforcing a production mandate would bankrupt state prosecutors.²¹⁶ They complained that *Crawford* would have "particularly profound implications for domestic violence cases."²¹⁷ They worried about the possibility that enforcement of the Confrontation Clause might impair national security.²¹⁸

Following *Crawford*, prosecutors, courts, and commentators began to express particular concerns that requiring production of testimonial forensic witnesses would have made it harder for the prosecution to obtain convictions.²¹⁹ In three

²¹⁶ *Id.*

²¹⁷ Michael R. Dreeben, *Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 GEO. L.J. ANN. REV. CRIM. PROC., at iii, xxix (2005) (noting, with concern, that "between eighty and ninety percent of domestic violence victims recant their accusations or refuse to cooperate with a prosecution" and arguing that a production mandate would hinder the prosecution of their abusers (quoting *Stancil v. United States*, 866 A.2d 799, 807 (D.C. 2005)); see also *Stancil*, 866 A.2d at 807 (expressing concern that *Crawford* might prevent prosecutors from "go[ing] forward with domestic violence prosecutions without the alleged victim's cooperation or testimony," since those prosecutions had previously depended upon "out-of-court statements made by the alleged victims, or by other eyewitnesses"); G. Michael Fenner, *Today's Confrontation Clause (After Crawford and Melendez-Diaz)*, 43 CREIGHTON L. REV. 35, 80–90 (2009) (summarizing concerns about a rule of production that would require a "traumatized" witness to testify in court).

²¹⁸ Fenner, *supra* note 217, at 87 (referring to "national-security criminal prosecutions where the state has a compelling interest in keeping secrets and . . . keeping the operative off the stand" and "terrorism cases where the government has a compelling interest" in using out-of-court statements).

²¹⁹ See, e.g., *United States v. Feliz*, 467 F.3d 227, 236 (2d Cir. 2006) (citing with approval a discussion of society's interests in permitting prosecutions to proceed without testimonial forensic witnesses); *People v. Lackey*, 120 P.3d 332, 351 (Kan. 2005) (noting that, in a murder prosecution, requiring the prosecution to produce the author of an autopsy report would "have the effect of requiring the pathologist who performed the autopsy to testify in every criminal proceeding," and expressing concern that if the "medical examiner is deceased or otherwise unavailable," a mandate of production would produce a "harsh and unnecessary" rule precluding the State "from using the autopsy report in presenting its case, which could preclude the prosecution of a homicide case"), *overruled by State v. Davis*, 158 P.3d 317 (Kan. 2007); *State v. Kent*, 918 A.2d 626, 642 (N.J. Super. Ct. App. Div. 2007) (bemoaning the "palpable" burden that would be placed on "[l]aboratory technicians . . . and hospital workers . . . [who] would need to divert from their regular functions, in testing substances and treating sick people, and travel to courthouses to vouch for the contents of their certified reports"); *People v. Durio*, 794 N.Y.S.2d 863, 869 (N.Y. Sup. Ct. 2005) ("Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case."), *abrogated by People v. Rawlins*, 884 N.E.2d 1019 (N.Y. 2008); Thomas F. Burke III, *The Test Results Said What? The Post-Crawford Admissibility of Hearsay Forensic Evidence*, 53 S.D. L. REV. 1, 22 (2008) ("[C]ourts have exhibited considerable reluctance" to consider Breathalyzer certifications as testimonial evidence, "realizing that such a holding would seriously impede the State's prosecution of drunk driving offenses (namely, by requiring that maintenance technicians appear in court for nearly every drunk driving case that goes to trial).").

opinions regarding the production of forensic evidence, a deeply divided Court quickly retreated from *Crawford*'s production imperative, returning to the substantive reliability questions that dominated the post-incorporation Confrontation Clause opinions.²²⁰

B. The Forensic Trilogy's Retreat

In its trilogy of forensic post-*Crawford* cases, the Supreme Court grappled with questions of confrontation's production obligation. Each case considered whether the Confrontation Clause requires the production of the forensic or scientific expert who prepared or analyzed an out-of-court forensic report.²²¹ In two of these cases—*Melendez-Diaz v. Massachusetts* and *Bullcoming v. New Mexico*—a narrow majority of the Court ostensibly upheld confrontation's production mandate.²²² In the third case—*Williams v. Illinois*—no single view of confrontation captured a majority; instead, a fractured Court openly struggled with the uncomfortable consequences of a strong production mandate.²²³ Together, these cases demonstrate that the Court has failed to fully divorce itself from the substantive considerations that dominated its *Roberts*-era jurisprudence. These cases illustrate two trends: first, notwithstanding *Crawford*'s rhetoric, the Supreme Court remains deeply ambivalent about confrontation as a rule of production; second, the Court's ambivalence is lodged in the same cost considerations that drove its pre-*Crawford* jurisprudence.

1. *Melendez-Diaz*

In *Melendez-Diaz*, a deeply divided Court debated whether confrontation's rule of production required the prosecution to produce the authors of testimonial forensic reports.²²⁴ On its face, *Melendez-Diaz* presented the narrow question of whether, in a prosecution for cocaine distribution, the Confrontation Clause precluded the admission of forensic analysis affidavits without live testimony by the declarants.²²⁵ Massachusetts law authorized the prosecution to introduce forensic certificates of analysis as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed," without requiring that the prosecution's forensic declarant testify in court.²²⁶

²²⁰ The following opinions are referred to as the post-incorporation Confrontation Clause opinions: *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012); *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2713 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009).

²²¹ See *supra* note 219 and accompanying text.

²²² *Bullcoming*, 131 S. Ct. at 2709; *Melendez-Diaz*, 557 U.S. at 329.

²²³ *Williams*, 132 S. Ct. at 2227.

²²⁴ *Melendez-Diaz*, 557 U.S. at 307.

²²⁵ *Id.*

²²⁶ *Id.* at 309 (quoting MASS. GEN. LAWS ch. 111, § 13 (2007)).

Ostensibly, the unanimous opinion in *Crawford* had mooted any consideration of the *reliability* of testimonial evidence.²²⁷ Yet, *Melendez-Diaz* produced a lengthy debate about whether production and cross-examination of a forensic witness would increase the *accuracy* of a trial outcome.²²⁸ Notwithstanding its straightforward application of *Crawford*, the *Melendez-Diaz* majority continued to debate the dissent's assertion that producing forensic witnesses provided a meaningful opportunity to test the accuracy of the evidence and the declarant's "honesty, proficiency, and methodology."²²⁹ This debate marked a significant re-engagement with the recently abandoned theory of confrontation as a rule of reliability.

The *Melendez-Diaz* majority stressed that prosecutorial witness production was a non-negotiable mandate of the Confrontation Clause.²³⁰ It did so, however, as an act of textual fealty. For the majority, the Confrontation Clause established confrontation as an essential and exorable procedural component of a valid conviction.²³¹ The majority explained that, although there might be "other ways—and in some cases better ways—to challenge or verify" the accuracy of the prosecution's evidence, "the Constitution guarantees one way: confrontation" of witnesses at trial.²³² Prosecutorial witnesses must be made available for confrontation even if they have "the scientific acumen of Mme. Curie and the veracity of Mother Teresa."²³³ The *Melendez-Diaz* majority affirmed that legislatures and courts "do not have license to suspend the Confrontation Clause," even if "a preferable trial strategy is available."²³⁴

Shoring up its validation of *Melendez-Diaz*'s confrontation claim, the majority explained that the adversarial structure of the Sixth Amendment places the risk of "adverse-witness no-shows" upon the prosecution.²³⁵ Shifting that risk to the accused violates the core structural protections of the Confrontation Clause.²³⁶ After all, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court."²³⁷ Therefore, the clause's "value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."²³⁸ Massachusetts's statutory scheme

²²⁷ *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

²²⁸ *Melendez-Diaz*, 557 U.S. at 309.

²²⁹ *Id.* at 321.

²³⁰ *Id.* at 324.

²³¹ *Id.* at 325.

²³² *Id.* at 318.

²³³ *Id.* at 319 n.6.

²³⁴ *Id.* at 318; *accord* *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) ("The 'necessities of trial and the adversary process' are irrelevant [to questions about confrontation], since they cannot alter the constitutional text.").

²³⁵ *Melendez-Diaz*, 557 U.S. at 324.

²³⁶ *Id.* at 324–25.

²³⁷ *Id.* at 324.

²³⁸ *Id.* at 324–25.

violated the Constitution when it “[c]onvert[ed] the prosecution’s duty under the Confrontation Clause into the defendant’s privilege under state law or the Compulsory Process Clause.”²³⁹

The majority never fully addressed the due process implications of production as a confrontation-essential imperative. Instead, the majority returned, again and again, to the question of whether forensic evidence is *per se* reliable, or “uniquely immune from the risk of manipulation.”²⁴⁰ The majority stressed that forensic witnesses might “face pressure to sacrifice appropriate methodology for the sake of expediency . . . or have an incentive . . . to alter the evidence in a manner favorable to the prosecution.”²⁴¹ “[U]nder oath in open court,” a dishonest analyst might “reconsider his false testimony.”²⁴² The majority also emphasized the role of cross-examination in “weed[ing] out not only the fraudulent analyst, but the incompetent one” or the one who lacks “proper training or [has a] deficiency in judgment.”²⁴³ All of these arguments focused on the reliability of the evidence rather than the mandate that the prosecution produce a live witness to offer that evidence.

The dissenting Justices urged a return to confrontation as a rule of reliability, at least where forensic evidence was concerned.²⁴⁴ Alleging that forensic evidence was likely to be highly reliable, the dissenters argued that its reliability excused prosecutorial non-production and suspended the defense right to confrontation and cross-examination.²⁴⁵ Because “[t]he Confrontation Clause is not designed, and does not serve, to detect errors in scientific tests,” prosecutors should not be required to produce these scientific witnesses.²⁴⁶ Unwilling to abandon a reliability-centered Confrontation Clause they insisted that, unless Melendez-Diaz “dispute[d] the authenticity of the samples tested or the accuracy of the tests performed,” production simply “transforms the Confrontation Clause from a sensible procedural protection into a distortion of the criminal justice system.”²⁴⁷

²³⁹ *Id.* at 324.

²⁴⁰ *Id.* at 318.

²⁴¹ *Id.* (citation omitted).

²⁴² *Id.* at 319 (citing *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988)).

²⁴³ *Id.* at 319–20.

²⁴⁴ *Id.* at 340 (Kennedy, J., dissenting).

²⁴⁵ *Id.* at 330.

²⁴⁶ *Id.* at 337; *id.* at 334 (“[A forensic analyst is] remote from the scene, has no personal stake in the outcome, does not even know the accused, and is concerned only with the performance of his or her role in conducting the test.”).

²⁴⁷ *Id.* at 338–39. The dissent also attempted to distinguish forensic analysts from other types of testimonial witnesses. The dissent offered three distinctions: (1) “a conventional witness recalls events observed in the past, while an analyst’s report contains near-contemporaneous observations of the test”; (2) an “analyst’s distance from the crime and the defendant, in both space and time, suggests the analyst is not a witness against the defendant in the conventional sense”; and (3) the *Melendez-Diaz* analysts worked for the Massachusetts Department of Public Health and so were not “adversarial” to the defendant. *Id.* at 345–46.

Along with this return to a debate about evidentiary reliability, *Melendez-Diaz* marked a return to an active debate about confrontation's costs. Massachusetts asked the Court "to relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process.'" ²⁴⁸ Massachusetts and its supporters urged that "the substantial total number of controlled-substance analyses performed by state and federal laboratories in recent years" meant that a mandate for witness production would bankrupt law enforcement and weaken (or destroy) drug prosecutions. ²⁴⁹ In his dissent, joined by Justices Roberts, Breyer, and Alito, Justice Kennedy focused largely on "the costs the Court's ruling will impose on state drug prosecutions." ²⁵⁰ The dissenters worried that *Melendez-Diaz*'s mandate of witness production would "disrupt if not end many prosecutions where guilt is clear" ²⁵¹ and would "put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician . . . simply does not or cannot appear." ²⁵²

In addition, the dissenters worried that *Melendez-Diaz* might cause "uncertainty and disruption" in cases involving non-scientific declarants, such as doctors and bank tellers. ²⁵³ Burdening the prosecution with confrontation's production mandate offered these "negligible benefits," particularly when weighted against the "costs [the *Melendez-Diaz*] decision imposes on criminal trials" and the larger criminal justice system. ²⁵⁴ Witnesses might be forced to waste time waiting to be called at trial. ²⁵⁵ In sum, enforcement of confrontation would "impose[] enormous costs on the administration of justice." ²⁵⁶

Most shockingly, the dissenters complained about the "costs" of a Confrontation Clause that reinforced the Constitution's acquittal bias:

The Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of today's decision, adding nothing to

²⁴⁸ *Id.* at 325 (majority opinion) (quoting Brief for Respondent at 59, *Melendez-Diaz*, 557 U.S. 305 (No. 07-591), 2008 WL 4103864).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 341 (Kennedy, J., dissenting).

²⁵¹ *Id.* at 333.

²⁵² *Id.* at 340–41 ("By requiring analysts also to appear in the far greater number of cases where defendants do not dispute the analyst's result, the Court imposes enormous costs on the administration of justice.").

²⁵³ *Id.* at 337.

²⁵⁴ *Id.* at 340–41.

²⁵⁵ *Id.* at 341–42 (noting that "[t]he analyst [might] face the prospect of waiting for days in a hallway outside the courtroom," because "[t]rial courts have huge caseloads to be processed within strict time limits").

²⁵⁶ *Id.* at (arguing that "analysts responsible for testing the drugs at issue in those cases now bear a crushing burden," which will increase exponentially as a result of the *Melendez-Diaz* ruling).

the truth-finding process. The analyst will not always make it to the courthouse in time. He or she may be ill; may be out of the country; may be unable to travel because of inclement weather; or may at that very moment be waiting outside some other courtroom for another defendant to exercise the right the Court invents today. If for any reason the analyst cannot make it to the courthouse in time, then, the Court holds, the jury cannot learn of the analyst's findings The result, in many cases, will be that the prosecution cannot meet its burden of proof, and the guilty defendant goes free on a technicality that, because it results in an acquittal, cannot be reviewed on appeal.²⁵⁷

The *Melendez-Diaz* majority ostensibly refused to consider these costs, noting, “The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.”²⁵⁸ Still, the majority clearly took these cost concerns seriously. The majority devoted considerable ink to refuting the possibility that witness production would come at a high cost.²⁵⁹ Although the majority was ultimately convinced that “there is little reason to believe that our decision today will commence the parade of horrors respondent and the dissent predict,”²⁶⁰ it nevertheless took steps to assure that confrontation did not carry a high systemic price. Having rejected the notion of equivalence between the Confrontation and Compulsory Process Clauses, the majority reversed course and relied upon Compulsory Process jurisprudence to endorse the use of notice-and-demand statutes.²⁶¹ In so doing, the majority tipped its hand: notwithstanding *Crawford*, the majority remained unable—or unwilling—to fully embrace production as a procedural mandate with an independent adversarial role mandated by the Constitution. Hence, the *Melendez-Diaz* majority offered its dangerous dicta: “States are free to adopt procedural rules,” such as notice-and-demand statutes, that require a defendant to make a pretrial demand that the prosecution produce its witnesses or be deemed to have waived, by silence, his confrontation rights.²⁶²

As will be discussed in Part IV, this notice-and-demand dicta began the Court's steady slide toward a new incursion on confrontation's rule of production. By offering notice-and-demand statutes as a “solution” to confrontation's production “problem,” the Court maintained a rhetorical commitment to *Crawford*'s creed while retreating from *Crawford*'s consequences.

²⁵⁷ *Id.* at 342–43 (citation omitted).

²⁵⁸ *Id.* at 325 (majority opinion).

²⁵⁹ *See, e.g., id.* (“[T]he sky will not fall after today's decision.”).

²⁶⁰ *Id.* at 328.

²⁶¹ *Id.* at 326–27.

²⁶² *Id.* at 327.

2. *Bullcoming*

Melendez-Diaz provoked widespread hysteria about the effects of requiring the prosecution to produce its forensic witnesses. Commentators complained that “*Melendez-Diaz* makes prosecuting cases more difficult, more expensive, and, in some circumstances, impossible.”²⁶³ They bemoaned that “[t]he burdens *Melendez-Diaz* imposed on state prosecutions, [are] especially challenging during these dismal economic times when state coffers are wanting.”²⁶⁴

Melendez-Diaz meant that prosecutors would incur “substantial financial burdens . . . to accommodate the travel necessities” of analysts who were no longer in the jurisdiction.²⁶⁵ A prosecution might be stymied by the death of an analyst, producing a “morally repulsive” outcome.²⁶⁶ *Melendez-Diaz* would make “some cases unprosecutable . . . [including] [p]articularly vulnerable . . . cases in which a crucial scientific test cannot be duplicated and the analyst who conducted the test is unavailable.”²⁶⁷

Police and prosecutors worried about a potential increase in trials, the costs of producing forensic witnesses, and the likelihood of increasing numbers of acquittals and dismissals.²⁶⁸ They claimed that “[f]orensic labs’ workloads [had] noticeably spiked and certain states have been having problems producing analysts at trial in the wake of *Melendez-Diaz*’s increased demands.”²⁶⁹ They complained that *Melendez-Diaz* “unnecessarily divert[ed] taxpayer resources better spent on fighting and preventing continued drug and other crimes.”²⁷⁰ At bottom, law enforcement and its advocates objected to the structural costs of an adversary system that saddled the prosecution with the burdens of production and persuasion:

²⁶³ Oliver M. Gold, Note, *Trimming Confrontation’s Claws: Navigating the Uncertain Jurisprudential Topography of the Post-Melendez-Diaz Confrontation Clause*, 43 LOY. L.A. L. REV. 1431, 1431 (2010) (emphasis omitted).

²⁶⁴ *Id.* at 1448.

²⁶⁵ *Id.* at 1442.

²⁶⁶ *Id.* at 1443.

²⁶⁷ Christina Miller & Michael D. Ricciuti, *Crawford Comes to the Lab: Melendez-Diaz and the Scope of the Confrontation Clause*, 53 BOS. B.J. 13, 15 (2009).

²⁶⁸ See, e.g., *id.* at 14 (noting the claim by Attorney General Martha Coakley, who argued *Melendez-Diaz* in the Supreme Court, that *Melendez-Diaz* would require the dismissal of drug cases because “arranging for the testimony of [drug] analysts at every drug prosecution is ‘virtually impossible with current staffing’”); Tom Jackman, *Lab Analyst Decision Complicates Prosecutions: High Court Requires Scientists to Testify*, WASH. POST, July 15, 2009, at A16 (reporting prosecutors’ concerns that *Melendez-Diaz* will place an oppressive burden on the state and speculating that the number of trials “could well go up”).

²⁶⁹ Gold, *supra* note 263, at 1444.

²⁷⁰ Brief of the States of Indiana et al. as Amici Curiae in Support of Respondent at 1, *Briscoe v. Virginia*, 130 S. Ct. 1316 (2010) (No. 07-11191), 2009 WL 3652660; *id.* at 6, 10–11 (arguing that *Melendez-Diaz* “impacts a high-volume, high-cost subset of criminal prosecutions,” and expressing alarm at “the potential for skyrocketing costs associated with drug and other forensic-evidence prosecutions”); Brief for the United States as Amicus Curiae Supporting Respondent at 9–10, *Briscoe*, 130 S. Ct. 1316 (No. 07-11191), 2009 WL 3615002 (same).

Emboldened by the Court's holding in *Melendez-Diaz*, defendants and their counsel have been increasingly unwilling to stipulate to the admission of drug analysis certificates, even when they have no intention or motivation to dispute the accuracy of that evidence. Defendants and their counsel have instead adopted a wait-and-see strategy, insisting on the defendant's constitutional right to confrontation and hoping that the State will be unable to produce a qualified analyst to testify at trial. If not, the prosecution is forced either to seek a continuance to secure an analyst's presence at trial, present substitute evidence to prove the composition and weight of the drugs, or agree to reduce, or even dismiss, the charges against the defendant.²⁷¹

Two years after *Melendez-Diaz*, the Court considered the forensic evidence case of *Bullcoming v. New Mexico*.²⁷² *Bullcoming* presented the relatively straightforward question of whether the testimony of a surrogate analyst about a forensic certificate would satisfy the Confrontation Clause.²⁷³ *Bullcoming* was “materially indistinguishable from the facts” of *Melendez-Diaz*²⁷⁴ except that the author of the forensic report was on “unpaid leave” at the time of the trial, so the State offered the testimony of a surrogate analyst.²⁷⁵ *Bullcoming*'s outcome seemed to be a foregone conclusion; the laboratory report was testimonial evidence, therefore, the Confrontation Clause required that the prosecution produce its author. However, *Bullcoming* produced a fractured opinion, one that revealed the Justices' commitment to production as a guarantor of cross-examination—not as an independent structural requirement.²⁷⁶

The *Bullcoming* majority reaffirmed *Crawford*'s promise that “fidelity to the Confrontation Clause” precludes the admission of testimonial statements by absent witnesses unless “the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”²⁷⁷ However, the majority's focus remained on *cross-examination* and its capacity to add reliability to trial outcomes.²⁷⁸ For example, the Court found that the absence of the report's author was troubling since the State had offered no explanation either for his “unpaid leave” or for the State's decision not to call him to the stand.²⁷⁹ If it had focused on the Confrontation Clause

²⁷¹ Brief of the States of Indiana et al., *supra* note 270, at 23, 24. See Part IV *infra* for a discussion of how these “costs” are at the adversarial core of American constitutional criminal procedure.

²⁷² 131 S. Ct. 2705, 2707 (2011).

²⁷³ *Id.* at 2710.

²⁷⁴ *Id.* at 2721.

²⁷⁵ *Id.* at 2711–12.

²⁷⁶ *Id.* at 2710.

²⁷⁷ *Id.* at 2713 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

²⁷⁸ *Id.* at 2708.

²⁷⁹ *Id.*

as a rule of production, the Court might have observed that the State's failure to call the forensic declarant was, in and of itself, a *prosecutorial failure to meet its confrontation burden*. Thus, *Bullcoming* treated the Confrontation Clause as a guarantee of the right to cross-examination, not as a mandate for prosecutorial witness production.²⁸⁰

Again, the Court considered confrontation's costs. The *Bullcoming* filings had been replete with dire warnings about the consequences of confrontation's production mandate. Witness production "would pull valuable analysts away from their underresourced [sic] laboratories and . . . would stifle continued development and improvement of reliable and efficient evidence-processing."²⁸¹ The costs of constitutional enforcement would include "more trials," "unduly lenient plea bargains," or meritless acquittals and dismissals.²⁸² "The State and its *amici* urge[d] that unbending application of the Confrontation Clause to forensic evidence would impose an undue burden on the prosecution."²⁸³ Once again, dissenting Justices agreed with those cost-conscious claims.

In an echo of the concerns that had influenced the Court's pre-*Crawford* confrontation jurisprudence, the dissenters raised concerns about crime control, confrontation's resource costs, and a blow to federalism.²⁸⁴ They insisted that "increases in subpoenas [for drug analysts would] further impede the state laboratory's ability to keep pace with its obligations."²⁸⁵ The demand for witness production would waste "[s]carce state resources [that] could be committed to other urgent needs in the criminal justice system."²⁸⁶ Vulnerable victims would face increased risks and violent batterers would be unfairly acquitted or have their cases dismissed.²⁸⁷ Further, *Bullcoming* disrupted the proper relationship between the state and federal government by "foreclos[ing] [states] from contributing to the formulation and enactment of rules that make trials fairer and more reliable."²⁸⁸

²⁸⁰ *Id.* ("[T]he Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.").

²⁸¹ Brief for the States of California et al. as Amici Curiae Supporting Respondent at 2, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876), 2011 WL 175867.

²⁸² *Id.* at 8; see also Brief for National District Attorneys Ass'n et al. as Amici Curiae in Support of Respondent at 27, *Bullcoming*, 131 S. Ct. 2705 (No. 09-10876), 2011 WL 175868 (expressing concern that as a result of *Bullcoming*'s claim, "in many murder prosecutions, the prosecution would be left without the means of proving the manner and cause of death, . . . a shocking result").

²⁸³ *Bullcoming*, 131 S. Ct. at 2717.

²⁸⁴ *Id.* at 2725–28 (Kennedy, J., dissenting).

²⁸⁵ *Id.* at 2728.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 2727 (arguing that *Bullcoming* would undermine "recent state laws allowing admission of well-documented and supported reports of abuse by women whose abusers later murdered them").

²⁸⁸ *Id.* (arguing that burdening the prosecution with confrontation's production mandate had caused "ongoing, continued, and systemic displacement of the States and dislocation of the federal structure").

In response, the majority insisted that the Confrontation Clause was not amenable to concerns of cost.²⁸⁹ Nevertheless it returned to the argument that “notice-and-demand procedures, long in effect in many jurisdictions, can reduce burdens on forensic laboratories.”²⁹⁰ Once again the Court debated whether, in the “‘small fraction of . . . cases’ that ‘actually proceed to trial,’” confrontation’s costs were too high for enforcement.²⁹¹ Thus the majority’s holding appears to rest, in part, upon its conclusion that “the sky ha[d] not fallen” as a result of *Melendez-Diaz* and was unlikely to do so as a result of *Bullcoming*.²⁹²

In Part IV of the majority’s opinion, Justices Ginsburg and Scalia rejected the State’s suggestion that if a defendant wanted to challenge the forensic report, the defendant should bear the burden of retesting the evidence: “[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.”²⁹³ Moreover, confrontation requires prosecutorial witness production “in every case, *whether or not the defendant seeks to rebut the case against him.*”²⁹⁴ Yet, in the next sentence, the Justices once again urged a statutory “solution” to the prosecution’s production “problem,” reminding the state that, “notice-and-demand statutes, long in effect in many jurisdictions, can reduce burdens on forensic laboratories.”²⁹⁵ This reference to notice-and-demand statutes undermines any claim that Part IV of the opinion sought to enforce confrontation as a regulation of the means by which the prosecution must meet its burden of proof.

3. *Williams*

In many ways, the 2012 case of *Williams v. Illinois*²⁹⁶ best exemplifies the Court’s retreat to a confrontation analysis based on cross-examination and reliability, rather than one based on production as a procedural mandate. As a plurality opinion, *Williams* lacks precedential value.²⁹⁷ However, each of its four opinions demonstrates a focus on substantive reliability rather than procedural compliance.²⁹⁸

²⁸⁹ *Id.* at 2717–18 (majority opinion).

²⁹⁰ *Id.* at 2718.

²⁹¹ *Id.* (alteration in original) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009)).

²⁹² *Id.* at 2719.

²⁹³ *Id.* at 2718 (alteration in original) (quoting *Melendez-Diaz*, 557 U.S. at 324).

²⁹⁴ *Id.* (emphasis added) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 n.14 (1988)).

²⁹⁵ *Id.*

²⁹⁶ 132 S. Ct. 2221 (2012) (plurality opinion).

²⁹⁷ *See id.*

²⁹⁸ Justice Alito wrote the plurality opinion in which Justices Breyer, Kennedy, and Chief Justice Roberts joined. *Id.* at 2227. Justice Breyer wrote a separate concurrence. *Id.* at 2221. Justice Thomas concurred in the judgment but disagreed with the plurality’s reasoning. *Id.* Justice Kagan wrote a dissent in which Justices Ginsburg, Scalia, and Sotomayor joined. *Id.* Justice Thomas, whose opinion maintained that the report was not testimonial and therefore

Williams considered whether the Confrontation Clause required the prosecution to produce the technician who performed a DNA test for cross-examination or whether another analyst from the laboratory could be called to interpret the results of the test.²⁹⁹ Justice Alito (for the plurality) and Justice Breyer (in a concurrence) both argued that because the forensic report itself was reliable, the producer of the report was exempt from confrontation's rule of production.³⁰⁰ They also argued that DNA reports were so accurate that they were exemplars of the types of evidence *not* covered by the Confrontation Clause.³⁰¹ The plurality found the possibility of error "inconceivable."³⁰² It therefore concluded that it was "surely permissible for the trier of fact to infer" that the report was reliable and therefore exempt from confrontation's rule of production.³⁰³

Similarly, in his concurrence, Justice Breyer returned again and again to confrontation as a rule of cross-examination (substantive reliability) rather than a rule of production (burden compliance).³⁰⁴ Justice Breyer characterized *Williams* as a case asking whether the defendant could "cross-examine the individual or individuals who produced" a forensic report, *not* whether the prosecution could simply decline to produce those individuals.³⁰⁵ Like Justice Alito, Justice Breyer speculated that cross-examination would not improve the accuracy of the verdict and therefore

not subject to the Confrontation Clause, continued to measure the Confrontation Clause's applicability by reference to substantive reliability rather than procedural compliance. *Id.* at 2259–61 (Thomas, J., concurring).

²⁹⁹ *Id.* at 2227 (plurality opinion).

³⁰⁰ *Id.* at 2228. The Justices argued that the "report was produced before any suspect was identified," *id.*, "there was no 'prospect of fabrication' [of the report] and no incentive to produce anything other than a scientifically sound and reliable profile," *id.* at 2244 (citing *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 (2011)). There was "no real chance that 'sample contamination, sample switching, mislabeling, [or] fraud' could have led Cellmark to produce a DNA profile that falsely matched petitioner." *Id.* (alteration in original) (responding to Justice Kagan's dissent directly).

³⁰¹ *Id.* at 2239, 2244 (asserting that errors in DNA testing "may often be detected from the [DNA] profile itself"; moreover, "how could shoddy or dishonest work in the Cellmark lab have resulted in the production of a DNA profile that just so happened to match petitioner's? If the semen found on the vaginal swabs was not petitioner's and thus had an entirely different DNA profile, how could sloppy work in the Cellmark lab have transformed that entirely different profile into one that matched petitioner's? And without access to any other sample of petitioner's DNA (and recall that petitioner was not even under suspicion at this time), how could a dishonest lab technician have substituted petitioner's DNA profile?" (footnote omitted)).

³⁰² *Id.* at 2244.

³⁰³ *Id.* at 2239.

³⁰⁴ *Id.* at 2244–48 (Breyer, J., concurring).

³⁰⁵ *Id.* at 2244–45; *see also id.* at 2247 (discussing whether "cross-examination could sometimes significantly help to elicit the truth"); *id.* at 2249 (discussing why "the need for cross-examination is considerably diminished when the out-of-court statement was made by an accredited laboratory employee").

was unnecessary.³⁰⁶ Based on the alleged inutility of cross-examination, Justice Breyer concluded that the Confrontation Clause did not require witness production.³⁰⁷

Justices Alito and Breyer argued that enforcing confrontation as a rule of production would impose unjustifiable costs upon the criminal justice system.³⁰⁸ They insisted that a rule of production would actually *reduce the reliability* of trial outcomes.³⁰⁹ Justice Alito framed *Williams* as a case about costs and “whether *Crawford* substantially impedes the ability of prosecutors to introduce DNA evidence and thus may effectively relegate the prosecution in some cases to reliance on older, less reliable forms of proof.”³¹⁰ Justice Breyer responded with an argument that enforcing confrontation as a rule of production would indeed “undermine, not fortify, the accuracy of factfinding at a criminal trial” and thereby “increase the risk of convicting the innocent.”³¹¹ Justice Breyer reached a dubious conclusion: “An interpretation of the Clause that risks greater prosecution reliance upon less reliable evidence cannot be sound.”³¹²

Justice Breyer also urged that confrontation’s rule of production yield to the societal interest in prosecuting and convicting guilty individuals.³¹³ He worried about what might happen if “say, a victim’s body has decomposed, repetition of the autopsy

³⁰⁶ Justice Breyer claimed that cross-examination cannot “prevent admission of faulty evidence,” and is “rarely effective” in demonstrating the weakness or falsity of forensic evidence. *Id.* at 2250. For an argument that cross-examination can prevent the admission of faulty evidence, see Metzger, *supra* note 25.

³⁰⁷ *Williams*, 132 S. Ct. at 2251 (Breyer, J., concurring).

³⁰⁸ *See, e.g., id.* at 2228 (plurality opinion) (explaining how a rule of production would put economic pressure on prosecutors to forgo DNA tests).

³⁰⁹ *See, e.g., id.* at 2251 (Breyer, J., concurring) (explaining how prosecution would have to rely on less reliable evidence).

³¹⁰ *Id.* at 2227 (plurality opinion).

³¹¹ *Id.* at 2251 (Breyer, J., concurring) (stating that enforcing confrontation as rule of production may “increase the risk of convicting the innocent [as] . . . the additional cost and complexity involved in requiring live testimony from perhaps dozens of ordinary laboratory technicians who participate in the preparation of a DNA profile may well force a laboratory ‘to reduce the amount of DNA testing it conducts, and force prosecutors to forgo forensic DNA analysis in cases where it might be highly probative’” (quoting Brief for New York County District Attorney’s Office & the New York City Office of the Chief Medical Examiner as Amici Curiae in Support of Respondent, *Williams*, 132 S. Ct. 2221 (No. 10-8505), 2011 WL 5125054)).

³¹² *Id.* (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.” (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990))). Justice Breyer revealed his indifference to confrontation as a prosecutorial burden by urging that a defendant should “provide good reason to doubt the laboratory’s competence or the validity of its accreditation” before a court should permit him to question the forensic report. *Id.* at 2252. Why? Because the defendant’s satisfaction of this new burden would demonstrate that “the alternative safeguard of reliability . . . no longer exist[s] and the Constitution would [then] entitle defendant to Confrontation Clause protection.” *Id.*

³¹³ *Id.* at 2251.

may not be possible. What is to happen if the medical examiner dies before trial?”³¹⁴ Notwithstanding *Crawford*, cost weighed heavily on the Justices’ minds.

In response to concerns about lessening the prosecution’s burden under the Confrontation Clause, Justices Alito and Breyer adopted the discredited argument that the availability of the Compulsory Process Clause mooted any Confrontation Clause objection.³¹⁵ Justice Alito argued that relieving the prosecution of its burden of production “will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because *those who participated in the testing may always be subpoenaed by the defense* and questioned at trial.”³¹⁶ Justice Breyer reiterated this position: excusing the prosecution from producing the forensic declarant would still “leave[] the defendant free to call the laboratory employee as a witness *if the employee is available*.”³¹⁷ The costs of confrontation were simply greater than the plurality was willing to bear, so they focused their arguments on reliability and access to witnesses rather than the procedural mandates of the Confrontation Clause.

The *Williams* dissenters were also deeply engaged in examining confrontation as a rule of reliability rather than production. Although the dissenters urged enforcement of confrontation as a rule of production, the dissent relied heavily on a reliability analysis.³¹⁸ Justice Kagan’s dissenting opinion began by emphasizing how cross-examination contributes to substantive reliability.³¹⁹ Describing a stunning example of an erroneous DNA report from the Cellmark laboratory, Justice Kagan stated bluntly: “Our Constitution contains a mechanism for catching such errors—the Sixth Amendment’s Confrontation Clause.”³²⁰ The “cure” for these errors was the requirement that “testimony against a criminal defendant be subject to cross-examination.”³²¹

The dissenters urged reversal in *Williams* because “if a prosecutor wants to introduce the results of forensic testing into evidence, he must *afford the defendant an opportunity to cross-examine* an analyst responsible for the test.”³²² In this analysis,

³¹⁴ *Id.*

³¹⁵ *Id.* at 2228 (plurality opinion).

³¹⁶ *Id.* (emphasis added).

³¹⁷ *Id.* at 2251–52 (Breyer, J., concurring) (emphasis added).

³¹⁸ *See id.* at 2266–76 (Kagan, J., dissenting).

³¹⁹ *Id.* at 2264.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* (emphasis added). As Justice Kagan noted, “Once confronted, [an] analyst [may] discover[] and disclose[] the error she ha[s] made.” *Id.* However, that speaks to the value of production as a device that requires witnesses to reconsider and re-examine their testimony. Surely, if the prosecution had called the witness to the stand, the witness would still have been forced to review her report and, perhaps reconsider her conclusions, regardless of whether the defendant cross-examined her. So, although it is true that “[c]ross-examination of the analyst is especially likely to reveal whether vials have been switched,

production only serves to advance cross-examination: “Forensic evidence is reliable only when properly produced, and the Confrontation Clause prescribes a particular method for determining whether that has happened.”³²³ The dissenters never addressed the more basic proposition: without producing the declarant, the prosecution cannot offer the evidence at all. The dissenters thus failed to acknowledge confrontation as a rule of production that requires the government to produce its witnesses in order to satisfy its burdens of production and persuasion.³²⁴

In sum, *Williams* reflects the Justices’ concerted efforts to reclassify forensic evidence as non-testimonial, not on principle, but as a practical expedient designed to evade the rule of production. Prosecutors and legislatures remain free to “create an exception that presumptively would allow introduction of DNA reports from accredited crime laboratories” to substitute for witness production.³²⁵ The *Crawford* Court ostensibly rejected this result. Yet, the “costs” of confrontation’s production mandate had assumed a central place in Confrontation Clause jurisprudence.

IV. CONSEQUENCES OF A COST-DRIVEN CONFRONTATION JURISPRUDENCE

Swayed by its concerns about the costs of production, the Court has paid insufficient attention to confrontation as a structural guarantee of a particular type of adversary system. In our constitutional system, the prosecution bears the burdens of production and persuasion. All of the initiative burdens of criminal procedure depend upon prosecutorial action. Yet, the Court’s persistent preoccupation with cost threatens the most basic adversary structures of constitutional criminal procedure.

A. Production as a Fundamental Component of the Adversary System

Viewed in a structural or architectural light, the Confrontation Clause gives a defendant the constitutional right to rely on the presumption of innocence. In practical terms, this means that a defendant may *do nothing* and still put the government to its full burden of proof. This burden of proof includes the burdens of production and persuasion. In the specific context of the Confrontation Clause, that burden of

samples contaminated, tests incompletely run, or results inaccurately recorded,” *id.* at 2264–65, it is equally true that witness production is also likely to lead to the internal discovery of errors or omissions in the prosecutor’s case.

³²³ *Id.* at 2264.

³²⁴ *Id.* at 2267. Justice Kagan noted that the expert witness “could not convey what [the actual analyst] knew or observed about . . . the particular test and testing process he employed.” *Id.* (quoting *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715 (2011)). Therefore, *Williams*’s counsel “could not ask questions about that analyst’s ‘proficiency, the care he took in performing his work, and his veracity.’” *Id.* (quoting *Bullcoming*, 131 S. Ct. at 2716 n.7). Justice Kagan did not address the more basic proposition that, without producing the declarant, the prosecution cannot offer the evidence at all.

³²⁵ *Id.* at 2248 (Breyer, J., concurring).

production requires the prosecution to produce live testimonial witnesses or forego reliance on those witnesses' statements. The defendant's only confrontation "burdens" arise: (1) during the witness's testimony, when the defendant must timely object to Confrontation Clause violations; and (2) after the witness's testimony, when the defendant must exercise or waive the right to cross-examination.

Before *Melendez-Diaz*, it was well established that confrontation's rule of production was an automatic right. The right "to be confronted by the witnesses" had always been understood as a right that "arise[s] automatically on the initiation of the adversary process."³²⁶ The two-part Confrontation Clause creates a rule of production that binds the prosecution "automatically" and upon "the initiation of the adversary process."³²⁷ The defendant's right "to be confronted with adverse witnesses [is] designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused."³²⁸ Thus, it applies "in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own."³²⁹ As the Court explained in 1988, in *Taylor v. Illinois*, "no action by the defendant is necessary to make [the Confrontation Clause] active in his or her case."³³⁰ Rather, the Confrontation Clause applies in every criminal case, without defendant demand, because it "shield[s] the defendant from potential prosecutorial abuses."³³¹ Only after the prosecution meets its burden of production does the defendant have the right to exercise or waive his right to cross-examination.

In the Constitution's acquittal-biased adversary system, the prosecution bears the burdens of production and persuasion. Whereas the Confrontation Clause controls the prosecution's presentation of evidence, the Compulsory Process Clause "comes into play at the close of the prosecution's case. It operates exclusively at the defendant's initiative and provides him with affirmative aid in presenting his defense."³³² The *Taylor* Court further explains:

[T]he right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.³³³

³²⁶ *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

³²⁷ *Id.*

³²⁸ *Id.* at 410 n.14 (quoting Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 74 (1974)).

³²⁹ *Id.* (quoting Westen, *supra* note 328, at 74).

³³⁰ *Id.* at 410.

³³¹ *Id.*

³³² *Id.* at 410 n.14 (quoting Westen, *supra* note 328, at 74).

³³³ *Id.* at 410.

However, the Court's flawed *Melendez-Diaz* dicta endorsing notice-and-demand erroneously lumps confrontation in with other contingent and defendant-initiated constitutional rights. Based upon that flawed premise, the Court endorsed an unprecedented application of demand-waiver rules to the Confrontation Clause. The *Melendez-Diaz* dicta alleges that "[t]he defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so."³³⁴ According to the Court, this means that, "[s]tates are free to adopt procedural rules governing [the timing of a defendant's exercise of the Confrontation Clause]."³³⁵ A demand-waiver doctrine holds that "a prior demand is a necessary condition" to the exercise of a constitutional right.³³⁶ In a demand-waiver regime, a defendant who does not demand a particular constitutional right waives that right by silence. In a demand-waiver regime, "it is irrelevant why the defense did not file a demand. . . . Failure to demand constitutes a 'waiver' of the right."³³⁷

As the *Melendez-Diaz* Court states, "It is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial, announcing his intent to present certain witnesses."³³⁸ Simply put, the Constitution permits restrictions upon the timing of a defendant's exercise of the compulsory process right, because a failure to do so would hinder the truth-seeking function of criminal process.³³⁹ The Court jumps from this compulsory process assertion to the radical proposition that "[t]here is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial."³⁴⁰

Yet, this is not the case with mandatory rights. Once the prosecution files a valid bill of information or indictment, the Constitution prescribes a set of mandatory minimum criminal procedures. Although a defendant may waive those procedures, in the absence of a waiver, the Constitution mandates procedural compliance. The structural-procedural protections provided by the Sixth Amendment "arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case."³⁴¹ Such rights "shield the defendant from potential prosecutorial abuses."³⁴² The Supreme Court has already considered, and

³³⁴ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009).

³³⁵ *Id.*

³³⁶ *Barker v. Wingo*, 407 U.S. 514, 525 (1972).

³³⁷ Metzger, *supra* note 25, at 517.

³³⁸ *Melendez-Diaz*, 557 U.S. at 327.

³³⁹ See *Taylor v. Illinois*, 484 U.S. 400, 414–15 (1988) ("In order to reject petitioner's argument that preclusion is *never* a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. . . . The integrity of the adversary process, which depends both on the presentation of reliable evidence . . . and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.").

³⁴⁰ *Melendez-Diaz*, 557 U.S. at 327.

³⁴¹ *Taylor*, 484 U.S. at 410.

³⁴² *Id.*

rejected, the application of a demand-waiver regime to automatic trial rights.³⁴³ In *Barker v. Wingo*,³⁴⁴ the Supreme Court considered the application of a demand-waiver doctrine to the right to a speedy trial. The *Barker* court held that “[a] defendant has no duty to bring himself to trial; the State has that duty.”³⁴⁵

As to those procedures controlled by the prosecution, the rights—from a defendant’s perspective—are self-executing. Consider, for example, a hypothetical (competent) defendant who conscientiously objects to all criminal proceedings against her. At arraignment, she refuses to enter a plea. In response, the court will enter a plea of “not guilty,” thereby triggering a series of processes mandated by the Sixth Amendment of the Constitution and subject to overarching principles of the Fifth Amendment. The defendant is entitled to a speedy trial. She need not demand it; the right devolves upon her as a result of the prosecution’s initiation of proceedings. Conversely, by virtue of its burden of production, once it charges a defendant, the prosecution bears the burden of providing that defendant with a speedy trial and bears the constitutional risk (of dismissal with prejudice) associated with failure to meet its burden.³⁴⁶

A felony defendant need not request a trial by jury; it is his absolute right, and he alone can waive it. Although bench trials can produce constitutionally valid convictions, jury trials are the mandatory default procedure. Thus, if the court or counsel inquires whether the defendant wants a jury trial and the defendant stands mute, the process defaults to the constitutional requisite of a jury trial. Judge trials are prohibited unless the defendant waives the jury trial right.

Similarly, a defendant need not demand a jury of his peers; the Constitution bestows that upon him without any effort or action on the defendant’s part. True, the defendant may argue that the jury provided to him is *not* in fact constitutionally compliant, but the defendant makes—or waives—that argument *after* the venire has been assembled. The assemblage of the venire itself requires no action by the defendant. If a defendant arrived in court on the day of his trial, no judge would ever

³⁴³ *Barker v. Wingo*, 407 U.S. 514, 525 (1972).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 527 (footnote omitted).

³⁴⁶ As Justice Stephens of the Washington Supreme Court noted in a recent dissenting opinion:

[T]he majority argues that we must deny defendants the right to confront laboratory analysts because the burden it places on the State is too heavy The Sixth Amendment also guarantees to criminal defendants the right to a speedy and public trial, to have facts (even “neutral” and “scientific” facts) found by a jury, and to be appointed a competent lawyer at no cost. Each of these guaranties has cost our State incalculable money, time, and lost convictions, and the costs continue to mount. If the majority is willing to exempt laboratory analysts from cross-examination to save a little, why not strike confrontation entirely, or do away with jury trials and court-appointed attorneys, and save much more?

State v. Lui, 315 P.3d 493, 526 (Wash. 2014) (Stephens, J., dissenting) (citation omitted), *cert. denied*, 134 S. Ct. 2842 (2014).

be permitted to announce, “Since you did not specifically demand a jury, I am going to treat this as a bench trial.”

Once the jury is assembled, the defendant need not demand the presumption of innocence, nor must he request that the burdens of production and persuasion be placed upon the government. Those are constitutional baselines, and a prosecutorial failure to meet its burden of proof and overcome the presumption of innocence results in the defendant’s acquittal.

“The defendant’s rights to be informed of the charges against him, to receive a speedy and public trial, to be tried by a jury, to be assisted by counsel, and to be confronted with adverse witnesses” arise when the prosecution charges the defendant.³⁴⁷ These rights share a common regulatory function; they are “designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused.”³⁴⁸ Accordingly, “[t]hey apply in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own.”³⁴⁹ “[N]o action by the defendant is necessary to make [those rights] active in his or her case.”³⁵⁰ In the Sixth Amendment context, the Supreme Court has never adopted a demand-waiver doctrine under which a defendant must demand a right and non-demand is deemed waiver.³⁵¹

In contrast, the Constitution also bestows certain contingent rights upon a defendant; those rights only arise if the defendant properly invokes them. The structure of the Constitution makes the exercise of those rights “dependent entirely on the defendant’s initiative.”³⁵² For example, the right to compulsory process “operates exclusively at the defendant’s initiative and provides him with affirmative aid in presenting his defense.”³⁵³

Whether the Constitution permits trial procedures that narrow the in-court protections associated with the Confrontation Clause, the Supreme Court has emphasized the importance of confrontation’s physical architecture. The practical meaning of confrontation supports its function. For example, even a child witness must appear before the defendant who is alleged to have abused him. The confrontation guarantee encompasses a defendant’s right to compel the witness 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.”³⁵⁴

Current notice-and-demand statutes require that a defendant, during pretrial proceedings, file a written motion or notice demanding that the government produce

³⁴⁷ Westen, *supra* note 328, at 74.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ Taylor v. Illinois, 484 U.S. 400, 410 (1988).

³⁵¹ See Barker v. Wingo, 407 U.S. 514, 525 (1972).

³⁵² Taylor, 484 U.S. at 410.

³⁵³ Westen, *supra* note 328, at 74.

³⁵⁴ Barber v. Page, 390 U.S. 719, 721 (1968).

its forensic witness(es) at trial.³⁵⁵ Although the *Melendez-Diaz* dissenters correctly characterized these notice-and-demand statutes as “burden-shifting,”³⁵⁶ the majority erroneously maintained that “these statutes shift no burden whatever.”³⁵⁷ The majority based this astounding conclusion upon the procedural realities of *trial* confrontation: “The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so.”³⁵⁸ This oversimplification ignores the important structural protections provided by the Confrontation Clause.

Even the simplest of these notice-and-demand statutes requires a defendant to actively invoke his confrontation rights. Thus, this ruling presents a dangerous threat to the structural protection associated with the confrontation guarantee: namely, the criminal defendant’s right to “do nothing at all” and rely on the government’s failure of proof. Surely, this is the same harm of which the *Melendez-Diaz* court complained: a systemic rule that “shifts the consequences of adverse-witness no-shows from the State to the accused.”³⁵⁹ Since “the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court,”³⁶⁰ why should defendants bear the burden of “demanding” rights that devolved upon them the moment they stood accused? How is a notice-and-demand statute any different than the system the Court rejected in *Melendez-Diaz*, “a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses”?³⁶¹

B. Production as an Imperative Cost of Confrontation

In the Confrontation Clause context, a pretrial failure to demand the production of live witnesses may forever foreclose the defendant from confronting and cross-examining crucial state witnesses. Silence becomes waiver. As it was in the case of speedy trial rights, a demand-waiver doctrine places defense counsel in what is, to say the least, an “awkward position.”³⁶² Unless counsel demands production of the witness, counsel is in danger of frustrating her client’s confrontation right. Yet, absent some strong sense of how the witness is likely to testify, counsel has no way to know whether production of the witness will help or hurt her client.

³⁵⁵ See *supra* notes 40–42 and accompanying text.

³⁵⁶ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 350, 356 (2009) (Kennedy, J., dissenting).

³⁵⁷ *Id.* at 327 (majority opinion).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 324.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 324–25.

³⁶² *Barker v. Wingo*, 407 U.S. 514, 527 (1972).

Confrontation's production mandate operates as part of a larger bundle of Sixth Amendment trial rights that burden the prosecution and protect the defendant.³⁶³ Confrontation's trial processes—the production of witnesses for sworn accusation and cross-examination—must conform to the Sixth Amendment's jury and public trial requirements.³⁶⁴ “[V]iewed holistically[,] the Sixth Amendment incorporates ‘the blank pad rule’ that requires courts to make sure that criminal convictions rest only on evidence produced in open court.”³⁶⁵ The prosecution's witnesses must confront the accused in the presence of the jury and at a public trial.³⁶⁶

Coupled with this requirement of a public confrontation, confrontation's production mandate makes the government accountable for the prosecution's investigative and adjudicative choices. Confrontation requires the prosecution to introduce its witnesses to the public, even if they are distasteful co-conspirators or informants with significant criminal histories. And, as it calls these witnesses to the stand, the prosecution metaphorically “vouches” for them, linking its institutional credibility to its witnesses' credibility.³⁶⁷ The prosecution cannot conceal from the public the ways in which the prosecution located, prepared, or induced its witnesses to testify.³⁶⁸ Confrontation's burden of production exposes prosecutorial practice to public scrutiny and forces the prosecution to assume responsibility for the character and

³⁶³ The Framers enacted the Confrontation Clause “in conjunction with the other procedural rights surrounding trial by jury” and anticipated the holistic enforcement of those procedural rights. Berger, *supra* note 31, at 586; *see also* Graham, *supra* note 84, at 211 (“[H]istory suggests that confrontation comprises one small part of the ‘holistic Sixth Amendment’ that the Founders called ‘trial by jury.’” (quoting CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE EVIDENCE* § 6348, p. 780 (2000))).

³⁶⁴ The public trial right demonstrates that “[t]he means used by the government to prosecute crime is a matter of public concern.” Berger, *supra* note 31, at 560 n.13, 561 (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1132–33 (1991) (“[P]rotection of the people against self-interested government” was the central concern “in the minds of those who framed the Bill of Rights.”)). Berger emphasizes: “Confrontation was part of an arsenal designed not only to ensure accurate results in criminal trials, but also to restrain the government in criminal trials from acting in a covert, repugnant manner that would be concealed from the people.” Berger, *supra* note 31, at 586.

³⁶⁵ Graham, *supra* note 84, at 210.

³⁶⁶ *See also* Alford v. United States, 282 U.S. 687, 691 (1931) (explaining that producing a witness for examination before the jury enhances community's participation as production allows the witness to “be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood,” and permits the jury to “interpret his testimony in the light reflected upon it by knowledge of his environment”). Although a defendant can waive the right to trial by jury, the defendant cannot “waive” the public's right to view the trial.

³⁶⁷ At common law, the party who called the witness to the stand “vouche[d]” for the witness. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quoting *Clark v. Lansford*, 191 So. 2d 123, 125 (Miss. 1966)). In contrast, when a judge instructs a jury to accept an out-of-court statement as fact—for example, by reading a stipulation or instructing the jury on prima facie proof—the evidence appears less partisan and more neutral.

³⁶⁸ *See* Berger, *supra* note 31, at 560–61.

conduct of its witnesses and its agents. It also forces prosecutors to assume responsibility for their allocation of scarce resources.³⁶⁹

Finally, confrontation's production imperative echoes the due process reasonable doubt rule, which places the burdens of production and persuasion on the prosecution. The burden of production requires the prosecution to "work" for a conviction; it must locate its witnesses and present their testimony at trial. If the prosecution fails to produce a witness and, as a result, fails to adduce evidence of an essential element of the charged crime, the Constitution demands an acquittal. In this manner, the Confrontation Clause also enforces a defendant's right to rely upon the reasonable doubt rule for acquittal.

The Court has previously noted that the good faith of government actors is irrelevant if their conduct erodes the confrontation guarantee. "The Framers . . . would not have been content to indulge [an] assumption" that unopposed testimony was admitted in good faith reliance on the accuracy of its statements.³⁷⁰ Thus, the Court concluded that then, as now, "government officers[] could not always be trusted to safeguard the rights of the people."³⁷¹ Would Framers who were "loath to leave too much discretion in judicial hands," have readily ceded that same authority to state legislatures?³⁷² Just as *Roberts* did "violence to [the Framers'] design," so too does a legislative rule that exists solely to minimize the likelihood that a defendant will exercise a right so important to the Framers.³⁷³

Of course, this is precisely what notice-and-demand statutes do; because there is no obligation for the State to represent that it does, in fact, have an available witness, the State can play a game of constitutional "chicken" and, given the extent to which public defenders are overburdened, no one is likely to call the State's bluff.³⁷⁴ Legislative exceptions to the Confrontation Clause's production rule

alter[] the balance struck by the Constitution. The Bill of Rights does not envision an adversary proceeding between two equal parties. If that were so, we might well benefit from procedures patterned after the Rules of the Marquis of Queensberry. But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution.³⁷⁵

³⁶⁹ Miller & Ricciuti, *supra* note 267, at 15 (noting that, after *Melendez-Diaz*, "prosecutors will be forced to make hard decisions about which cases to pursue and which to ignore").

³⁷⁰ Crawford v. Washington, 541 U.S. 36, 67 (2004).

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 67–68.

³⁷⁴ See also Bellin, *supra* note 203, at 1897 n.163 ("As a practical matter, the vast chasm of resources (and sometimes energy) between prosecution and defense makes the defense's ability to subpoena witnesses an even less palatable means of enforcing the confrontation right.").

³⁷⁵ *Wardius v. Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring).

Simply put, “defendants have no duty to assist the State in proving their guilt.”³⁷⁶ Relieving the government of its automatic burden of production and burdening the defendant with the obligation of demanding production alters the basic rule that the defendant has no responsibility to bring himself to trial or to assist the government in its prosecution. Justice Fortas once explained, “a man is not obliged to furnish the state with ammunition to use against him.”³⁷⁷ The prosecution has “no right to compel [a defendant] to surrender or impair his right of self-defense.”³⁷⁸ How much less, then, can the State compel a defendant to demand the weapons that the Constitution unconditionally promises him?

The burden of production “reduc[es] the relative disadvantage individual defendants typically face relative to the state’s own vast trial resources.”³⁷⁹ In the context of self-incrimination, “[b]y forcing the state to speak, but not the (usually weaker) defendant, we get closer to Fortas’s adversarial ideal of two equals meeting in battle.”³⁸⁰ Similarly, by forcing the prosecution, but not the defense, to produce evidence at trial, we advance the adversarial model.³⁸¹

Like self-incrimination, the adversarial system uses confrontation’s production mandate “to help tame the state’s 500-pound gorilla: the refusal to allow the state to forcibly extract [proof] from the mouth of its opponent is a part of the ritual of respect for individual autonomy that is embodied by a fully adversarial trial.”³⁸² Like self-incrimination, confrontation’s production mandate “forces courts to account for the value of genuine adversarialism” by requiring the physical production of the prosecution’s testimonial witnesses.³⁸³ The prosecution’s burden of production is part of the fabric of our adversary system. Eliminating that burden is a first step down the slippery slope to trials by affidavit.

³⁷⁶ *Davis v. Washington*, 547 U.S. 813, 833 (2006).

³⁷⁷ Kenworthy Bilz, *Self-Incrimination Doctrine Is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 *CARDOZO L. REV.* 807, 847 (2008) (quoting Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 *CLEV. B. ASS’N J.* 91, 98–99 (1954)).

³⁷⁸ *Id.* (quoting Fortas, *supra* note 377, at 98–99).

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Confrontation’s detractors argue otherwise. In 2009, then–Solicitor General Elena Kagan argued:

[A] statutory right to cross-examine the forensic analyst meets constitutional requirements even though it does not guarantee that the prosecution will first present the analyst’s direct testimony during its case-in-chief. Neither the text of the Confrontation Clause, nor its history, nor the defendant’s tactical preference justifies a constitutional rule that would mandate a particular order of proof at trial.

Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 270, at 9.

³⁸² Bilz, *supra* note 377, at 848.

³⁸³ *Id.*

CONCLUSION

Confrontation's stringent burden of prosecutorial witness production "suffers from a major weakness: it can make a trial terribly inconvenient."³⁸⁴ Yet, by constitutional design, the conviction and prosecution of a presumptively innocent person is a difficult and resource-intensive task. The Constitution creates "a deliberate imbalance" in the burdens associated with prosecuting (rather than defending) a criminal case.³⁸⁵ A commitment to confrontation as a procedural right "precludes the counter-arguments that confrontation should be limited to ease the burden on the prosecution and that requiring confrontation in cases where it [will be] of little value will give defendants a windfall."³⁸⁶ Yet that is precisely what the Court has done in *Melendez-Diaz* and what the troubling confusion of *Williams* suggests may come in the future.

The Court's few pre-incorporation cases addressing the Confrontation Clause embraced the primacy of the prosecution's production imperative. To the extent the Court was faced with the costs of mandatory production, the Court was appropriately cost-blind. Then, as now, the Confrontation Clause promotes more than the truth-seeking function of criminal procedure. The Confrontation Clause promotes a system of criminal procedure that was carefully crafted to place the procedural burdens necessary to a conviction squarely upon the government's shoulders. The practical meaning of confrontation supports its function. The prosecution must produce even a child witness, if that witness offers testimony against a defendant.³⁸⁷

Viewed in a structural or architectural light, the confrontation guarantee means that a defendant has a constitutional right to rely on the presumption of innocence, and put the government to its full burden of producing its witnesses and evidence sufficient to support a conviction. In a modern context, this also means that the defendant has the right to relieve the government of its burden of production in exchange for some other benefit to the defendant. Inaction by the defendant results in the full range of constitutional protections: trial by jury, accompanied by the presumption of innocence and the right to "confront" the government's witnesses.³⁸⁸ Inaction by the government—a failure to produce witnesses or meet its burden of proof—results in acquittal. Only a vigilant commitment to a cost-indifferent Confrontation Clause can preserve this constitutional balance.

³⁸⁴ Douglass, *supra* note 24, at 227.

³⁸⁵ Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1307 (1977).

³⁸⁶ Samuel M. Duncan, "Qualified" Notice-and-Demand Statutes Unconstitutionally Eliminate a Criminal Defendant's Sixth Amendment Right to "True" Confrontation—Live Testimony from Witnesses, 34 HAMLINE L. REV. 51, 65 (2011).

³⁸⁷ See *California v. Green*, 399 U.S. 149 (1970).

³⁸⁸ U.S. CONST. amend. VI.