Terror on the High Seas

THE TRADE AND DEVELOPMENT IMPLICATIONS OF U.S. NATIONAL SECURITY MEASURES

Marjorie Florestal

I. INTRODUCTION

It really boggles my mind that there could be 40,000 nuclear weapons, or maybe 80,000, in the former Soviet Union, poorly controlled and poorly stored, and that the world isn't in a near state of hysteria about the danger.

—Howard Baker, U.S. Ambassador to Japan

Marjorie Florestal is an Assistant Professor of Law at the University of the Pacific, McGeorge School of Law (B.A., J.D. New York University). The author expresses deep appreciation to the colleagues and friends who sat through numerous discussions on what they once considered an obscure topic. In particular, heartfelt appreciation to Raj Bhala, Andrea Bjorklund, and Peggy McGuinness for insightful comments on an earlier draft of this work; Ruth Jones, Thom Main, Greg Pingree, Kojo Yelpaala, and participants in the McGeorge faculty works in progress helped the author shape these ideas, and the able intervention of some wonderful research assistants was critically important to the success of this work—particular thanks to Antonia Badway who shepherded this project through its very early stages. Lee Sheldon subsequently took up the mantle with assistance from Nicole Sargent and Lindsey Read. This article was supported by a McGeorge Summer Research Fund.

Testimony of Howard Baker before the Senate Foreign Relations Committee, quoted in Graham Allison, Fighting Terrorism – By Invitation – Could Worse Be Yet to Come?, ECONOMIST, Nov. 1, 2001, available at http://www.economist.com/world/na/displayStory.cfm?Story_ID=842483. In fact the world—and certainly the United States—is very concerned with the possible implications. U.N. Resolution 1540 “[a]ffirm[s] that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security” and goes on to prohibit states in aiding or abetting non-state actors from acquiring such weapons. S.C. Res. 1540 ¶ 1, U.N. Doc. S/RES/1540 (April 28, 2004) [hereinafter Resolution 1540]. The resolution also directs states to establish effective domestic controls to prevent the proliferation of nuclear weapons or weapons of mass destruction. Id. In addition, in 2003, President Bush announced the establishment of the Proliferation Security Initiative (“PSI”), which would seek international
Shipping containers are the new frontline in the War on Terror. Before September 11, 2001, the innocuous forty by eighty foot steel structures were seen as nothing more than floating boxes meant to transport goods from country of production to country of consumption. If Americans gave any thought to the millions of containers that find their way to U.S. shores each year, at best, they imagined that within their narrow, windowless confines were several tons of used clothes bound for the Dominican Republic, or perhaps toys imported from China. Few would have considered, even for a moment, the possibility that a shipping container could house an Al-Qaeda terrorist. But only one month after the September 11 attacks, Italian officials intercepted Rizik Amid Farid, an Egyptian national and reputed Al-Qaeda member, in a container bound for Canada. Farid carried with him a Canadian passport, along with several airport security passes, and an aircraft mechanic certificate that allowed him entry into sensitive areas in New York’s John F. Kennedy Airport, as well as Newark International, Los Angeles International and Chicago-O’Hare.


2 Containers come in lengths of ten, twenty, thirty, and forty feet long by eight feet wide, but the most common containers are the twenty- and forty-foot varieties. Construction-Guide.com, Matthew Bendert, Cargo Containers, http://www.construction-guide.com/cargo-containers.htm (last visited Oct. 31, 2006).


4 OECD REPORT, supra note 3, at 7. See also Felsted & Odell, supra note 3.
How could the enemy so easily infiltrate the most important link in the global trade supply chain? Experts believe without the intermodal shipping container—standard-sized steel boxes that can be hoisted onto a ship as a single unit and transported by sea, rail, and truck—globalization would not have been possible.

Before the invention of the shipping container, goods were individually loaded onto a ship piece by piece in “break bulk,” an expensive process that often took days to complete and subjected goods to theft or breakage. “Containerization” did for maritime shipping what Henry Ford’s assembly line did for the automobile manufacturing industry, largely automating the loading and unloading process, thus making the system faster, more efficient, and cost effective. But the very attributes of “the box”—its speed, efficiency, and above all its anonymity—are what allowed Farid

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5 The “enemy” has long infiltrated the maritime transportation industry. Since Captain Blackbeard roamed the Caribbean Sea striking fear in the hearts of sailors and merchants alike, maritime trade has had a long and colorful history of criminal activity. For a discussion of Blackbeard’s exploits, see generally JEAN DAY, BLACKBEARD, TERROR OF THE SEAS (1997). While current threats to the international trade supply chain go far beyond piracy, the profession is not dead. See generally INT’L CHAMBER OF COMMERCE, INT’L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, 2005 ANNUAL REPORT (2006). Most recently, passengers on a cruise ship bound for Mombassa, Kenya found themselves in the midst of an all-out pirate attack. Cruise Ship Repels Somali Pirates, BBC NEWS, INT’L VERSION, Nov. 5, 2005, http://news.bbc.co.uk/2/hi/africa/4409662.stm. In 2003, The International Maritime Bureau Piracy Reporting Centre, a non-governmental organization under the auspices of the International Chamber of Commerce, reported that 445 ships were attacked by pirates. See PIRACY AND ARMED ROBBERY AGAINST SHIPS, supra, at 5. The Malacca Strait and the area around Sumatra and Indonesia pose the greatest risks of piratical attacks. See Paul Dillon, Did Tsunamis Ruin Pirates of Sumatra?, GLOBE AND MAIL, Jan. 25, 2005, at A1. Of the 100,000 ships that sail through those waters carrying half of the world’s oil supplies and one-third of all its cargo, 149 were subjected to pirate attacks in 2003. See PIRACY AND ARMED ROBBERY AGAINST SHIPS, supra, at 5. Perhaps the only bright spot from the devastating 2004 Tsunami in Asia was the short-lived respite in pirate attacks in the region. See Dillon, supra, at A1.


to bypass security safeguards. Those same characteristics have made shipping containers the new frontline in the War on Terror.

Over 90% of world trade moves by container. But only about 2% of the nearly nine million containers entering the United States each year are ever inspected. For the most part, U.S. Customs and Border Protection ("Customs")—the agency charged with protecting the nation’s land and sea borders—has no firsthand knowledge of what is being transported in those containers. It must rely on the unverified information shippers provide in their cargo manifest documents. This largely self-regulated system has seen a number of security breaches: In 1999, the Interagency Commission on Crime and Security in U.S. Seaports reported that containers have been used to smuggle into the United States everything from drugs to illegal arms and munitions to undocumented workers. More recently, scientist Abdul Qadeer Khan, the father of Pakistan’s atomic bomb, confessed to smuggling nuclear equipment and technology to Libya, Iran and North Korea in a smuggling network that spanned fifteen years.

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13 The Interagency Commission on Crime and Security in U.S. Seaports concluded that drug smuggling was the most prevalent reported crime, with the twelve seaports participating in the study reporting that between 1996-1998, narcotics seized constituted 69% of total weight of cocaine, 55% of marijuana, and 12% of heroin. The smuggling of illegal aliens was the second-most prevalent problem, with the twelve participating seaports reporting 1187 stowaways and 247 individuals with fraudulent documents arriving aboard vessels between 1996 and 1999 alone. Finally, cargo theft—often conducted by organized crime figures—was identified as the third-most prevalent problem, accounting for between $6 billion and $12 billion of direct losses annually. S. Comm. on Commerce, Science and Transportation, Port and Maritime Security Act of 2001, S. 1214, 107th Cong. (2002); S. REP. No. 107-64, at 5 (2001) [hereinafter Port and Maritime Security Act].
years. Khan purportedly shipped all of his nuclear materials inside containers. The seemingly obvious solution to the security risk posed by shipping containers is to increase the number of inspections. Why not inspect 100% of the containers arriving in the United States? If Customs was to adopt such a policy, the supply chain would grind to a halt, trailing global economic catastrophe in its wake. In a “just-in-time” world—where businesses purchase and accept delivery of products as needed rather than buying them in advance and incurring expensive warehousing and other storage costs—the slightest delay in the delivery of goods leads to significant economic loss. In 2002, a


15 Christian Caryl, The Box Is King, NEWSWEEK INT’L, Apr. 10, 2006 (citing former U.S. State Department official David Asher), available at http://www.msnbc.msn.com/id/12112804/site/newsweek. Examples such as Farid and Khan are only the tip of the iceberg. In recent years, terrorist organizations have begun to use the maritime industry in novel and sophisticated ways to advance their objectives. A number of terrorist groups are reported to own maritime fleets that conduct both legitimate and shadowy activities to generate profits. The Liberation Tigers of Tamil Eelam (LTTE), a guerilla force at war with the Sri Lankan government since the 1980s, is perhaps the most engaged in the shipping industry, with a profitable fleet estimated at ten to twelve freighters. See OECD REPORT, supra note 3, at 14. Al Qaeda also owns or controls a fleet of fifteen cargo vessels. See John Mintz, 15 Freighters Believed to Be Linked to Al Qaeda, WASH. POST, Dec. 31, 2002, at A1.


17 In addition to the costs imposed by 100% inspection, some experts argue that it would amount to no more than a waste of time and effort. See Alane Kochems & James Jay Carafano, One Hundred Percent Cargo Scanning and Cargo Seals: Wasteful and Unproductive Proposals, The Heritage Foundation (May 5, 2006), http://www.heritage.org/Research/HomelandDefense/wm1064.cfm (noting that “[l]nspecting every container that is shipped to the U.S. makes no sense. Doing so would cost billions of dollars and drown authorities in useless information. Moreover, it is not clear why every container would require inspection. The ‘nuke-in-a-box’ scenarios deployed to justify such drastic measures are highly implausible.”). Despite that, CBP appears to be moving towards a 100% inspection model. As a result of the Security and Accountability for Every Port Act, signed into law October 13, 2006, CBP has directed additional resources to the nation’s busiest port—Los Angeles-Long Beach—to ensure that by January 2007, 100% of container traffic exiting the port by truck and rail will be screened for nuclear and radiological materials. Press Release, U.S. Customs and Border Protection, SAFE Ports LA/Long Beach Style: CBP Shows Off High-Tech Equipment to Detect Radiological Weapons (Nov. 2, 2006), http://www.cbp.gov/xp/cgov/newsroom/news_releases/112006/11022006.xml (statement of Commissioner W. Ralph Basham).

18 The U.S automobile industry is a case in point. After the borders reopened within just days of the September 11 attacks, the backlog of container traffic was so
ten-day strike by West Coast area dock workers was estimated to cost the U.S. economy as much as $1 billion a day, ultimately leading the President to invoke federal authority to order strikers back to work. And a mere two-day delay in shipments after the September 11 attacks nearly crippled the U.S. automobile industry. Moreover, merely increasing the number of inspections would not lead to greater security. Without sufficient information to target specific containers, Customs would be searching for the proverbial needle-in-the-haystack—at great economic cost.

But if September 11 revealed the tragic gaps in airport security, when those two airplanes hit the World Trade Center it also forced Customs officials to acknowledge holes in the maritime trade security infrastructure. If a shipping container could house an Al Qaeda operative, could it also hold a “dirty bomb”? Could a terrorist stow a nuclear device in a container, ship it to one of the nation’s busiest ports, and then detonate that device by remote control upon arrival? The “nuke-in-a-box” scenario, which would have seemed far-fetched before September 11, now drives U.S. container security policy. Just four months after the attacks, Customs adopted the controversial Container Security Initiative (“CSI”), describing it in this way:

severe that it caused enormous delays in auto-parts shipments from Canada and Mexico, which in turn jeopardized the industry’s financial position and threatened to lead to plant closings and massive layoffs. See Bonner Jan. 2002, supra note 3. As the war on terrorism heats up, U.S. companies are purchasing products further in advance of what is needed (just-in-case inventory). One expert estimates the increased inventory holding could add $50 to $80 billion in U.S. costs and wipe away approximately half of the productivity gains the U.S. has achieved in the past ten years. OECD REPORT, supra note 3, at 18 (citing Donald Bowser & David Closs, Supply Chain Sustainability and Cost in the New War Economy, TRAFFIC WORLD, Apr. 1, 2002).


21 Bonner Jan. 2002, supra note 3. Ironically, after the September 11 attacks, only a few critical ports were closed in the New York area and the general container trade was not significantly impacted. OECD REPORT, supra note 3, at 4.

22 A “dirty bomb” is one “made of nuclear materials wrapped around conventional explosives.” Felsted & Odell, supra note 3.
Imagine if a weapon of mass destruction sitting in a container within the sea cargo environment were detonated. This program helps keep that from happening.23

Designed to “extend the zone of security outward,” CSI’s central premise is that American seaports and borders must become the last line of defense and not the first.24 In short, by the time a nuclear device hidden in a shipping container laden with Chinese footwear finds its way into a U.S. port, it is already too late. CSI is meant to prevent just such an occurrence.25 Rather than waiting until the container arrives in the United States, CSI shifts security and screening activities to the border of the exporting country. With the host

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23 Slide Presentation, CSI, U.S. Customs and Border Protection, Response to Terrorism, [link to presentation] [hereinafter Slide Presentation].

24 Press Release, Dep’t of Homeland Sec., Remarks of Tom Ridge at the Port of Newark, New Jersey (June 12, 2003), available at [link to press release] [hereinafter Ridge].

25 CSI was not the only security measure to be adopted post-September 11. To protect America’s ports, ships and cargo, the United States adopted a “layered” security system featuring a separate but related latticework of over twenty-five laws, regulations and initiatives, including both voluntary and mandatory measures, and affecting both domestic and international participants. Dep’t of Homeland Sec., Secure Seas: Open Ports: Keeping Our Waters Safe, Secure and Open for Business 3-4 (June 21, 2004), available at [link to DHS report].

Figure 1: Layers of Port and Maritime Security – Post-September 11

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government’s permission, Customs agents are posted in the foreign port where they inspect “high risk” containers bound for the United States before they ever leave the foreign port.

In principle, CSI began as no more than a voluntary program by which Customs, through a series of bilateral agreements, obtains authorization from some of the United States’ top trading partners to deploy personnel abroad in order to prevent a catastrophe at home. But in practice, CSI is a “hidden revolution” that has radically altered the way international maritime trade is conducted, and it has transformed the world trade system. The effect of CSI has been to favor some trading partners over others, creating clear winners and losers. Opting to implement the program in three

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26 Bonner Jan. 2002, supra note 3. CSI teams are not legally authorized, however, to inspect containers on their own but must seek permission from the host government to inspect any shipments. If permission is not granted, the shipment is sent to the United States without inspection, although CSI teams are required to place a domestic hold on the shipment, so that it will be inspected upon arrival at its U.S. destination. A recent report by the Government Accountability Office has found that, in at least a few instances, some containers which CSI teams had labeled “high-risk” but which host government officials had not permitted to be inspected in-country were also not inspected upon arrival in the United States. See U.S. Gov’t Accountability Office, GAO-05-466T, Homeland Security: Key Cargo Security Programs Can Be Improved 4 (May 26, 2005), available at http://www.gao.gov/new.items/d05466t.pdf [hereinafter GAO Report, May 2005] (statement of Richard M. Stana, Director, Homeland Security and Justice Issues).

27 In a reciprocal program, CSI authorizes participating countries to post their own officials at U.S. borders. U.S. Gov’t Accountability Office, GAO-03-770, Container Security: Expansion of Key Customs Programs Will Require Greater Attention to Critical Success Factors 10 n.10 (July 2003), available at http://www.gao.gov/new.items/d03770.pdf [hereinafter GAO Report 2003]. Canada and Japan have posted officials to the United States. Id. While CSI’s critical innovation is that it moves inspection of high-risk containers to a much earlier point in the overall process, the program incorporates three additional components: (1) Establish security criteria to identify those containers that are considered “high-risk”; (2) Use non-intrusive equipment such as radiation, gamma, and x-rays to quickly pre-screen high-risk containers; and (3) Develop secure and “smart” devices that could detect any tampering with the container that might have occurred en route. Bonner Jan. 2002, supra note 3.

28 While CSI began as an initiative of Customs—taken under its own authority—on October 13, 2006, President Bush signed into law The Port Security Improvement Act of 2006, which codified the program. The move toward codification appeared to be an effort on the part of Congress to actively manage the port security issue. Jeff Berman, Bush Signs Off on New Port-Security Legislation, Logistics Mgmt., Oct. 1, 2006, available at http://www.logisticsmgmt.com/article/CA6382237.html?stt=000&pubdate=10%2F01%2F2006 (“As certain programs like . . . CSI go toward increasing cooperation between the government and shippers, we make them a product of statutory authority, as opposed to just a program of the administrations. . . . We put the imprimatur of the Congress on it . . . .”) (quoting Rep. Dan Lungren).

29 Caryl, supra note 15 (quoting Former Coast Guard Captain, Stephen Flynn).
stages, Customs initially excluded from CSI membership all but the top twenty “megaports”—those ports that send the largest volume of container traffic to the United States. In Phase II of the project, ports of political or strategic significance are permitted membership in CSI provided they meet certain criteria. Only in Phase III will ports that require

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30 Bonner 2003, supra note 11.

Currently, there are fifty-one operational CSI ports throughout the world:

Africa (1):
South Africa (1).

Asia (17):
Singapore (1), Japan (4), Hong Kong (1), South Korea (1), Malaysia (2), Thailand (1), UAE (1), China (4), Sri Lanka (1), Oman (1).

Europe (24):
The Netherlands (1), Germany (2), Belgium (2), France (2), Sweden (2), Italy (5), United Kingdom (5), Greece (1), Spain (3), Portugal (1).

The Americas (9):
Canada (3), Brazil (1), Argentina (1), Honduras (1), The Dominican Republic (1), Jamaica (1), The Bahamas (1).


32 To participate in CSI a candidate nation must commit to the following minimum standards:

The Customs Administration must be able to inspect cargo originating, transiting, exiting, or being transshipped through a country.

Non-intrusive inspectional (NII) equipment (including gamma or X-ray imaging capabilities) and traditional detection equipment must be available and utilized for conducting such inspections. The equipment is necessary in order to meet the objective of quickly screening containers without disrupting the flow of legitimate trade.

The seaport must have regular, direct, and substantial container traffic to ports in the United States.

Commit to establishing a risk management system to identify potentially high-risk containers, and automating that system. This system should
technical assistance and capacity building—those ports in developing countries—be considered for CSI membership.33

Membership in CSI comes with tangible benefits, the most significant of which is the ability to move through Customs with little delay. Given these benefits, exporters are more likely to source from countries with CSI-certified ports. In fact, that appears to be a deliberate design of the program; Customs admits that “[i]n the event of a terrorist attack, the CSI ports would have a competitive advantage. They would be rewarded for their foresight.”34

CSI’s “hidden revolution” has impacted the world, but the effect of the measure is perhaps more deeply felt at the margins. Given CSI’s staggered implementation schedule, along with the conditionalities imposed on membership, most developing countries become eligible to participate years after the program has been implemented in developed countries’ ports. Moreover, even if they are eligible, many of the poorer developing countries do not have the resources and technical know-how to implement CSI’s requirements (indeed, at least one developed country is finding implementation beyond its capacity).35 The developing country perspective is virtually

include a mechanism for validating threat assessments and targeting decisions and identifying best practices.

Commit to sharing critical data, intelligence, and risk management information with the United States Customs service in order to do collaborative targeting, and developing an automated mechanism for these exchanges.

Conduct a thorough port assessment to ascertain vulnerable links in a port’s infrastructure and commit to resolving those vulnerabilities.

Commit to maintaining integrity programs to prevent lapses in employee integrity and to identify and combat breaches in integrity.

CSI Fact Sheet, supra note 9, at 3.

33 While Phase III has not been officially announced, CBP has begun to incorporate some developing countries into the CSI program. As of September 2006, CSI was operational in ports in Kingston, Jamaica, Freeport, The Bahamas and Caucedo, the Dominican Republic. Ports in CSI, supra note 31. CSI also added ports in Buenos Aires, Argentina and Puerto Cortes, Honduras. Id.

34 CSI Fact Sheet, supra note 9, at 4.

35 Greece, a CSI participant, member of the European Union, and host of the 2004 Summer Olympics, did not have the requisite technology. In a departure from standard procedure, the United States supplied the necessary technology on loan. See GlobalSecurity.org, Greece Signs Container Security Agreement with U.S., June 25, 2004, available at http://www.globalsecurity.org/security/library/news/2004/06/sec-040625-usia01.htm [hereinafter Greece Signs Agreement]. CSI requires that participating members have the requisite non-intrusive inspectional equipment (NII), including gamma and x-rays, in place. See also CSI Fact Sheet, supra note 9, at 3.
ignored in the balance the United States has struck between protecting its borders and ensuring the efficacy of the maritime trade supply chain. For developing countries, exclusion from CSI creates a formidable non-tariff barrier to trade, further entrenchment of existing trading patterns that favor the rich, and greater marginalization of preference programs like the African Growth and Opportunity Act, all of which are likely to have severe consequences for their development agendas.

Beyond the impact on developing countries, CSI also poses a significant dilemma for the trading system. Terrorism is the single greatest threat facing the multilateral system in the twenty-first century, yet CSI’s unilateral approach bypasses the multilateral system altogether. By opting for a “go it alone” strategy—working with just a few like-minded states—rather than seeking to build a broad-based coalition of countries to address the problem, the United States is effectively undermining multilateralism.36 If the multilateral system is ineffective in dealing with the greatest challenge today, then its ultimate demise is inevitable. Given that the multilateral trading system has effectively advanced U.S. interests in a number of areas, undermining the system by choosing a unilateral approach ultimately jeopardizes U.S. interests.

In the face of terrorist threats, the idea that the United States would take measures to protect its ports and the maritime trade supply chain is not surprising, particularly given the importance of the system and the enormity of the crisis a successful attack would precipitate. The critical question, therefore, is not should the United States take action, but rather how should the United States implement such action so as to maximize protection of domestic security interests while minimizing potential economic harm to both the United States and its trading partners.

This article analyzes CSI and argues that the program’s discriminatory and unilateral approach will ultimately prove detrimental to developing countries, U.S. security interests, and the multilateral trading system as a whole. Part II evaluates CSI within the context of U.S. international obligations, arguing that CSI violates the non-discrimination

36 For a more detailed discussion of the unilateral/bilateral approach, see infra, section III.A.
requirement of GATT Article I, and it is not justified by the national security exception of GATT Article XXI because it fails to consider the impact on development. Part III concludes with a prescription for a more development-friendly measure that balances the need for domestic security with the development objectives of the trading system’s most vulnerable members.

II. A UNILATERAL APPROACH TO A MULTILATERAL PROBLEM: CSI AND THE WORLD TRADE ORGANIZATION

It is by now cliché to assert that September 11, 2001 has changed the face of U.S. society. Confronted with the single greatest terrorist catastrophe ever to hit American soil, the United States responded in ways that have had enduring effects both at home and abroad. Domestically, legislation like the USA Patriot Act reversed long-cherished notions of the law’s role in regulating government’s interaction with the accused. A body of law that once championed the rights of criminal defendants has now given way to notions of “enemy combatants” and indefinite detentions without charge or access to legal counsel. And internationally, the United States’

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37 Defining terrorism is a complex endeavor, and it has often been said that “one man’s terrorist is another man’s freedom fighter.” Boaz Ganor, Defining Terrorism: Is One Man’s Terrorist Another Man’s Freedom Fighter?, Institute for Counter-Terrorism (ICT), available at http://www.ictconference.org/var/119/17070-Def%20Terrorism%20by%20Dr.%20Boaz%20Ganor.pdf. U.S. law defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2) (2004 & Supp. 2006). But by that measure, the U.S. also labeled as “terrorism” efforts of the African National Congress (ANC) to liberate South Africa from the tyranny of a racist minority regime. From the Irish Republican Army to the Palestine Liberation Organization to the ANC, governments have long sought to delegitimize armed dissent, even in the face of popular support for the combatants or the “justness” of the liberation struggle. While coming to an accepted definition of terrorism is beyond the scope of this article, few would dispute that the perpetrators of September 11—targeting as they did unarmed, non-combatant civilians—engaged in acts of terrorism. For further discussion of the dangers inherent in defining terrorism, see Ganor, supra (noting that “[i]n the statement, ‘One man’s terrorist is another man’s freedom fighter,’ has become not only a cliché, but also one of the most difficult obstacles in coping with terrorism. . . . In the struggle against terrorism, the problem of definition is a crucial element in the attempt to coordinate international collaboration, based on the currently accepted rules of traditional warfare.”).


39 For a critique of U.S. domestic measures in the face of terrorism, see David D. Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 HARV.
posture shifted from one focused on building strong international institutions to combat common problems to one championing pre-empptive war and shying away from institution-building for fear that those same institutions would be turned against American interests. In short, in the aftermath of September 11, the U.S. worldview swung from multilateral cooperation to a go-it-alone strategy or at best a bilateral approach—a “coalition of the willing”—working with only a handful of like-minded states.

No aspect of U.S. foreign policy escaped this new approach. Even in the international trade arena, where multilateralism has brought decisive benefits to the American

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C.R.-C.L. L. Rev. 1, 2 (2003) (arguing that the United States has not learned the lessons of the McCarthy Era, and any decline in the traditional forms of repression are “more than offset” by the development of new ones).

40 The United States’ position regarding the creation of the International Criminal Court (“ICC”) presents perhaps the starkest example of America’s move away from multilateralism and institution-building. From President Woodrow Wilson’s League of Nations to the post-World War II efforts of Roosevelt, Truman and Eisenhower to create the United Nations and the multinational economic institutions like the World Bank and the International Monetary Fund, the United States had been at the forefront of international institution-building. But with respect to the ICC, one Bush Administration official noted baldly, “[It] is an organization whose precepts go against fundamental American notions of sovereignty, checks and balances, and national independence. It is an agreement that is harmful to the national interests of the United States, and harmful to our presence abroad.” John R. Bolton, Under Sec’y for Arms Control and Int’l Sec., The United States and the International Criminal Court, Remarks to the Federalist Society (Nov. 14, 2002), available at http://www.state.gov/t/usrm/15158.htm. Rather than championing the fledgling institution, the United States renounced its signature of the Rome Statute of the ICC and negotiated a number of bilateral agreements—so-called Article 98 agreements—whereby signatory states agreed not to submit U.S. citizens to the jurisdiction of the court. U.S. Communication to the United Nations (May 6, 2002), available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp. For a discussion of these Article 98 agreements and their legal impact, see Chet J. Tan, Jr, The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court, 19 Am. U. Int’l L. Rev. 1115 (2004).

Article 98 of the Rome Statute provides:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

economy, the United States has acted unilaterally to combat the scourge of terrorism.\footnote{In recent days, it appears the Bush Administration is re-thinking its “go it alone” strategy. See, e.g., David E. Sanger, A Bush Alarm: Shun Isolation, N.Y. TIMES, Mar. 13, 2006, at A1 (“The president who made pre-emption and going it alone the watchwords of his first term is quietly turning in a new direction, warning at every opportunity of the dangers of turning the nation inward and isolationist, and making the case for international engagement on issues from national security to global economics.”).} CSI is illustrative of that general trend. The following section explores whether CSI conforms to U.S. obligations under the World Trade Organization. It first examines CSI in the context of Article I of the General Agreement on Tariffs and Trade (“GATT”). Maintaining that CSI likely violates Article I, the section goes on to determine whether the national security exception of GATT Article XXI provides a viable excuse for the derogation.

A. Does CSI Violate Article I’s Most Favored Nation Obligation?

When the United States proposed creation of the International Trade Organization, the still-born precursor to the GATT, the very idea that the world trade community could be ordered in a non-discriminatory fashion—that members would be bound by the same obligations and entitled to the same benefits—was the height of controversy.\footnote{For a discussion of the negotiations on the ultimately unsuccessful International Trade Organization, see generally CLAIR WILCOX, A CHARTER FOR WORLD TRADE (1949).} The history of trading relations up until 1946 was one in which advantages were bestowed or compelled through special relationships, economic duress, and even war.\footnote{See generally KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 42 (1970) (stating that “[t]he United States had made elimination of all preferences a major principle of its policy for post-war organization of world trade”).} The bold declaration of non-discrimination inherent in GATT Article I was a call to reinvent the status quo ante.\footnote{To be sure, Article I does not eliminate all discrimination recognizing as it does the preferential relationships between some countries and their former colonies. See, e.g., General Agreement on Tariffs and Trade art. I, sec. II, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, available at http://www.wto.org/english/docs_e/legal_e/gatt47.pdf [hereinafter GATT] (allowing pre-existing preferences for inter alia, “two or more territories which . . . were connected by common sovereignty or relations of protection or suzerainty”). In addition, GATT-WTO law allows for a number of waivers of the MFN obligation, including a waiver to provide for “differential and more favourable treatment” to developing countries. Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, ¶ 1, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203-05 (1980). Other waivers}
preference-based trading relationships would give way to an all-for-one-and-one-for-all system of trading. Almost single-handedly, the United States persuaded those nations represented in the GATT negotiations to adopt non-discrimination—or “most favored nation” treatment—as the cornerstone obligation of the new, rules-based system of trading. While the United States was one of the earliest champions of non-discriminatory trading relationships, the

of the MFN obligation can be found in GATT Article XXIV’s sanction of regional trading agreements—free trade areas and customs unions—which necessarily discriminate in favor of their members; and of course, the general exceptions of the GATT embodied in Articles XX and XXI constitute waivers of the MFN obligation.

45 As early as 1941, before the end of World War II, Prime Minister Winston Churchill and President Franklin Roosevelt met secretly off the coast of Newfoundland to chart the course of the new world order. “There they jointly agreed that the principle of multilateralism would be the cornerstone of an emergent international economic system.” See Daniel Drache, The Short but Significant Life of the International Trade Organization: Lessons for Our Time 8 (Ctr. for Canadian Studies, Working Paper No. 62/00, 2000). British support for the ITO and the new order had been purchased by the large amount of economic support the Americans had pledged for post-war reconstruction. Id. Despite that, British support for the principle of MFN was lukewarm at best, as they sought American agreement that discrimination “of a defined and moderate degree in favour of a recognised political or geographical grouping of states would be permitted,” primarily to preserve “a moderate degree of Imperial Preference.” JOHN TOYE & RICHARD TOYE, THE U.N. AND GLOBAL POLITICAL ECONOMY: TRADE, FINANCE AND DEVELOPMENT 24 (2004) (internal quotation marks omitted).

For the other participants not beholden to American financing, the objections to MFN were particularly vociferous—and sometimes even amusing: The Russian delegation contended that MFN was “a device of the devil to ensnare and enslave small countries,” and the Latin American contingent eschewed MFN in favor of a preference-based system that self-consciously took into consideration the interests of developing countries:

[W]ealth and income . . . should be redistributed between the richer and the poor states. Upon the rich, obligations should be imposed; upon the poor, privileges should be conferred. The former should recognize it as their duty to export capital for the development of backward areas; the latter should not be expected . . . to insure the security of such capital, once it was obtained. The former should reduce barriers to imports; the latter should be left free to increase them. The former should sell manufactured goods below price ceilings; the latter should sell raw materials and food stuffs above price floors. Immediate requirements should be given precedence over long-run policies, development over reconstruction, and the interests of regionalism over world economy. Freedom of action, in the regulation of trade, must be preserved. The voluntary acceptance by all states, of equal obligations with respect to commercial policy must be rejected as an impairment of sovereignty and a means by which the strong would dominate the weak.

WILCOX, supra note 42, at 32.

46 See DAM, supra note 43, at 42 (noting that “[t]he United States had made elimination of all preferences a major principle of its policy for the post-war organization of world trade.”).

47 Over time, U.S. support for MFN has been somewhat mercurial. It has itself circumvented MFN’s precept, including its refusal in the 1950s to extend MFN
Container Security Initiative bestows on some WTO members certain advantages not afforded to others, thereby calling into question its conformity with Article I.48

Article I:1 of the GATT provides in relevant part:

[With respect to all rules and formalities in connection with importation and exportation, . . . any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.49]

The core obligation of Article I can be summed up in the idea that “membership has its privileges”; by virtue of its membership in the WTO, a country is entitled to receive the same treatment—or at least treatment “no less favorable”—for its imports as that received by other WTO members.50 The prototypical example of the operation of most favored nation (“MFN”) treatment involves tariffs. Imagine this scenario: The United States, France and South Africa, all of whom are WTO members, are engaged in a series of protracted (and undoubtedly heated) negotiations over the tariff duty rate to be
imposed on imports of bottled water into the United States. After much heated discussion, South Africa and the United States manage to come to an agreement that would lower the tariff from 10% to 5%. Negotiations between the French and the Americans break down. MFN treatment nonetheless requires the immediate and unconditional extension of the 5% duty rate to French bottled water imports. Moreover, even WTO members who chose not to participate in the negotiations at all—for example, Italy—would be entitled to the same benefits.51

The MFN obligation is not restricted to customs duties or charges. It also includes the obligation to refrain from discriminating among WTO members with respect to any advantage, including domestic regulations, such as CSI.52 To successfully establish a violation of MFN, three elements must be satisfied: First, there must be an “advantage” of the type covered by Article I; second, that advantage must not be accorded to the “like product” of all WTO Members; and third, that advantage must not be granted to members “immediately and unconditionally.”53

An “advantage” in the WTO context is broadly defined.54 The advantages conferred by CSI membership are both economic and political in scope. The greatest economic benefit to participants is the ability to move through the shipping process with little fear that containers will be stopped or delayed at the U.S. border. Once containers from CSI ports pass inspection in-country, they are usually not re-examined

52 GATT Article I:1 also provides:

[And with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, supra note 44. GATT Article III:2 refers to taxes while GATT Article III:4 refers to domestic regulations. Id.
54 Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, ¶ 206, WT/DS27/AB/R (Sept. 9, 1997) (noting that a “broad definition has been given to the term ‘advantage’ in Article I:1 of the GATT 1994”).
upon entry to a U.S. port.55 In a “just-in-time” world, the ability to navigate the trade supply chain with a minimum of delay is a significant competitive advantage—even a single day’s delay at Customs adds almost 1% to the cost of goods.56 CSI ports therefore immediately obtain “preferred” status, and countries that do not have CSI-certified ports are at a competitive disadvantage given the likelihood that their shipments will undergo more complex examinations and will thus be cleared more slowly.

Beyond the immediate fast-track benefit, CSI membership also serves as an “insurance policy.” Should the unimaginable happen and a terrorist attack is successfully implemented against the maritime trade supply chain, CSI ports would likely not be shut down at all, whereas shipments from all other ports would not be allowed entry into the United States.57 Even if the maritime transportation sector had to be shut down completely, CSI-certified ports would begin handling containerized cargo far sooner than other ports.58 The implications for the economies of CSI and non-CSI-certified countries are enormous.59 Ultimately, CSI-certification gives a strategic business advantage to some ports over others; all other things being equal, shippers who wish to continue exporting to the United States are induced to ship from CSI ports.

In addition to the economic benefits, CSI membership also confers a significant political advantage to participants. While a “voluntary” program, CSI is nevertheless a cornerstone of the U.S. War on Terror. Few countries, even Germany and France,60 are willing to be seen as obstructionist or non-

55 Ridge, supra note 24.
58 CSI Fact Sheet 6, supra note 9, at 2-3.
59 After the French tanker Limburg was attacked in Yemen, underwriters immediately tripled premiums for vessels calling on Yemeni ports (as much as $300,000 per vessel). Some lines cut Yemen altogether from their schedules and switched to neighboring ports, resulting in massive layoffs at Yemeni terminals (as many as 3000 people) and losses totaling $15 million per month. Despite the government’s efforts to retain business by putting in place a loss guarantee program, shippers fled Yemen. OECD REPORT, supra note 3, at 17.
60 Both German and French ports signed bilateral CSI agreements with the United States. Initially, their cooperation appeared costly when the European Union Commission decided to bring infringement action against all EU member states that
cooperative. Along with the big stick, however, comes a tantalizing carrot: CSI members are seen as “partners” in the War on Terror, and as such are entitled to special treatment. For example, the United States loaned Greece the equipment necessary to implement CSI despite the fact that CSI requires a potential member to own the requisite equipment before it can be considered for membership. And certainly Pakistan is a poster child for the tangible benefits that accrue to cooperative partners in the War on Terror.

Membership in CSI thus brings substantial benefits. For those left out of the system, the costs of being on the frontlines of the War on Terror without a shield are considerable. While CSI membership is no protection against economic losses stemming from an actual terrorist attack, its benefit on the front-end of the transaction—as a perceived “insurance policy”—is enormous. Exporters are more likely to utilize CSI-certified ports based on their assumption that those

had signed CSI agreements, alleging they had no such authority. The Commission subsequently dropped the proceedings after entering into an EU-wide CSI agreement with the United States. Container Security, European Union Factsheet, available at http://ec.europa.eu/comm/external_relations/us/sum06_03/cs.pdf [hereinafter EU Factsheet].

Evidence of the inability of most countries to “just say no” to U.S. antiterrorism initiatives can be found in how quickly CSI was implemented. Former Customs Commissioner Robert Bonner noted that while placing U.S. officials in a foreign country usually would have been a slow and difficult process, CSI moved from concept to implementation at “lightening [sic] speed.” Bonner Aug. 2002, supra note 31. Unfortunately, the speed with which CSI was rushed in place did not allow for proper evaluation. The GAO noted that Customs implemented the program without even having a way to measure whether they were successful in that respect—whether CSI gave them any greater capabilities than they had before. GAO REPORT 2003, supra note 27, at 26.

See Greece Signs Agreement, supra note 35.

After securing Pakistan’s cooperation in the War on Terror, the United States adopted a number of provisions to reward the country for its efforts. See, e.g., Pakistan Emergency Economic Development and Trade Support Act, S. 1675, 107th Cong. § 2 (2001) (authorizing the President to reduce or suspend duties on Pakistani textiles imports if he determines, among other things, that Pakistan is incurring “substantial economic harm” as a direct consequence of its assistance in the War on Terror). See also Pub. L. No. 107-57, 115 Stat. 403 (authorizing the President to waive with respect to Pakistan U.S. legal prohibitions on providing direct assistance to a country whose “duly elected head of government was deposed by decree or military coup”).

Yemen’s experience after a devastating terrorist attack is illustrative. See supra note 59 and sources cited therein.

Indeed, globalization means countries suffer economically even when they have not faced attack. Even countries that are not directly involved in a terrorist event may expect their incomes to decline; one post-September 11 study found that decline could amount to $75 billion per year as a result of a 1% ad valorem increase in “frictional” (i.e., transactional) trade costs. Global Economic Prospects, supra note 56, at 188.
ports are less likely to face a terrorist attack in the first place, and in any case they would be first in line when the supply chain reopens after an attack. This provides a considerable competitive advantage to CSI member countries. Recognizing the distortions to trade CSI engenders, the European Union (“EU”) Commission brought infringement proceedings against eight member states that signed individual agreements with the United States. In the Commission’s view, CSI jeopardizes the common commercial policy by distorting competitive conditions among EU ports. In short, the EU Commission considered CSI to create unhealthy competition among EU ports by causing shippers to divert trade from non-CSI ports to ports within the program. Ultimately, to avoid the trade-distorting impact of CSI, the Commission signed its own CSI agreement with the United States, which made all EU ports eligible for membership.

The CSI advantage is not granted to the “like product” of all WTO member countries. Defining “like product” under GATT Article I is a challenging exercise. Perhaps the

66 EU Factsheet, supra note 60.

67 Id. The top eight European ports handle 85% of Europe’s containerized cargo bound for the United States. Id.


69 The U.S.-E.U. Agreement provides “[p]articipation of Community ports in the Container Security Initiative is necessary to avoid significant barriers to large volumes of transatlantic trade with the United States resulting from customs control measure in US ports.” Agreement between the European Community and the United States of America on Intensifying and Broadening the Agreement of 28 May 1997 on Customs Co-operation and Mutual Assistance in Custom Matters to Include Co-operation on Container Security and Related Matters, Explanatory Mem. para. 2, Jan. 22, 2004 [hereinafter U.S.-E.U. Agreement]. The Annex provides that “[r]ecognizing that expansion of CSI should occur as quickly as possible for all ports within the European Community where exchange of sea-container traffic with the United States of America is more than de minimis and where certain minimum requirements are met and where adequate inspection technology exists.” Id.

70 It is perhaps not surprising given the inherent difficulty in determining with specificity, for example, whether dry-roasted Costa Rican coffee is “like” un-roasted Venezuelan coffee. Moreover, it is in the “like product” analysis that countries so inclined find the best opportunity for hidden discrimination. For example, imagine that the United States wishes to disfavor Venezuela for its political and economic policies and wants to favor Costa Rica as a counterpoint dominant actor in the region. Some Customs official could be asked to analyze the imports of the respective countries and imagine that it was discovered that Venezuela shipped dry roasted coffee beans and Costa Rican exported un-roasted. The U.S. might well charge a higher tariff on
simplest way to conceive of it—to borrow an idea from one trade scholar—is to think of “likeness” as a continuum, with “identical” merchandise at one end of the spectrum and “different” merchandise at the other end; in between would be products that are “similar.”71 The easiest analysis, not surprisingly, is at the edges: Different products are not entitled to MFN treatment, while identical products are. Thus, the United States may assess one duty rate on unprocessed cocoa imports from the Ivory Coast and another on chocolate bars from Belgium because those products are “different.” Imports of raw cocoa from both countries are “identical” and would thus be subject to the same duty. The difficulty lies with “similar” products. Are imports of sweetened, ground and processed cocoa from Belgium like ground cocoa from the Ivory Coast? The short answer is that it depends.72

Much of the wealth of GATT-WTO “like product” jurisprudence is irrelevant in evaluating CSI’s conformity with Article I, however. CSI does not discriminate on a product-specific but on a country-specific basis. In other words, in treating shipments from CSI ports better than shipments from non-CSI ports, CSI discriminates based on the origin of the product rather than on the product itself. Thus, the question becomes whether origin-based discrimination is permissible under GATT Article I. The seminal case on this point is Belgian Family Allowances.73

In 1951, Belgium found itself brought before a GATT dispute settlement panel. Denmark and Norway objected to a Belgian-imposed tax on imports purchased by local government dry roasted and argue that the products are not “like” because they are not classified under the same tariff heading, for example. See Report of the Panel, Spain – Tariff Treatment of Unroasted Coffee, L/5135 (Apr. 27, 1981), GATT B.I.S.D. (28th Supp.) (1981) [hereinafter Spain Tariff]. See also Report of the Panel, Treatment by Germany of Imports of Sardines, ¶ 12, G/26 (Oct. 30, 1952), GATT B.I.S.D. (1st Supp.) at 57 (1953) [hereinafter German Sardines].

71 HALA, supra note 51, at 7.

72 In GATT jurisprudence, a determination of “likeness” is made after taking into account such factors as physical characteristics and consumer preference. See, e.g., Spain Tariff, supra note 70. See also German Sardines, supra note 70. For a discussion of the policy dimensions of Article I’s like product requirement, see Robert E. Hudec, “Like Product”: The Differences in Meaning in GATT Articles I and III, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW 101-23 (Thomas Cottier & Petros Mavroidis, eds., 2000), reproduced at http://www.worldtradelaw.net/articles/hudeclikeproduct.pdf.

bodies. The purpose of the tax was to provide a broad revenue base to fund Belgium’s family allowance program (a government social welfare benefit program). Rather than imposing the tax on all imports, Belgium exempted from the program products from countries that had a family allowance regime similar to its own. Denmark and Norway had family allowance programs in place and sought such an exemption, but were denied. While both countries maintained that the discrimination lay only in Belgium’s failure to exempt them from application of the tax, the panel appeared to go one step further, concluding that Belgium’s legislation was “based on a concept which was difficult to reconcile with the spirit of the General Agreement.” What did the “spirit” of GATT require?

\[\text{The Belgian legislation would have to be amended insofar as it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions.}\]

Although the panel did not arrive at a definitive ruling, it concluded the Belgian legislation was inconsistent with the provisions of Article I. Apparently, neither the panel nor GATT members found this to be a conceptually difficult case.

John H. Jackson, one of the leading scholars in the field, characterized Belgian Family Allowances as follows:

The case can be interpreted to support the proposition that although treatment can differ if the characteristics of goods themselves are different, differences in treatment of imports cannot be based on differences in characteristics of the exporting country that do not result in differences in the goods themselves.

Applying the panel’s determination in Belgian Family Allowances to an evaluation of CSI, one is led to the ultimate conclusion that the difference in treatment of developing country imports is not based on any inherent differences in the products themselves. Developing countries are not being

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75 Belgian Family, supra note 73, at 60.

76 The entire process from referral to the panel to the adoption of the panel report took nine days. The panel’s report was adopted with little discussion. See Charnovitz, supra note 74.

77 JACKSON, supra note 47, at 163.
treated differently because their exports of bananas, lumber or textiles are inherently more of a security risk. Rather, they face different treatment because Customs has made the determination initially to limit CSI membership to those countries of strategic and economic significance to the United States. Thus, the differing treatment afforded CSI and nonCSI goods has little to do with differences in the goods being exported—i.e., Customs has not made the determination (except perhaps implicitly) that goods from non-CSI members are inherently more of a security risk than goods from CSI members.78 Goods from CSI and non-CSI countries face different treatment merely because Customs constructed an implementation schedule that was administratively convenient.

The CSI advantage is not accorded “immediately and unconditionally” to the like product of all other WTO members.79 Not every interested country is permitted to join CSI. In the first phase of implementation, membership was restricted to the top twenty megaports, which send the largest volume of container traffic to the United States. Phase II of the project targets ports that are of political or strategic significance.80 These ports are asked to join CSI only if they satisfy certain minimum standards, the most important of which include having “regular, direct and substantial” container traffic to the United States and having the requisite non-intrusive inspectional equipment available.81 Merely satisfying some of the criteria for membership does not, however, guarantee inclusion in CSI. For example, Mexico apparently sought membership only to be denied because it did not have sufficient container traffic to the United States.82 Similarly, Jamaica’s port security system appeared to meet CSI

78 There is an argument to be made that goods of developing countries are not “like products” because they are not subjected to the same domestic security controls as are goods from CSI members. In short, the assumption is that poorer countries devote less resources to port, container and customs’ security measures. That is, of course, merely an assumption. Some developing countries have excellent controls. See, e.g., Arlene Martin-Wilkins, Jamaica’s Port Security Procedures to Be Used as World Benchmark, JAMAICA OBSERVER, June 21, 2005, available at http://www.jamaicabobserver.com/news/html/20050620t220000-0500_82811_obs_jamaica_s_port_security_procedures_to_be_used_as_world_benchmark.asp.
79 Canada-Autos, supra note 50.
80 CSI Fact Sheet, supra note 9.
81 Id.
requirements, but it was not admitted into CSI until September 2006, several years after the program became operational.83 Developing countries for the most part are excluded from CSI in the first two phases of implementation. While a tiny minority of ports in developing countries participate in CSI—Sri Lanka, Malaysia, and South Africa to name a few—only in Phase III are significant numbers of developing country ports considered for CSI membership.84

Thus, CSI would appear to violate Article I because it confers benefits on some members that are not immediately and unconditionally made available to all WTO members. It would be difficult to forget that CSI was implemented in the face of a pervasive fear of terrorist attack on the most important—and perhaps most vulnerable—link in the trade supply chain. Having concluded that CSI violates a central tenet of the WTO Agreement, it does not automatically follow that the multilateral system is ill-equipped to deal with terrorism. The GATT was crafted in a time of war, and its authors and signatories were well aware of the need for trade rules to give way to security measures. It would have been short-sighted indeed if the GATT had not contemplated and made provisions for the situation where a member would have to act to protect its national security interests, even if that meant violating the provisions of a trade agreement.

The next section maintains that the WTO Agreement does enable countries to deal with the single greatest threat facing the world in the twenty-first century. GATT Article XXI recognizes and explicitly authorizes members to take action that would otherwise be inconsistent with their WTO obligations if such actions are taken to protect their “essential security interests.” Implicit in Article XXI, however, is the recognition of a “development dimension.” What does this development dimension entail? Can CSI be justified in light of it?


84 It is not clear when Phase III implementation will begin. While Customs has recently admitted a handful of developing countries in CSI, it has not officially announced commencement of Phase III. See Ports in CSI, supra note 31.
B. Justifying CSI Under the National Security Exception

The Charter is long and complicated and difficult. . . . But we must not lose sight, in all of its detail, of the deeper problems that underlie these mysteries. For the questions with which the Charter is really concerned are whether there is to be economic peace or economic war, whether nations are to be drawn together or torn apart, whether men are to have work or to be idle, whether their families are to eat or go hungry, whether their children are to face the future with confidence or with fear.

—Honorable William L. Clayton

No provision of international law or the WTO Agreement itself prevents a country from taking measures necessary to protect its own security interests. National security is the “Achilles’ heel of international law.” In any international agreement, “the issue of national security gives rise to some sort of loophole . . . [allowing] any nation-state to protect itself . . . by employing otherwise unavailable means.”

From its inception, GATT recognized the “Achilles’ heel” of national security would require trade rules to be subordinated to national security considerations. Article XXI was thus adopted as a general exception allowing members to derogate from any and all of their obligations in specific instances of national security. But the text of Article XXI has led to a great deal of controversy. While it unequivocally states that “[n]othing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests,” the language of Article XXI nevertheless presents some significant interpretive difficulties. The following section addresses one of the key questions in this area: Is Article XXI “self-judging,” thus insulating national security measures from any possibility of review from the WTO’s dispute settlement

85 W. L. Clayton, Foreword to Wilcox, supra note 42, at ix. William Lockhart Clayton was head of the U.S. delegation at the historic negotiations under the auspices of the United Nations Conference on Trade and Employment, which culminated in the signing of ITO Charter. The ITO never came into existence, primarily because Congress refused to ratify it based on concerns from the business sector that developing countries had too much leeway to expropriate foreign property. See Drache, supra note 45, at 28.


87 Id.

88 GATT, supra note 44, art. XXI.
mechanism? After reviewing relevant authority on the question, the section then moves on to argue that even accepting the self-judging argument, Article XXI contains a two-fold requirement that must be satisfied if a measure is to be consistent with its terms: proportionality and development. In other words, Article XXI limits members to taking only those measures that are “necessary”; this necessity obligation can only be satisfied if the measure taken is proportionate to the harm being addressed and does not unduly burden the development needs of poorer developing countries.

The question of how Article XXI is to be interpreted is not merely a technical one. In a post-September 11 world where the War on Terror promises to be a long one, and where the enemy has no home or well defined borders, it is of critical importance to have a clear understanding of what is permissible under the national security exception. Otherwise, the security exception promises to unravel the careful balance of rights and obligations constructed by the WTO Agreement.

1. On the Self-Judging Nature of Article XXI

In 1947, only a few short years after the restoration of peace in Europe, and with the Continent in economic ruin, fifty-four countries ushered in a new era of trade relations with the signing of the Final Act of the Havana Charter for the International Trade Organization (“ITO”). The unfettered exercise of sovereign rights had only led to a political meltdown, and in this new era, notions of sovereignty were to be tempered with economic cooperation.

But with the memory of World War II fresh in the delegates’ minds, the need to balance the economic development promised by greater cooperation with national security considerations was paramount; the clash of these somewhat competing interests caused negotiators not inconsiderable difficulties. As one U.S. delegate noted:

We gave a good deal of thought to the question of the security exception.... We recognized that there was a great danger of

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89 Hon. James G. Fulton & Hon. Jacob K. Javits, Report for the S. Comm. on Foreign Affairs, 80th Cong., The Int’l Trade Org., An Appraisal of the Havana Charter in Relation to United States Foreign Policy, with a Definitive Study of Its Provisions 8 (Comm. Print 1948). Argentina and Poland were the two lone dissenting governments who participated in the negotiations but failed to sign on to the agreement. Id.

90 Wilcox, supra note 42, at 36.
having too wide an exception . . . because that would permit anything under the sun . . . . [T]here must be some latitude here for security measures. It is really a question of balance.91

The balance struck during the ITO negotiations ultimately led to adoption of the security exception in GATT Article XXI, which provides:

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations;

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.92

The greatest cause of debate and consternation, and the section most invoked by far, has been section (b) (iii). The question surrounding Article XXI (b) (iii) has been exactly who is allowed to interpret its terms? Despite the wealth of competing arguments, a review of relevant authority—GATT practice and GATT/WTO jurisprudence—fails to yield a definitive answer.

a. Reviewing Relevant Authority

Despite the apparent open-ended language of Article XXI—or perhaps because of it—the national security exception

92 GATT, supra note 88, art. XXI (emphasis added).
has rarely been invoked by WTO members. 93 This surprising restraint evidences WTO members' recognition that with

93 No Article XXI cases have gone to dispute settlement under the WTO system. The European Union did raise a claim against the United States’ Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C §§ 6021-6091 (better known as the Helms-Burton Act), which penalized foreign companies “trafficking” in property formerly owned by U.S. citizens that had been expropriated by the Cuban government during the revolution. Given the sensitive nature of U.S.-Cuban relations in the WTO, the United States has refused all dealings with the communist government. Should the matter have proceeded to dispute settlement, the United States undoubtedly would have invoked Article XXI. The parties ultimately reached a negotiated solution without resort to the WTO’s formal dispute mechanism. Resolution on the Negotiations Between the Commission and the U.S. Administration on the Helms-Burton Act, June 10, 1997, 1997 OJ (C 304) 116.

Under the old GATT system, only a handful of matters concerning Article XXI were ever notified or addressed by the Contracting Parties:

1. **United States–Czechoslovakia (1949):** Czechoslovakia sought GATT action on a U.S. export control licensing scheme, which prevented the export of certain goods to Czechoslovakia. The Czech government brought its complaint under GATT Articles I and XXI, but its claim was ultimately rejected by the GATT panel. GATT ANALYTICAL INDEX, supra note 91, at 602.

2. **Ghana–Portugal (1961):** Ghana imposed a total ban on trade with Portugal at the latter’s accession to the GATT claiming Portugal’s support of the war in Angola constituted a potential threat to the peace of the African continent. Any action which might pressure the Portuguese Government into lessening this danger was justified in the essential security interest of Ghana. GATT ANALYTICAL INDEX, supra note 91, at 600.

3. **United States–Cuba (1962):** The United States imposed an embargo on trade with Cuba a few years after the Cuban Revolution and justified the measure as a matter of national security. GATT ANALYTICAL INDEX, supra note 91, at 605.

4. **Sweden (global measure) (1975):** Sweden imposed quota restrictions on certain footwear imported from any GATT contracting party claiming essentially that decreasing domestic production of footwear threatened its security by calling into question Sweden’s ability to outfit its military:

   [The] decrease in domestic production [of footwear] has become a critical threat to the emergency planning of Sweden’s economic defence . . . necessitat[ing] the maintenance of a minimum domestic production capacity in vital industries . . . to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations.

   GATT ANALYTICAL INDEX, supra note 91, at 603. The GATT Contracting Parties, we are told, “expressed doubts as to the justification of these measures under the General Agreement.” Id.

5. **European Community–Argentina (1982):** The EC as well as its member states, along with Canada and Australia, suspended imports from Argentina in retaliation for Argentinean armed intervention in the Falkland/Malvinas Islands. Argentina was ultimately successful in getting the GATT Contracting Parties to issue an interpretation of Article XXI, which provided in part that “the contracting parties undertake, individually and jointly: . . . to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement.” GATT ANALYTICAL INDEX, supra note 91, at 603 (alteration in original). The
liberal use, Article XXI could easily evolve into “the exception that swallowed GATT.”94 But its limited explicit use in practice has not prevented controversy from swirling around Article XXI almost from its adoption.

As the dominant users of Article XXI, developed countries take a decidedly “hands off” approach to the interpretation of the national security exception.95 As early as 1949, in the first dispute involving Article XXI, the United States insisted that the security exception was “a virtually unlimited escape clause, controlled only by the general policy notion that the GATT system should not be undermined


6. United States–Nicaragua (1985): The United States notified the GATT contracting parties of its imposition of a trade embargo on Nicaraguan exports several years after the populist Sandinista National Liberation Front (Frente Sandinista de Liberación or FSLN) took control of the government. GATT ANALYTICAL INDEX, supra note 91, at 603. For further discussion of the dispute, see text and footnotes supra section II.B.

7. European Communities–Yugoslavia (1992): The EC and its member states revoked Yugoslavia’s preferential access to the EC market—citing Article XXI—in an effort to force a peaceful solution to the Yugoslavian conflict. Yugoslavia protested, arguing that its situation was “a specific one [that] does not correspond to the . . . meaning of Article XXI(b) and (c).” GATT ANALYTICAL INDEX, supra note 91, at 604. The GATT Council established a dispute panel to examine the EC’s action, pursuant to a request from Yugoslavia. Id. But with the dissolution of Socialist Federal Republic of Yugoslavia, the Article XXI dispute was superseded by events, and the matter quickly devolved into a discussion of whether the newly reconstituted Federal Republic of Yugoslavia (consisting of Serbia and Montenegro) could participate in GATT as the successor nation. Id. at 604-05.

These seven matters listed above will be referred to hereinafter as “Article XXI Measures in GATT Practice.”

94 RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 157 (1998). No Article XXI disputes have been adjudicated under the WTO system, and only a handful of such measures were ever notified to the GATT. See supra note 93. But the controversy surrounding Article XXI meant that GATT members often chose not to notify their security measures to the GATT but rather to implicitly rely on the security exception. See generally Wesley Cann, Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilaterism, 26 YALE J. INT’L L. 413 (2001). In 1982, at the instigation of Argentina, the GATT Contracting Parties adopted provisions requiring notification of such measures. Decision Concerning Article XXI of the General Agreement, supra note 93, at 23.

95 But see supra note 93 (Ghana’s invocation of Article XXI to justify a total ban on Portuguese goods).
through the use of the security exception.” 96 When GATT members subsequently discussed the United Kingdom’s trade embargo on Argentina in retaliation for its armed intervention in the Falkland Islands, the United States again declared that “the General Agreement left to each contracting party the judgment as to what it considered to be necessary to protect its security interests. The [Contracting Parties] had no power to question that judgment.” 97 The UK echoed that view, maintaining that “[t]he exercise of these rights constituted a general exception to the GATT and ‘required neither notification, justification, nor approval.’” 98

By and large, developing countries reject the notion of a self-judged security exception. 99 There have been no WTO disputes involving Article XXI and little in the way of GATT jurisprudence to resolve the matter. 100 While the preponderance of scholarly writing has rejected the notion that Article XXI is self-judging, some scholars disagree. 101 Regardless of the merits of either position, a definitive view on the interpretation of Article XXI, at least with respect to its self-judging character, is beyond the scope of this article. Rather, this article seeks to make a more fundamental point: No matter who gets to interpret it, the WTO Agreement contains requirements on how the national security exception should be applied. The question of whether Article XXI is self-

96 Hahn, supra note 48, at 569. The dispute was brought by Czechoslovakia against the United States for the imposition of a discriminatory export licensing scheme that prohibited exportation of certain key products to the then Communist state.
97 *Quoted in BHALA & KENNEDY, supra note 94, at 157.*
98 Hahn, supra note 48, at 574.
99 *But see Ghana’s invocation of Article XXI to justify its trade embargo against Portugal, supra note 93. Ghana specifically argued that “under this Article each contracting party was the sole judge of what was necessary in its essential security interest.” GATT ANALYTICAL INDEX, supra note 91, at 600.*
100 *See supra note 93. In Military and Paramilitary Activities In and Against Nicaragua, The International Court of Justice had an opportunity to examine the U.S. trade embargo against Nicaragua. In doing so, it compared the language found in GATT Article XXI with the language contained in article XXI of the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua. Ultimately, the ICJ concluded:*

*After examining the available material, particularly the Executive Order of President Reagan of 1 May 1985, the Court finds that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, and the general trade embargo of 1 May 1985, cannot be justified as necessary to protect the essential security interests of the United States.*

101 *See generally Cann, supra note 94.*
judging reduces the focus to only one portion—the “it” element—of the Article XXI analysis (“Nothing in this Agreement shall be construed . . . to prevent any contracting party from taking any action which it considers necessary . . . .”). Left out of the analysis is an equally compelling question: How should the term “necessary” be defined? Addressing that question, however, requires an initial examination of the critical assumption underlying the self-judging debate—the belief that without an enforcement mechanism, no requirements or obligations can exist.

b. A “Right Without a Remedy?”

Implicit in the self-judging/non-self-judging debate is the assumption that without recourse to a coercive dispute settlement mechanism, a country against whom an Article XXI measure has been imposed has no hope of influencing the way in which the country taking such action chooses to impose it. In short, both proponents and opponents subscribe to the maxim of *ubi jus ibi remedium*—there is no right without a remedy.102

International legal scholarship is rich in theoretical and empirical analyses of state compliance with international obligations and norms in the absence of enforcement mechanisms. What emerges is an understanding that states uphold their obligations for reasons other than mere coercion.103 Enforcement in international law is always a challenge given the continuing preeminence of sovereignty. But even in the absence of enforcement, international law imposes on states a duty to carry out their treaty obligations in good faith104—

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102 WILLIAM BLACKSTONE, 3 COMMENTARIES *23.
103 See, e.g., Omar M. Dajani, *Shadow or Shade: The Roles of International Law in Palestinian-Israeli Peace Talks*, 32 YALE J. INT’L L. ___ (forthcoming 2007; manuscript on file with author) (maintaining that “international law may exert influence not only as a result of the shadow it casts over bargaining, but also by virtue of the shade it offers—that is, its perceived value, independent of the threat of enforcement, as an objective and legitimate standard for resolving disputed issues”). See also Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT’L L.J. 158, 163-64 (2000) (noting that “[n]either GATT nor the WTO possess centralized enforcement power, the upshot being that both have relied on the complainant itself to implement any retaliatory measures that may be authorized. . . . [T]his threat [of such enforcement alone] is obviously insufficient to induce [concessions] in the majority of cases . . . .”).
104 The doctrine of *pacta sunt servanda* holds that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, *available*
indeed, states must refrain from acts that would defeat the object and purpose of the treaty even before it is ratified.\textsuperscript{105} Thus, under the WTO’s “single undertaking,”\textsuperscript{106} members are bound by all WTO rules not because there is some coercive force compelling compliance but because they undertook those obligations in good faith.

There is much to suggest that this good faith presumption is well founded. The trillions of dollars of world trade that takes place every day, 98\% of which is covered by the WTO Agreement, has led to only a handful of disputes since 1995.\textsuperscript{107} Many of those have been resolved at the consultations stage between members, never giving rise to an actual dispute.\textsuperscript{108} Thus, most of the time most members act in accordance with most of their WTO obligations. And in instances where at least one side has perceived that a member’s action was inconsistent with its obligations, the disputing parties were able to come to a negotiated settlement. These accommodations and negotiated agreements are possible because states find some benefit in complying with their

\begin{flushright}
\textit{at} \url{http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf} [hereinafter Vienna Convention].
\end{flushright}

\textsuperscript{105} Vienna Convention, supra note 104, art. 18.

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

\textit{Id.}

\textsuperscript{106} The WTO noted: “It is now well established that the WTO Agreement is a ‘single undertaking’ and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously unless there is a formal ‘conflict’ between them.” Report of the Panel, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, ¶ 7.38, WT/DS98/R (June 21, 1999).

\textsuperscript{107} Dispute Settlement Body Overview, Update of WTO Dispute Settlement Cases, WT/DS/OV/26 (Mar. 1, 2006). The WTO has been notified to date of 335 requests for consultations; 110 of these cases have adopted the Appellate Body, Panel, or Panel Compliance Reports. \textit{Id.}

\textsuperscript{108} Of the 335 requests for consultations, fifty resulted in “Mutually Agreed Solutions,” twenty-nine became “Inactive” (terminated, panel request withdrawn, etc.), sixteen resulted in “Arbitrations on Level of Suspension of Concessions” (pursuant to arbitration proceedings under Articles 22.6 and 22.7 of the DSU and Article 4.11 of the Subsidies agreement), and fifteen were given “WTO Authorizations of Suspension of Concessions” (pursuant to Article 22.7 of the DSU and 4.10 of the Subsidies Agreement). \textit{Id.}
obligations (or not breaching them in the first instance) that has little to do with a dispute settlement mechanism.

Professor Hudec’s famous study, though now somewhat dated, bears out this conclusion at least in part. Evaluating state compliance with GATT panel reports, Hudec found that at a time when few penalties attached and few enforcement mechanisms existed, contracting parties largely complied with their GATT obligations.\footnote{Hudec, Enforcing Trade Law, supra note 47, at 6.} That outcome is not surprising considering that for nearly thirty years GATT was a “diplomatic” system, one of the hallmarks of which was the critical need for cooperation among members in order for decisions to be taken.\footnote{Robert E. Hudec, The New WTO Dispute Settlement Procedure: An Overview of the First Three Years, 8 Minn. J. Global Trade 1, 4 (1999). Hudec claims: [D]uring the first thirty years of GATT history, roughly 1948-1978, the GATT disputes procedure did exhibit a distinctly diplomatic character. Its operating procedures were quite ill-defined, its legal rulings were written in vague language that suggested more than it said, and both its procedures and its rulings left plenty of room for negotiation. In 1970, the artful ambiguity of this early GATT procedure led this author to christen its methods “A Diplomat’s Jurisprudence.” Id. He went on to note: After 1980, the GATT dispute settlement procedure transformed itself into an institution based primarily on the authority of legal obligation. The GATT procedure’s transformation into a more “judicial” or “juridical” instrument was not only remarkable in its own right, but more important to our present subject, the development of these legal powers and their general acceptance by GATT governments laid the essential foundation for even stronger legal powers that followed under the WTO. Id.} Despite the shift in 1995 from a diplomatic to a rules-based system, cooperation remains the hallmark of WTO decision-making. For example, consensus rather than majority voting remains the norm in the WTO; thus, if even one member protests, consensus is not reached and action normally will not be taken.\footnote{For further discussion on the WTO’s consensus voting methods, see, for example, Joost Pauwelyn, The Transformation of World Trade, 104 Mich. L. Rev. 1, 26 (2005).} The need for consensus voting is perhaps one explanation as to why countries would comply with their obligations in the absence of an effective enforcement mechanism.

There is of course some basis for holding the competing viewpoint that states will not act unless forced to do so. Certainly the WTO currently is in an implementation crisis: In several controversial and high profile cases, members—mainly
the United States and, to a lesser extent, the European Union—have refused to implement cases they have lost.\textsuperscript{112} Even more to the point is the \textit{U.S.–Nicaragua} Article XXI dispute.\textsuperscript{113} In that case, the United States imposed a trade embargo on Nicaragua in retaliation for the communist government’s “policies and practices,” which allegedly constituted an extraordinary threat to American security.\textsuperscript{114} After having a difficult time securing authorization to establish a dispute settlement panel,\textsuperscript{115} Nicaragua ultimately received little for its trouble. The panel made no ruling on Nicaragua’s allegation that the U.S. embargo, even if justified under Article XXI, nullified or impaired benefits accruing to it under the GATT. The panel based its determination not on the legal merits of Nicaragua’s position, but on its determination that no adequate countermeasures could be authorized to Nicaragua should it prevail on its claim. In short, the panel declined to address the question of whether Nicaragua’s rights had been

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{113} \textit{U.S.-Trade Measures Affecting Nicaragua, supra} note 48.
\item \textsuperscript{114} Executive Order 12513 reads:
\begin{quote}
I, Ronald Reagan, President of the United States of America, find that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.

I hereby prohibit all imports into the United States of goods and services of Nicaraguan origin; all exports from the United States of goods to or destined for Nicaragua, except those destined for the organized democratic resistance, and transactions relating thereto.
\end{quote}
\begin{footnotesize}
\item \textsuperscript{115} The United States made the now familiar argument that its actions were covered under Article XXI: (b)(iii) and that “[a] panel could therefore not address the validity of, nor the motivation for, the United States’ invocation of Article XXI: (b)(iii).” \textit{U.S.-Trade Measures Affecting Nicaragua, supra} note 48, at 1. Nicaragua was ultimately successful in getting a panel established, but at the insistence of the United States the terms of reference specifically precluded the Panel from examining or judging the validity of or motivation for U.S. invocation of Article XXI: (b)(iii). \textit{Id.} at 1-2. At the time, establishment of a panel was not an automatic right.
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violated precisely because it concluded there would be no way to remedy the situation:

The Panel noted that, under the embargo . . . not only imports from Nicaragua into the United States were prohibited but also exports from the United States to Nicaragua. In these circumstances, a suspension of obligations by Nicaragua towards the United States could not alter the balance of advantages accruing to the two contracting parties under the General Agreement in Nicaragua’s favour.

The Panel noted that the United States had stated that an authorization permitting Nicaragua to suspend obligations towards the United States “would be of no consequence in the present case because the embargo had already cut off all trade relations between the United States and Nicaragua” and that Nicaragua had agreed that “a recommendation by the Panel that Nicaragua be authorized to withdraw its concessions in respect of the United States would indeed be a meaningless step because of the two-way embargo.”

The Panel therefore had to conclude that, even if it were found that the embargo nullified or impaired benefits accruing to Nicaragua independent of whether or not it was justified under Article XXI, the CONTRACTING PARTIES could, in the circumstances of the present case, take no decision . . . that would re-establish the balance of advantages which had accrued to Nicaragua under the General Agreement prior to the embargo” . . .

In the light of the foregoing considerations the Panel decided not to propose a ruling this case on the basic question of whether actions under Article XXI could nullify or impair GATT benefits of the adversely affected contracting party.116

But if U.S.–Nicaragua illustrates anything, it is that dispute settlement in the area of national security simply will not work—particularly in a superpower versus developing country “showdown.”117 Despite the lack of available recourse to dispute settlement, however, less powerful developing countries have managed to obtain some benefits within the trading system, including, for example, adoption of the Generalized System of Preferences and other “special and differential rights.”118

116 Id. at 13 (emphasis added).


118 See, e.g., GATT, supra note 44, pt. IV.
The greatest refutation of the position of proponents of the “no right without a remedy” argument has been the evolution of Article XXI itself. Beginning as it did with the general premise that the national security exception required “neither notification, justification, nor approval,” the position of developed countries has shifted significantly—or, more accurately, GATT/WTO practice has changed. Where developed countries once argued that Article XXI required no notification, GATT members adopted the Understanding on Article XXI, which specifically requires notification. Where developed countries once argued that no justification is required under Article XXI, in fact the practice has been to provide some sort of justification. With respect to CSI, as described further below, the United States has provided a full explanation for taking action. And finally, where developed countries once argued that Article XXI required no approval, in practice they have lobbied for such approval. In at least one instance, the U.S.–Czechoslovakia 1949 Article XXI dispute, GATT approval was explicitly forthcoming. But even without a panel determination, members imposing Article XXI measures seek approval at least from their allies. In the European Community–Argentina matter, for example, the United Kingdom sought “approval” and support from its allies, and the Article XXI measure was imposed not only by the European Community but also by Canada and Australia.

Thus, even accepting the argument that Article XXI measures are self-judging and therefore ultimately are not subject to evaluation by any dispute settlement body, one is

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(1) Subject to the exception in Article XXI, contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI.” Id. (emphasis added).

120 Article XXI Measures in GATT Practice, supra note 93.

121 In this instance, the United States took pains to explain the measure and its rationale, rather than merely imposing it. See, e.g., Trade Policy Review, Mexico Question & Answer, supra note 82.

122 Summary Record of the Twenty-Second Meeting: Held at Hotel Verdun, Annecy, at 9, GATT/CP.3/SR.22 (June 8, 1949), available at http://gatt.stanford.edu/bin/object.pdf?90060100. The summary notes: “The Chairman, however, was of the opinion that... the United States Government had defended its actions under Articles XX and XXI which embodied exceptions to the general rule contained in Article I.” Id. A vote by roll-call resulted in one affirmative (Czechoslovakia), seventeen negatives, three abstentions, and two absent votes, approving the U.S.’s use of Article XXI. Id.

123 GATT Analytical Index, supra note 91, at 603.
still left with the question of whether such measures must conform to any WTO obligations at all, and if so, what?

2. The “Development Dimension”: Interpreting Article XXI’s Necessity Obligation

A WTO member is not authorized under Article XXI to take any action it chooses in the name of national security. By its terms, the security exception limits the available response to those actions that are necessary. What are the limits of this necessity requirement?

The argument to be developed below maintains that the “necessary” language of Article XXI cannot be read in isolation. The WTO Appellate Body has long relied on the interpretive rule of Article 31 of the Vienna Convention on the Law of Treaties, which states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” When the necessity obligation is so read, it becomes clear that a measure is “necessary” if and only if it is proportionate to the harm faced by the invoking country and that the measure does not unduly burden the development objectives of vulnerable developing countries.

Even if the text of Article XXI itself does not suggest a broader interpretive reading, general norms of equity and fairness, along with the nature of this new War on Terror—a war without an end date against an enemy without geographical boundaries—calls for a reinterpretation. Article XXI surely could not have been intended to allow a member to

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124 Vienna Convention, supra note 104, art. 31. In United States – Import Prohibition of Certain Shrimp And Shrimp Products, the Appellate Body concluded:

The Panel did not follow all of the steps of applying the “customary rules of interpretation of public international law” as required by Article 3.2 of the DSU. As we have emphasized numerous times, these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.

reconfigure the world trade order in such a way as to unduly burden and penalize the most vulnerable members.

a. Proportionality

It is by now well established in WTO jurisprudence that as an exception to the general treaty obligations of the WTO Agreement, Article XXI is to be narrowly construed.125 Thus, the apparently expansive language that would allow a member to take “any measure” must be constrained by certain core or fundamental principles of international law, one of which is the principle of proportionality. As one court notes, the principle of proportionality requires that “the application of . . . rules . . . must be appropriate for securing attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.”126 In short, the basic premise underlying the proportionality principle is that the punishment must fit the crime; one is justified in responding to an attack, but both the means employed to respond and the level of the response must be calibrated to the harm actually suffered. Or, to use less war-and-crime laden language, the means employed to address a problem must be appropriate for securing the objective and cannot go beyond what is necessary to attain it.

The proportionality principle is central to an analysis of Article XXI because it establishes limits on the type, manner and amount of the countermeasure a member may take to protect its essential security interests. But, as with most interpretations of the provisions of Article XXI, the proportionality principle applied in this context is not without controversy. One could make the argument that a

125 See, e.g., Report of the Panel, Japan – Restrictions on Imports of Certain Agricultural Products, L/6253 (Feb. 2, 1988), GATT B.I.S.D. (35th Supp) at 163 (1989). The United States argued that “[a]ny exceptions to the ban on quantitative restrictions had to be construed as narrowly as possible, and all criteria for such an exception had to be met.” Id. ¶ 3.2.2. The panel concurred, noting:

In order for an import restriction to be justified under Article XI:2(c)(i) all of the conditions noted above must be fulfilled. Therefore, in those cases in which the Panel found that one condition was not met, it did not consider it necessary to examine the restriction further in the light of the other conditions.


126 The European Court of Justice also employs the principle of proportionality in its jurisprudence. See, e.g., Case C-58/98, Corsten, 2000 E.C.R. I-7919, I-7957.
proportionality analysis is not relevant to an interpretation of Article XXI. The national security exception is unlike GATT’s other general exception—Article XX’s health, safety and morals exception—which specifically recognizes a “least trade restrictive” limitation.127 But that argument merely re-engages

127 The chapeau to GATT Article XX specifically provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

GATT, supra note 44, art. XX. The Appellate Body has interpreted that language as follows:

Turning then to the chapeau of Article XX, we consider that it embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of its right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, Article XI:1, of other Members. Similarly, because the GATT 1994 itself makes available the exceptions of Article XX, in recognition of the legitimate nature of the policies and interests there embodied, the right to invoke one of those exceptions is not to be rendered illusory. The same concept may be expressed from a slightly different angle of vision, thus, a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of “General Exceptions” in Article XX to prevent such far-reaching consequences.

Shrimp-Turtle, supra note 124, ¶ 156.

Article XXI lacks the explicit tempered language to be found in Article XX, but the argument developed here would implicitly draw in to Article XXI, the jurisprudence the Appellate Body has developed with regard to Article XX. See, e.g., Rene E. Browne, Note, Revisiting “National Security” in an Interdependent World: The GATT Article XXI Defense After Helms-Burton, 86 GEO. L.J. 405, 423-24 (1997) (arguing “[b]ecause Article XX also describes ‘exceptions’ that justify trade restrictive measures under GATT, it is the section of the agreement most analogous to Article XXI. It would seem reasonable—in the absence of any decisions pertinent to the security exceptions and considering Article XXI’s proximity and substantive similarity to Article XX—for a panel reviewing Article XXI to consider Article XX decisions.”). Browne goes on to argue for the incorporation of Article XX’s “least trade restrictive measure” requirement into Article XXI:

A similar construction applied to Article XXI would allow parties to determine their own security interests, just as parties determine their own domestic environmental or public health policies. When these policies have
the self-judging/non-self-judging debate: There is no question that Article XX allows a panel to make the assessment of whether a measure is proportionate—i.e., least trade restrictive. But arguing that a panel cannot make a similar assessment with respect to Article XXI is not to say that Article XXI does not, nevertheless, require a measured response to a national security emergency. Admittedly, however, some countries have tried to make the claim for a proportionality standard in Article XXI, with little success. But in the case of CSI, whether the measure applied must conform to some standard of proportionality is a less difficult legal hurdle given the United States appears to acknowledge, at least tacitly, the need for such a standard. In the WTO’s 2005 review of U.S. trade policies, the European Union and the United States exchanged the following set of questions and answers:

**Question:** (EU #3)

What procedures does the U.S. have in place to ensure that the principle of proportionality/least trade restrictiveness and non-discrimination have been adequately observed in the development of new proposals and new measures to increase security against future terrorist attacks? Have there been any risk analyses undertaken or studies into the likely impact on trade flows of specific measures?

**Answer:** (United States)

CBP has numerous layers of targeting and risk management tools in place to assist in making decisions concerning threat assessments. By using advance information, risk management and technology, and by partnering with other nations and with the private sector,

extraterritorial effect that impairs other parties' rights under GATT, however, the party invoking the exception would have to demonstrate that no alternative measures consistent with the GATT, or less inconsistent with it, are available to achieve these essential security objectives.

Id. at 426. *But see* Raj Bhala, *Fighting Bad Guys With International Trade Law*, 31 U.C. DAVIS L. REV. 1, 1 (1997) (concluding “[t]he first feature of article XXI is that it is an all-embracing exception to GATT obligations. This point is evident from the first word of the article: ‘nothing.’ Once a WTO Member relies on article XXI to implement a measure against another Member, the sanctioning Member need not adhere to any GATT obligations toward the target Member.”).

128 In the *United States – Nicaragua* dispute, for example, some countries maintained that U.S. action was disproportionate, but the issue was not addressed by the GATT panel. General Agreement on Tariffs and Trade, *Minutes of Meeting Held in the Centre William Rappard on 29 May 1985*, C/M/188 (June 28, 1985), available at http://www.wto.org/gatt_docs/English/SULPDF/91150029.pdf.

the twin goals of the United States of enhanced security and trade facilitation do not have to be mutually exclusive. Since 9-11, we have developed ways to make our borders more secure that also ensure the efficient flow of legitimate trade and travel.\footnote{Id.}

In the case of a War on Terror, the need for security measures to be informed by a proportionality analysis becomes even more important. The current war is being fought without a timetable for completion, and while the objective is to protect U.S. interests from stateless enemies, the means employed to achieve that objective very directly impact state actors. In short, CSI adversely impacts some WTO member countries—and will continue to do so for some time—despite the fact that those members are not the cause of the harm. While recognizing that “collateral damage” in wartime is inevitable, the damage inflicted must meet some minimum standards of decency and fair play. Adopting a proportionality analysis in Article XXI measures would achieve that equitable objective.

Merely adopting a proportionality element would not, however, be sufficient. While constraining the actions of stateless terrorists is the objective or the ends sought, the means the United States has used to achieve that objective—the Container Security Initiative—has great repercussions for developing countries, most of whom are no more than innocent bystanders in the War on Terror. Thus, to address that imbalance requires not just an application of the proportionality principle—balancing means and ends—but it also requires a deliberate, self-conscious recognition of the need to protect the interests of developing countries.

\begin{itemize}
\item[b. Development] Some have maintained that “there is no distinction in international law between developed and developing countries in matters of security.”\footnote{Statement of the United States Delegate Before the GATT Council, General Agreement on Tariffs and Trade, Minutes of Meeting held in the Centre William Rappard on 29 June 1982, at 19, C/M/159 (Aug. 10, 1982), available at http://www.wto.org/gatt_docs/English/SULPDF/90440048.pdf [hereinafter Statement of U.S. Delegate Before the GATT Council]}
\end{itemize}
short, national security concerns trump all other considerations and allow a member to take a measure *at any cost*. But taking a measure at any cost is exactly what Article XXI and the WTO Agreement are meant to prevent. Indeed, it is the foundational principle of the trading system that “if each of us insists on retaining freedom to take action without first considering how it would affect our neighbors, we shall provoke bad feeling, retaliation, and economic war.”\(^{132}\)

While it is true that Article XXI makes no mention of developed or developing countries, a proper interpretation of the national security exception prohibits one from reading that provision in isolation; the text must be read in context in light of the object and purpose of the WTO Agreement.\(^{133}\) When read accordingly, it becomes clear that there is a recognized distinction in international trade law between developed and developing countries, and that developed countries have a special duty of care when implementing measures that may harm developing countries.

That “context” of Article XXI necessarily includes other provisions of the WTO Agreement. The most relevant provision on the duty of care developed countries owe to more economically vulnerable members is GATT Article XXXVII:3(c), which requires developed countries to:

\begin{quote}
Have *special regard* to the trade interests of less-developed parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures when they would affect essential interests of those contracting members.\(^{134}\)
\end{quote}

And certainly the object and purpose of the WTO Agreement would not support the proposition that there are no differences between developed and developing countries in matters of security.\(^{135}\)

\(^{132}\) Wilcox, *supra* note 42, at 218.

\(^{133}\) Vienna Convention, *supra* note 104, art. 31. In *United States – Trade Measures Affecting Nicaragua*, *supra* note 93, the panel concluded that “article xxi could not be read in isolation and is part of legal text with which it must be reconciled.” See also Shrimp-Turtle, *supra* note 124.

\(^{134}\) GATT, *supra* note 44, art. XXXVII:3(c) (emphasis added).

\(^{135}\) The WTO Agreement contains a number of provisions on “special and differential rights” treating developing countries different from—and better than—developed countries. In particular, Part IV of the GATT “recall[es] that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed
Thus, inherent in the right of members to take action to protect their security interests is the concomitant obligation of developed countries not to act in ways that would unduly harm the development objectives of developing countries. The idea that Article XXI measures must not be used in ways to harm poorer countries’ development objectives is not novel, and it has long been advocated by developing countries themselves. What is novel is that the War on Terror presents us with an explicit illustration of why the adoption of a development standard in Article XXI is necessary. In all previous Article XXI measures except Swedish Footwear, the member invoking the action did not adopt a global measure; the trade prohibition was always targeted at one specific country. And in all instances except Swedish Footwear, the member invoking Article XXI took action because of some transgression the country on the receiving end was alleged to have committed that threatened the national security of the imposing state. In short, past national security actions were almost always retaliatory measures limited to one country. But developing countries that are being burdened by CSI are not the source of the harm CSI is meant to address. Rather than protecting their interests, CSI imposes additional burdens on developing countries.

One such burden is the 24-Hour Rule, which applies to all U.S. trading partners. The 24-Hour Rule enables Customs officials to gather and process information in order to target high risk shipments. The need for information gathered under the 24-Hour Rule came about only after Customs had conceived and begun to implement CSI. Once it established contracting parties. It goes on to authorize—indeed implore—developed countries to derogate from the rules to the benefit of developing countries:

The developed contracting parties shall to the fullest extent possible—that is, except when compelling reasons, which may include legal reasons, make it impossible—give effect to the following provisions:

(b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties.

Id. art. XXXVII(b).

136 See, e.g., Cann, supra note 101.
137 Article XXI Measures in GATT Practice, supra note 93.
the first CSI-port in Rotterdam, Customs realized that legal and logistical problems prevented it from having access to data it needed to effectively pre-screen containers.140 Rather than implementing a rule that would require only CSI members to provide the required data, Customs adopted the 24-Hour Rule, which would apply to CSI and non-CSI members alike.141

The Rule requires all exporters to file an electronic cargo manifest declaration form twenty-four hours prior to loading a container either bound for the United States or transiting through its borders.142 Implementation of the 24-Hour Rule is a significant obstacle for developing countries. Despite massive resistance from the trading community, Customs declared victory, claiming that there have been “no serious problems” in implementing the 24-Hour Rule’s requirements.143 But that determination rests on the claim that no legitimate exports were turned away or delayed as a result of the Rule.144 Even if true, the real impact of the 24-Hour Rule goes far beyond whether countries were ultimately successful in getting their goods past Customs. Measuring the real impact of the 24-Hour Rule must include an examination of the rule’s implementation costs as well as the disproportionate impact on the goods of developing countries.145 When those

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140 See GAO REPORT 2003, supra note 27, at 18.
141 Id. at 7.
142 CSI Fact Sheet, supra note 9.
143 In a 2003 speech, Commissioner Bonner derided doomsday predictions and declared victory in implementing CSI and the 24-Hour Rule:

We heard nightmarish tales about how the 24-hour rule would paralyze maritime trade and put companies out of business. We heard that companies would not be able to comply. So what have we found since February 2, when we started enforcing compliance with the rule? We’ve found that none of these doomsday predictions have come to pass. . . . Let me make this clear to you: through the 24-hour rule and the Container Security Initiative (CSI)—we are identifying shipments that pose potential threats. These programs are working.

Bonner 2003, supra note 11. But in the same speech, Bonner himself acknowledges some implementation problems: “Compliance with the new rule is high, and the number of disruptions is low.” Id.

144 See Statement of Ambassador Linnet Deily, Deputy U.S. Trade Representative, Trade Policy Review Of The United States, Response to Issues Raised in the Course of the Review Meeting (Jan. 16, 2004), available at http://www.usmission.ch/press2004/0116Deily%20TPR.html [hereinafter Statement of Ambassador Deily] (asserting that “[t]he test of time has proven that there have been no instances where a legitimate shipment has been detained and prevented from sailing on board the vessel upon which it was originally scheduled to depart the foreign port.”).

145 In evaluating the impact of measures like the 24-Hour Rule on developing countries, the United Nations Conference on Trade and Development concluded: “[p]otentially, the legitimate trade of developing countries may be adversely affected,
issues are factored in, it becomes clear that the 24-Hour Rule has had profound effects on the trading system, and those effects are particularly pronounced with respect to developing countries. In implementing the 24-Hour Rule, the financial costs have been significant for all U.S. trading partners. Even major trading partners with sophisticated customs regimes have seen their administrative costs increase by upwards of six hundred million dollars.\textsuperscript{146} The expenditures are significant enough that even exporters from rich countries are calling for U.S. subsidies to offset the costs of implementation,\textsuperscript{147} and the World Bank has underscored the need for importing and exporting countries to develop a cost sharing formula optimal for all.\textsuperscript{148}

For developing countries, the implementation cost of the 24-Hour Rule is considerably higher. Firstly, they bear additional costs not borne by developed countries. In India, for example, where nearly 35\% of outbound trade is headed to the United States, exporters are incurring a new cost of having to pay local agencies to assist with document processing.\textsuperscript{149} Secondly, developing countries are starting from a lower technological base. Most shippers and freight forwarders in developing countries conduct a manual trade and have access solely to telephones, typewriters and fax machines in order to conduct their business.\textsuperscript{150} Shifting from a manual to an automated system will require equipment, know-how, and reliable electricity supply, to name a few things, that many developing countries do not have.\textsuperscript{151} To be sure, in the long term a shift to electronic transmission will undoubtedly prove beneficial for developing countries through increases in

due to the inability of particularly small and medium size enterprises within these countries, to effectively comply with the new requirements.” UNCTAD Report, supra note 68, at 20.

\textsuperscript{146} For example, Japan’s administrative costs have increased by about $625 million dollars. This figure captures only the administrative costs of inputting shipping information into the U.S. computer system (AMS). Id. at 25.

\textsuperscript{147} Global Economic Prospects, supra note 56, at 188. “The Hong Kong Shippers Council . . . and the ASEAN Federation of Forwarders Associations [exporters from relatively wealthy countries] have urged [the United States] to subsidize the cost of its new requirements and U.S. importers to share . . . the burden of providing information.” Id.

\textsuperscript{148} Id.

\textsuperscript{149} Id. at 184-85 (“Almost 35\% of outbound trade from India is headed to the U.S.”).

\textsuperscript{150} Id. at 185; UNCTAD Report, supra note 68, at 25.

\textsuperscript{151} Global Economic Prospects, supra note 56, at 186; UNCTAD Report, supra note 68, at 25.
efficiency and a decrease in costs, but in the short to medium term, developing countries will have to bear the massive initial startup costs. The risk is that developing country exporters will find it increasingly difficult to participate competitively in the world market.

In addition to forcing developing countries to bear higher economic costs, the 24-Hour Rule affects disproportionately the type of cargo developing countries are likely to ship. Developing countries tend to export perishable commodities. Those goods are often harvested and prepared for shipping at the last minute. Before the 24-Hour Rule, documentation requirements were not an impediment to last-minute shipments as Customs would generally allow shippers to provide preliminary data that would then be finalized up to thirty days after the shipment had arrived in the United States. This now-lost flexibility allowed shippers and freight forwarders to adequately verify and finalize required paperwork without delaying the shipment itself. But the 24-Hour Rule requirement has cut the processing timeline in developing countries to shorter and shorter lengths. Given that processing export documents is often a time consuming and inefficient effort in developing countries, shippers are now requiring that shipments be processed and ready for boarding much earlier than they used to; otherwise they risk delays and fines. Ports that previously accepted cargo as few as six hours before departure now require at least twenty-four. The

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152 Global Economic Prospects, supra note 56, at 186.
153 OECD REPORT, supra note 3, at 47.
154 Id. Of course, much of this hardship could be alleviated if shippers were to use air transportation rather than sea—presumably air transportation post-September 11 is more secure. See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-616T, TRANSPORTATION SECURITY: POST-SEPTEMBER 11TH INITIATIVES AND LONG-TERM CHALLENGES (April 1, 2003) (Statement of Gerald L. Dillingham, Director, Physical Infrastructure Issues), available at http://www.gao.gov/new.items/d03616t.pdf (noting the security loopholes in air transportation prior to September 11, 2001, and highlighting changes after that period). But the air transportation sector is one of the most non-liberalized in international trade. While more than 20% of African exports enter the United States by air, the costs of air transportation in developing countries far exceeds the same costs in the developed world. Liberalization of the air transportation sector likely would decrease costs of transportation, which would make developing country goods more competitive in developed country markets. Global Economic Prospects, supra note 56, at 188.
155 Global Economic Prospects, supra note 56, at 184.
economic losses for developing country exports are still being tallied.\textsuperscript{157}

The trade-distorting impact of CSI is most pronounced with respect to developing countries. In order to remain competitive in the current business climate, exporters in non-CSI-certified countries may be forced to ship their goods to countries that have CSI ports for the onward voyage to the United States.\textsuperscript{158} This will undoubtedly increase non-CSI members’ transportation costs. Transportation costs are a crucial determinant of a country’s ability to participate in the global economy,\textsuperscript{159} and for developing countries even a small increase in the price of moving goods between destinations and across international borders serves as a formidable trade barrier.\textsuperscript{160} Transit costs in developing country markets already are routinely two to four times higher than in rich countries.\textsuperscript{161} Adding on the additional costs of transporting goods to CSI-certified ports for transit to the United States further increases the price of those goods. Of even greater concern is the possibility that, in the long run, importers and exporters may adapt their trading patterns to avoid these additional costs by sourcing products from countries with CSI-certified ports.

Thus, CSI violates U.S. obligations under GATT Article I. Moreover, CSI cannot be justified under GATT Article XXI because it lacks a development dimension. The following section goes beyond the legal debate to explore some of the practical reasons why CSI and future U.S. security measures should incorporate a development dimension.

\textsuperscript{157} See UNCTAD Report, supra note 68, at 24 (noting that “[n]o clear estimates of the overall costs of the 24-Hour Rule have, so far been published”). The Report went on to cite an OECD study, conducted only a few months after implementation of the Rule began, which estimated costs at $5 to $10 billion per year. Over the long term, the OECD Report acknowledged a more realistic estimate would be in the region of $281.7 million. \textit{Id.} The OECD report did not take into account the special circumstance of developing countries. OECD REPORT, supra note 3, at 47.

\textsuperscript{158} Global Economic Prospects, supra note 56, at 181.

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.} While the focus within the WTO (and the GATT before that) has historically been on lowering tariffs, research has shown that for most developing countries the costs of transporting exports to foreign markets are a much greater hindrance to trade than are tariffs. See \textit{id.} (noting that “a comparison of countries’ ‘transport cost incidence’ . . . shows that for 168 out of 216 U.S. trading partners, transport cost barriers outweigh tariff barriers”).

\textsuperscript{161} \textit{Id.} at 179.
III. ENVISIONING A NEW POST-SEPTEMBER 11 SECURITY ARCHITECTURE

A. Beyond the Legal Debate: Why Future Security Measures Should Incorporate a Development Dimension

The global war on terrorism is like watching water running downhill. Water always goes to the place of least resistance.

—Admiral Walter F. Doran, U.S. Pacific Fleet Commander

Globalization has created a world in which social and economic ties are so intertwined that no country acting alone can ensure either its own prosperity or its own security. Particularly in the maritime transportation sector—where a ship may be owned by a company in one country, crewed by the nationals of a second country, and carry the cargo of a third to a port of a fourth—multilateral cooperation is necessary to effectively address the threat of terrorism. But multilateralism calls for more than cooperation amongst a group of like-minded and similarly-situated countries. As Mikhail Gorbachev recently noted, “you cannot ensure your security without ensuring global security.”

Incorporating a development dimension into CSI is necessary not merely because a proper reading of the WTO Agreement would seem to call for such a dimension, but also because failing to do so jeopardizes our own security. This section goes beyond the legal arguments developed above to explore some of the practical reasons why a development dimension in CSI, as well as in future security measures, is crucial.

Terrorism recognizes no state boundaries. Indeed, the new face of terrorism is one in which non-state actors play a leading role. While organizations like Al-Qaeda may have found sanctuary in Taliban-controlled Afghanistan or pre-September 11 Pakistan, the hallmarks of these entities are


164 Mikhail Gorbachev, Address at Univ. of the Pac. McGeorge Sch. of Law (Oct. 26, 2005) [hereinafter Gorbachev Statement].

165 See, e.g., Audrey Kurth Cronin, Behind the Curve: Globalization and International Terrorism, 27 INT'L SECURITY 30, 30 (2003) (noting that “[t]he current wave of international terrorism, characterized by unpredictable and unprecedented threats from nonstate actors, not only is a reaction to globalization but is facilitated by it”).
their ability to work across national lines and their lack of formal ties or strict allegiance to any state. After the bombings of the U.S. embassies in Kenya and Tanzania in 1999, Secretary of State Madeline Albright acknowledged the rise of this new breed of terrorism: “What is new is the emergence of terrorist coalitions that do not answer fully to any government, that operate across national borders and have access to advanced technology.” The problem is that U.S. response to the new terrorism has been “reactive and anachronistic.”

Adopting measures better suited to state-centric threats, the United States attempts to “cast twenty-first-century terrorism into familiar strategic terms.”

CSI and programs like it are premised on the notion that exports from certain states pose greater security risk than exports from others. CSI rewards participant states—mainly developed countries—for their “foresight,” and Customs focuses its resources on the presumptively more high-risk containers arriving from non-participating—mostly developing—countries. Because the new breed of terrorists are not themselves bounded by state lines, at least two additional risks arise from U.S. action. One possibility is that terrorists manage to infiltrate containers from CSI countries. Successfully infiltrating a CSI-container virtually assures success of the overall mission (detonating a nuclear device on U.S. shores, for example) given the presumption that those containers are “clean” and likely would not face further inspection in the United States. Breaching security structures and “hijacking” a CSI container is not a far-fetched scenario; while CSI creates new security protocols, the system is largely self-regulated, leading one expert to dub it a “trust but don’t verify” program.

There have already been a number of

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167 Cronin, supra note 165, at 30.

168 Id.

169 See CSI Fact Sheet, supra note 9.

170 Disturbing Lack of Attention Paid to America’s Security Vulnerabilities, Interview by Michael Moran, Executive Editor, Council on Foreign Relations, with Stephen E. Flynn, former Coast Guard Commander (Dec. 21, 2005), available at http://www.cfr.org/publication/9471 (stating that “if you rely essentially on a trust-but-don’t-verify system [where] you ask companies to be [responsible] but can’t determine if they really are, I worry that everything we defined as low risk will be redefined as high
security breaches. One of the most significant was Customs’ failure to inspect a number of containers that arrived in the United States from a CSI port after those containers were determined to be high-risk, but the host-government refused permission to inspect them in-country.\footnote{171} Moreover, employing the most state-of-the-art inspection technology on land does not insulate CSI countries from terrorists intersecting their containers at sea.\footnote{172} Some terrorist organizations have an intimate knowledge of the maritime transportation industry, not simply as interlopers but as fleet owners—Sri Lanka’s Tamil Tigers own a substantial fleet, as does Al-Qaeda.\footnote{173} Using their knowledge to access containers in transit is particularly feasible because so-called tamper-resistant technology—that would alert Customs to any interference with the container in transit—is at a nascent stage of development.\footnote{174} Alternatively, containers from non-CSI countries may become more attractive to terrorists seeking entry into the trade supply chain. Even if CSI allows Customs to deploy more of its resources to containers from non-CSI countries, there are insufficient resources available to inspect all such containers. The possibility of terrorists using such containers to stage an attack against the United States is certainly foreseeable. Whether in Kenya, Tanzania or Yemen, terrorists have long exploited the more lax security systems of

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\footnote{172} The Tamil Tigers, a guerrilla force at war with the Sri Lankan government since the 1980s, intercepted in-transit shipments of guns bound for the government and converted them for their own use. OECD REPORT, \textit{supra} note 3, at 14-15.

\footnote{173} The Tamil Tigers are perhaps the most engaged in the shipping industry, with a profitable fleet estimated at ten to twelve freighters. \textit{Id.} at 14. The fleets are used to generate income from legitimate shipping activities. \textit{Id.} Al Qaeda’s fleet is said to number fifteen cargo vessels. Mintz, \textit{supra} note 15, at A1. Fearing Al Qaeda would use its fleet to escape capture, the United States reportedly assembled a coalition of ninety warships, including ships from the United Kingdom, Germany, France, Australia, Italy, Japan and Bahrain, to patrol the waters around the Arabian Peninsula and off the coasts of Pakistan and east Africa. Felsted & Odell, \textit{supra} note 3; Mintz, \textit{supra} note 15; OECD REPORT, \textit{supra} note 15, at 15.

\footnote{174} Container inspection technology is advancing, and it may ultimately be the only real solution to the risks terrorists pose in this sector. The port of L.A./Long Beach—the busiest port in the country—is moving toward 100% inspection of all cargo in the near future. \textit{See supra} note 17.
developing countries to launch attacks against U.S. targets.\textsuperscript{175} Ignoring the central role developing countries play in the War on Terror leaves them vulnerable to proxy attacks where they suffer the harm but the United States is the ultimate target.\textsuperscript{176} In so doing, the United States effectively undermines its own security.

A more reasonable approach to the new terrorism is to assist developing countries in raising their security standards. Ultimately, the new security protocols and advanced technologies CSI fosters are beneficial to the trading system. If developing countries do not begin to adopt these “best practices,” they will be left even further behind. Recognizing that possibility, developing countries indeed have—on their own initiative—taken on the challenge of upgrading their security infrastructures.\textsuperscript{177} What remains is for the United States and other developed countries to recognize that assisting them, rather than excluding them, is the only practical response to the new terrorism.\textsuperscript{178} To do otherwise would allow gaping holes in the global security infrastructure that would only be exploited by terrorists.

Thus, CSI’s present framework of engaging first with developed countries, and only later incorporating developing countries into its security web, poses significant dangers to U.S. security. By alienating developing countries, the United States also risks undermining a multilateral trading system that has served American interests well. The timing is particularly inauspicious considering the trading community is

\textsuperscript{175} See Rose, supra note 166, at 131; Victims of Kenya and Tanzania, supra note 166. Even on U.S. soil, terrorists have used such a strategy to great effect, boarding commuter planes in states like Maine ultimately to board flights in New York bound for Los Angeles, both major airports that have far more elaborate security measures. \textit{See generally National Committee on Terrorist Attacks Upon the United States}, \textit{The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States} (2004), available at http://www.gpoaccess.gov/911/pdf/fullreport.pdf.

\textsuperscript{176} In the U.S. embassy attacks in Kenya and Tanzania, alone, over 200 people were killed—most of whom were nationals. \textit{See Victims of Kenya and Tanzania, supra note} 166; \textit{see also supra} note 59.

\textsuperscript{177} Jamaica, for example, adopted many of the CSI protocols well before they were eligible to join CSI. \textit{See supra} note 83 and accompanying text. Similarly, the Agency for Air Transport Security in Africa has invested $27 million “to modernize member states’ airport security infrastructure.” \textit{Global Economic Prospects, supra} note 56, at 185.

\textsuperscript{178} Moreover, assisting developing countries makes good political sense given the United States’ interest in engaging them in such U.S.-sponsored initiatives like United Nations Resolution 1540, which is designed to attack the proliferation of weapons of mass destruction. Resolution 1540, \textit{supra} note 1, at 1-4.
currently in the midst of a new round of trade negotiations, the Doha Development Round, which is meant to “redress the existing imbalances in multilateral trade relations.” In return, developed countries are expecting developing countries to take on even more commitments to liberalize trade and implement WTO disciplines in areas like intellectual property. But the reality for developing countries is that the market access and other benefits they may achieve in the round will prove meaningless if the new security architecture excludes them from participation. In short, U.S. security measures potentially pose the greatest non-tariff barrier to trade for developing countries. The gains from the round will not be enough of an offset, calling into question the (already suspect) commitment of developed countries to redress imbalances inherent in the current trade order. Developing countries may ultimately conclude it is not in their interest to take on additional commitments or, in a less overtly confrontational response, they may adopt a “go-slow” approach to their current and future implementation obligations.


Some might argue developing countries have already adopted a “go-slow” approach, considering that almost eleven years after the birth of the World Trade Organization, many developing countries have failed to adequately implement their obligations. For developing countries, the “implementation issue” is a controversial one, with some experts maintaining it is not in the interest of some of the world’s poorest countries to implement their WTO obligations. See, e.g., J. Michael Finger & Phillip Schuler, Implementation of Uruguay Round Commitments: The Development Challenge, 23 WORLD ECON. 431, 511 (2000) (noting that “[i]mplementation will require purchasing of equipment, training of people, establishment of systems of checks and balances, etc. This will cost money and the amounts of money involved are
Thus, the U.S. security framework jeopardizes relations with developing countries, and it may call into question the new commitments they are expected to adopt under the Doha negotiating round. Security measures like CSI not only impede U.S. efforts to expand the rules-based trade regime into other sectors, but have the added effect of diluting or negating U.S. development initiatives.

In recent years, U.S. development policy has experienced a renaissance of sorts. In 2000, President Clinton signed into law the African Growth and Opportunity Act ("AGOA"), which provides duty-free and quota-free access to exports from sub-Saharan Africa.\(^{183}\) AGOA was the first significant innovation in U.S.-African trade relations in decades. In addition, the United States has tripled its development assistance to Africa and has embarked on negotiations with the Southern African Customs Union, which, if successful, would result in sub-Saharan Africa’s first free trade area with the United States.\(^{184}\) Beyond the African continent, U.S. innovations include the Millennium Challenge Account, and a promised doubling of development assistance by 2010.\(^{185}\) But development assistance and market access are insufficient inducements to counteract the competitive advantage of countries with CSI ports. Business will not be substantial. . . . An entire year’s development budget is at stake in many of the least developed countries. Would such money be well spent? . . . [For most of the developing and transition economies—some 100 countries—money spent to implement the WTO rules . . . would be money unproductively invested].


lured to Africa or other locations in the developing world as long as U.S. security measures continue to pose an expensive and unpredictable non-tariff barrier to trade.\textsuperscript{186} Without addressing that barrier, U.S. development initiatives are destined to fail—wasting both economic and political resources.

Five years after the tragedy of September 11, the unilateralism that characterized U.S. action in the immediate aftermath appears to be abating.\textsuperscript{187} More developing countries are being added to the CSI program, and Customs has worked within the International Maritime Organization to internationalize the security protocols developed under CSI.\textsuperscript{188} The United States has also played a significant role in security measures like the Proliferation Security Initiative and Resolution 1540—two significant multilateral efforts to address terrorism.\textsuperscript{189} While not too late, U.S. action is too little in scope, relegating multilateralism and the interests of developing countries to a mere afterthought. The next section explores possible approaches to terrorism that balance security needs with development objectives.

B. Crafting a Response to Terrorism that Balances Security with Development

A world where some live in comfort and plenty, while half of the human race lives on less than $2 a day is neither just nor stable. Including all of the world’s poor in an expanding circle of development—and opportunity—is a moral imperative and one of the top priorities of U.S. international policy.

—President George W. Bush\textsuperscript{190}

\textsuperscript{186} For the economic impact of CSI, see discussion supra section II.B.2.

\textsuperscript{187} U.S. foreign policy in general appears to have taken an about face from the go-it-alone strategy prevalent in the immediate aftermath of September 11. See, e.g., Sanger, supra note 41 (noting that in a recent State of the Union address, President Bush, who once viewed globalization as “mushy Clintonianism,” cautioned that “the road of isolationism and protectionism may seem broad and inviting—yet it ends in danger and decline”).

\textsuperscript{188} Recent developing countries admitted to CSI include Jamaica and The Bahamas. See Ports in CSI, supra note 31. In July 2004, the IMO’s International Ship and Port Facility Security Code (ISPS Code)—a comprehensive set of measures to enhance the security of ships and port facilities—entered into force. The mandatory security measures are included as amendments to the 1974 Safety of Life at Sea Convention. See International Maritime Organization, http://www.imo.org (last visited Jan. 6, 2007).

\textsuperscript{189} Valencia, supra note 1; Resolution 1540, supra note 1.

Poverty and the maldistribution of wealth among nations create instability.\textsuperscript{191} Globalization has only exacerbated the divide between the wealthy and the poor; it also enables those who adopt violence against civilians as a tool for social change to export their discontent around the world. Thomas Barnett, author of \textit{The Pentagon's New Map: War and Peace in the Twenty-First Century}, posits that modern instabilities in the world order stem almost exclusively from those countries left out of the “functioning core” of globalization.\textsuperscript{192} The U.S. embassy bombings in Kenya and Tanzania in 1998 reinforce the lesson: countries relegated to globalization’s periphery merely serve as a fertile hunting ground for terrorists.\textsuperscript{193} Logically then, integrating those countries left behind is not just a moral imperative but is the last best hope for ensuring U.S. and global security.\textsuperscript{194} The proposals that follow are thus broader than CSI or any single security measure; rather, they seek to inform the underlying basis from which the United States implements future antiterrorism initiatives.\textsuperscript{195}

\textsuperscript{191} The point is made most clear when one examines countries where wealth is stagnated in the hands of a tiny minority. Amy Chua’s \textit{World on Fire} highlights the dangers of technical assistance projects that export U.S.-style free markets and democracy to developing countries without the legal and regulatory mechanism to protect against a “market-dominant minority” hijacking the bulk of economic activity. See generally AMY CHUA, \textit{WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY} (2003).

\textsuperscript{192} “America can only increase its security when it extends connectivity or expands globalization’s reach, and by doing so, progressively reduces those trouble spots or off-grid locations where security problems and instability tend to concentrate.” THOMAS P.M. BARNETT, \textit{THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY} 56 (2004).

\textsuperscript{193} See Victims of Kenya and Tanzania, supra note 166.

\textsuperscript{194} President Bush’s statement in the 2002 U.S. National Security Strategy, thus somewhat misses the point. See NATIONAL SECURITY STRATEGY, supra note 190. While helping the poor has been a moral imperative at least since the biblical period, in a post-September 11 security environment “doing good” is inevitably linked to peace and security.

\textsuperscript{195} Any prescriptions raised by those outside the government’s national security agencies risk being labeled “facile.” The fears and uncertainties engendered by terrorist threats inevitably raise strong feelings of faith in government—citizens often believe, indeed need to believe, that government officials will do what is best to protect the nation’s security. What we are quickly learning—and perhaps history has already shown—is that even in the face of terrorism our national response runs the risk of being captured by special interests and pork barrel politics.

A disturbing report on U.S. spending on port defense has found that funding that should be utilized to shore up the nation’s most vulnerable ports—its frontline in the War on Terror—instead has become a casualty of pork barrel politics. DEPT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, \textit{REVIEW OF PORT SECURITY GRANT PROGRAM} (Jan. 2005), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_05-10_Jan05.pdf. The study found that Wyoming has received four times as much antiterrorism money per capita as New York. Grants were also given
Some argue that national security considerations trump all others, including civil liberties and certainly international obligations. Particularly where commercial interests are concerned, the average citizen likely would rather see the government err on the side of caution, even if the measures taken unduly impact commerce or development. But the U.S. government—and more specifically, Customs—does not subscribe to that view. CSI aims to balance security interests with trade and development considerations—one objective of the program is “enhancing homeland and border security while facilitating growth and economic development within the international trade community.” Thus, the “closed borders” approach to terrorism some would advocate simply is not an option. It remains an open question, however, as to how to strike the proper balance between security, commerce and economic development in a principled way. Customs adopted CSI’s staged-implementation approach, relegating admission of most developing countries to some distant time in the future, based on its assessment that “efforts had to begin somewhere, and it just made sense to start with the largest volume for purposes “other than security against an act of terrorism.” Id. at 35. For example, one small and remote facility that received less than twenty ships per year was awarded $180,000 to install security lights; at another port, which stood next to a luxury entertainment pavilion, a $25,000 grant was awarded to install video surveillance equipment and alarms, a project Department of Homeland Security staff concluded “appear[ed] to support a normal course of business.” Id. at 27, 35-36 (referenced by Eric Lipton, Audit Faults U.S. for its Spending on Port Defense, N.Y. TIMES, Feb. 20, 2005, § 1, at 1). See also Eric Lipton, In Kentucky Hills, Bonanza, N.Y. TIMES, May 14, 2006, § 1, at 1 (noting that Kentucky Representative Harold Rogers, chairman of the House subcommittee that controls the Homeland Security budget, has apparently used his position to benefit his hometown of Corbin, a small, poor, rural community in southeastern Kentucky. Rogers mandated that tamper-resistant identification cards that are to be issued to maritime workers be produced in Corbin using old technology (used in Corbin), rather than “smart-cards,” which are demonstrably superior.).

196 See, e.g., Cole, supra note 39, at 22; see also Statement of U.S. Delegate Before the GATT Council, supra note 131 (“there is no distinction between developed and developing countries in matters of security”).

197 Fear—even irrational fear—plays a significant role in public perception of the risks of terrorism. For a discussion of the role of public perception in guiding government action in the face of fear and uncertainty, see CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 83, 96-97 (2005).

198 See, e.g., Statement of Ambassador Deily, supra note 144. (“It is fully recognized that the U.S. economy, as well as the global economy, cannot thrive without the expeditious movement of international trade. These initiatives have been designed to identify and carefully screen high-risk cargo shipments while facilitating the expeditious movement of legitimate trade.”).

199 GAO REPORT, May 2005, supra note 26, at 8.
ports. Remembering that CSI was adopted just four months after the September 11 attacks, Customs’ desire to “do something” in the face of such a calamity is perhaps understandable. While such an approach may be administratively convenient, and it may have given Americans some comfort at a time when fear and the perception of risk from terrorist attack was at an unprecedented high, it is far from principled. Thus, in addition to its legal deficiency, CSI fails to advance Customs’ own objective of ensuring security while “facilitating growth and economic development.”

Balancing new security priorities with economic and trade objectives is a complicated task given the potential risks to human life should the United States underprotect its borders. But in assessing the real risk from maritime terrorism, threat assessment cannot be confused with vulnerability assessment. Threat assessment determines the probability of a terrorist attack while vulnerability assessment evaluates the damage likely to ensue from an attack. Confusing the two could result in a remote possibility being deemed an imminent threat. In 2000, the Interagency Commission on Crime and Security in U.S. Seaports concluded that the threat of terrorism to U.S. seaports was low, although vulnerability to terrorist attack was rated high. More recently, the GAO explored the impetus behind CSI—the fear that terrorists may appropriate containers to transport weapons of mass destruction or a nuclear device to the United States—and concluded it was not an imminent threat. While acknowledging that containerized cargo is vulnerable to some form of terrorist action, the GAO report determined: “[A]n extensive body of work . . . by the [FBI] and academic, think tank, and business organizations concluded that . . . the likelihood of . . . containers [being used to move WMDs to the United States] is considered low.”

The GAO’s finding is no
reason for inaction, but it does suggest there is time to construct measures to protect containers and the supply chain that make sense—in other words, measures that adopt a principled approach to balancing security, commerce and development considerations.

Redressing CSI's imbalance and increasing U.S. security requires a manifold approach. The realization that much of global insecurity will stem from those countries not integrated into globalizations "functioning core,"207 coupled with the arrival of a "new terrorism" without borders, points to the central role developing countries must play in the fight against terror. Future security measures must consciously and explicitly solicit their participation because the United States cannot ensure its security without their active engagement.208 In short, the very status of developing countries as marginal participants in the globalization revolution should make them "of strategic and political significance" to the United States.209

What would a more balanced CSI that incorporated a development dimension and was designed to address the new terrorism look like?

First, CSI would include technical assistance-capacity building as well as development assistance as part of its core structure. Without such assistance, developing countries cannot effectively be brought into the security fold. Membership in CSI is not without significant financial costs. At a minimum, CSI members must invest in state-of-the-art equipment and increased training for personnel all along the supply chain from customs officials to shippers to manufacturers and exporters.210 The costs of required scanning equipment range from one to five million dollars, while total security-related implementation costs are estimated at 1-3% of the value of traded goods.211 Many developing countries would not be able to absorb those costs alone; indeed even developed

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207 Barnett, supra note 192.

208 Mikhail Gorbachev's prophetic statement that we cannot ensure our security without ensuring global security highlights the massive shift in the global security environment since the fall of the Berlin Wall. Gorbachev Statement, supra note 164.

209 See CSI Fact Sheet, supra note 9 (language used in Phase II of CSI implementation).

210 Id. Of course some countries will already have had the equipment in use.

211 Global Economic Prospects, supra note 56, at 186. Note that the OECD suggests a more modest impact. See OECD Report, supra note 3, at 50.
countries like Greece apparently find CSI implementation challenging.\textsuperscript{212}

Admittedly, the idea that a country like the United States may have to pay others to ensure its national security may be unpalatable to some, but it is surely money well spent. Without question, helping ensure the security of developing countries’ exports also ensures U.S. security and the security of the supply chain. As one of the biggest providers of development and technical assistance aid in the world,\textsuperscript{231} the United States recognizes funding must often be provided to less wealthy countries in order to protect and advance U.S. interests.\textsuperscript{214} Moreover, adopting a multilateral approach to fighting terrorism would enable the United States to share the costs of assisting developing countries with wealthy allies and international lending institutions like the International Monetary Fund or the World Bank. In any case, providing technical assistance is specifically contemplated in the current CSI. But by the time such assistance is provided in Phase III of CSI implementation, it may well be too little too late. In addition to funding, many developing countries would need a transfer of technology and know-how to effectively implement CSI. Currently, CSI requires participating countries to establish and automate certain risk management systems to identify potentially high-risk containers, and they must also conduct port assessments to identify and resolve vulnerable links in a port’s infrastructure.\textsuperscript{215} Moreover, all CSI participants must own non-intrusive inspectional equipment (“NII”), which is equipment with gamma or X-ray imaging capabilities.\textsuperscript{216} NII equipment allows officials to inspect a container without having to open it, making inspections more efficient and less disruptive to the flow of legitimate trade.\textsuperscript{217} The United States should grant such equipment to developing countries that do not have it, and of course provide the experts

\textsuperscript{212} \textit{Greece Signs Agreement, supra} note 35.

\textsuperscript{213} See U.S. Agency for Int’l Development, Millennium Challenge Account Update: Fact Sheet (June 3, 2002), available at http://www.usaid.gov/press/releases/2002/fs_mca.html (“The United States is the world’s largest bilateral donor to the developing world. While many donors provide economic assistance, the United States provides resources both to strengthen security and foster economic growth.”).

\textsuperscript{214} Indeed, the United States has already provided such assistance with respect to Greece. See \textit{Greece Signs Agreement, supra} note 35.

\textsuperscript{215} See supra note 32.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{Id.}
who can help train local personnel to use them. There is some precedent for such action. When it sought to protect turtles from the nets of shrimp farmers, the United States gave Caribbean fishers “turtle exclusion devices” that enabled farmers to harvest their product for export while protecting the turtles. More recently, Customs provided NII equipment to Greece in order to bring that country online in time to host the 2004 Olympics. That level of innovative thinking should be used immediately on a larger scale to assist developing countries in meeting CSI’s security protocols.

Perhaps the most difficult challenge in constructing a more principled approach to CSI implementation is in addressing the question of which developing countries should be permitted head-of-the-line privileges to join CSI. By relegating admission of developing countries to some time in the future—and slowly allowing in some of the more advanced and politically powerful developing countries—Customs has not yet had to fully deal with that thorny issue. It is admittedly a difficult one because certain resource constraints must be taken into consideration. CSI implementation is costly even for the United States, both in monetary and human resource terms. For each CSI port, Customs must deploy four to five officers, computers and related paraphernalia to the foreign port. Starting with a budget of only $4.3 million in 2002, CSI has expanded to $126 million in 2005 and about $139 million was requested in fiscal year 2006. In addition to the economic costs, CSI implementation presents formidable logistical challenges. As the number of CSI ports increases, Customs is finding it more difficult to attract qualified personnel to staff overseas posts. Currently, thirty CSI ports are fully operational with Customs staff in place, but as the program expands out to “hardship” posts like Brazil and Greece, the expectation is that staffing will become a more


219 Greece Signs Agreement, supra note 35.

220 Business Report, supra note 48 (noting that this came after a South African official’s comment that CSI could pose challenge to WTO rules).


223 See GAO REPORT 2003, supra note 27, at 28.
difficult issue. These costs limit how quickly CSI can expand and—potentially—which countries can be included. But these resources constraints must be handled in a way that does not undermine security or penalize developing countries themselves.

It is of course impossible to construct a list of developing countries that under all circumstances should be incorporated in CSI and future security measures. But it is possible to develop a set of parameters for admission that do not rely exclusively on a country’s economic status. In the first instance, those countries that have the requisite equipment in place should not be denied admission. Thus, developing countries like Jamaica, Malaysia and South Africa, now part of CSI, would have been granted admission much earlier.

Another concern with CSI’s current implementation strategy is that on certain continents, a single country is privileged. In Africa, for example, South Africa is the only country with a CSI port, and until recently, South America had no ports at all. One response is to ensure that on every continent at least five to ten developing countries be incorporated in CSI. The criterion for admission cannot be based principally on whether a country has “substantial” trade with the United States, or at least the term must be loosely defined. What might be considered de minimis trade by U.S. standards could well be the economic life-blood of a developing country.

Finally, the question arises whether certain conditions should be imposed on developing countries in return for admission to CSI. “Conditionalities” are often imposed in World Bank or IMF lending, as well as in preference programs developed by wealthy nations to benefit developing countries.

224 Id.

225 Jamaica became a CSI member in 2006—years after CSI had been established. Malaysia joined in March 2004, and South Africa in February 2003. See Ports in CSI, supra note 31.

226 CSI Fact Sheet supra note 9, at 1.

227 One of CSI’s admission criteria is that a country have “regular, direct and substantial” container trade with the United States. Id. at 3.

228 AGOA, for example, sets certain conditions for membership, adding only those countries that:

have established, or are making continual progress toward establishing the following: market-based economies; the rule of law and political pluralism; elimination of barriers to U.S. trade and investment; protection of intellectual property; efforts to combat corruption; policies to reduce poverty, increasing
It is a popular way for those providing the funding to ensure their resources are being properly utilized. Much of the rationale behind conditionalities—protecting against corruption and waste—would presumably (and hopefully) not be at issue here given that improper implementation of CSI would expose developing countries themselves to terrorist attack.

CSI itself imposes certain conditions—such as having the requisite equipment and risk assessment capabilities\(^{229}\)—that would be non-controversial if applied to all members. But one could imagine other conditions that would elicit controversy; for example, what if the United States were to require as a condition for admission that a developing country agree to launch trade facilitation negotiations within the WTO? Conditions that go to the heart of the proper implementation of CSI, including possible audits to ensure that monies are being well-spent, make some sense and could be developed in a way that does not unduly trample on the sovereignty rights of developing countries. Conditions that are only tangentially related to CSI implementation, however, would likely force developing countries to rebel. To the extent possible, CSI admission should not be used as a tool to advance other interests. U.S. security interests—as well as the interests of the supply chain—are too important to be exposed to traditional “pork-barrel” politics.

IV. CONCLUSION

Terrorism was not invented on September 11, 2001. But when the Towers came tumbling down, it signaled the arrival of a new form of terrorism and a shift in globalization.\(^{230}\) The “new terrorism” is one that is highly mobile, technologically advanced, unfettered by state control, and profoundly lethal. In turn, the new terrorism revealed a need to re-conceptualize the link between globalization and security. Before September 11, discussions of that link tended to focus on the breakdown of domestic control that occurred when

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\(^{229}\) CSI Fact Sheet, *supra* note 9, at 3.
\(^{230}\) For a provocative discussion of the nexus between globalization and terrorism, see *Barnett, supra* note 192.
protestors took to the streets during international meetings to demonstrate against the ever-encroaching tide of globalization.\textsuperscript{231} But September 11 demonstrated that security and globalization are interrelated.\textsuperscript{232} Terrorists fly a plane into the World Trade Center, and along with the damage to lives and property come border closings, which threaten whole industries because in a just-in-time world, American enterprises cannot prosper without inputs from businesses around the world. This interrelationship of security, commerce and globalization has moved the lowly shipping container to the frontline in the War on Terror.

In an effort to protect the advances made possible by globalization, shipping containers—which facilitate the interconnection of countries—must be protected. Given the challenges terrorism poses to the system, U.S. action is not surprising; indeed, action is necessary. The WTO Agreement is not an impediment to taking such action, but it does impose certain obligations. One of those obligations is the need to balance security considerations with development objectives. The United States cannot ensure its security at the expense of further impoverishing economically vulnerable countries. Such a course of action, in the end, would only make the terrorists' objectives that much easier to attain.

Before September 11, the debate in trade and development circles centered on proponents of “free trade” versus those who advocated “fair trade.” But in the current security environment, secure trade adds another dimension to the debate. A stable and prosperous trading system will only be achieved when all three elements—free, fair and secure—are incorporated within an expanded trade regime.


\textsuperscript{232} Ironically, while the terrorists were in part protesting a globalization phenomenon that leaves much of the Middle East behind, their mission could not have succeeded without the advances in telecommunications and other technologies that globalization made possible. See, e.g., Kurt M. Campbell, \textit{Globalization's First War}, WASH. QUARTERLY, Winter 2002, at 10-11.
Compensation Representatives

A PRUDENT SOLUTION TO EXCESSIVE CEO PAY

Lawton W. Hawkins†

I. INTRODUCTION

The issue of CEO pay continues to garner significant attention both in the popular press and among regulators. The New York Times alone printed 339 stories dealing with executive compensation in 2006.¹ Moreover, the SEC received more than twenty thousand comment letters before it approved new compensation disclosure rules on July 26, 2006.² SEC Chairman Christopher Cox noted that “no issue in the 72 years of the Commission’s history has generated such interest.”³ The reason for the intense degree of interest is clear: CEO compensation in the United States is extremely high, and is getting higher. In 2003, the average CEO of a large U.S. firm made 500 times the salary of the average worker.⁴ This

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¹ Visiting Scholar and Adjunct Professor, University of Washington School of Law; J.D., University of Virginia School of Law; B.A., Williams College. I would like to express my thanks for the thoughtful comments and suggestions made by Professors Richard Kummert, Todd Zywicki, and Dale Oesterle, as well as the participants at a faculty colloquium held at Ohio State University Moritz College of Law. Needless to say, all remaining errors are my own.


³ See SEC Press Release, supra note 2.


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compares with 140 times worker salary in 1991. In absolute levels, the average pay of CEOs in the S&P 500 has risen (in constant 2002 dollars) from $3.7 million in 1993 to $9.1 million in 2003. One study of executive compensation at publicly traded firms with a market capitalization larger than $50 million found that, during the period from 2001 to 2003, these firms’ top five executives received compensation equivalent to 9.8% of the firms’ aggregate earnings.

Some commentators have argued that, for the good of society, CEOs should not be allowed to receive such exorbitant compensation. Others take the narrower position that, irrespective of the impact on broader society, excessive CEO pay clearly harms shareholders. Not only must shareholders ultimately pay the bill, but to the extent that such pay levels are pervasive throughout the market, it becomes difficult for them simply to sell the shares of any offending companies. Thus, following the so-called “Wall Street Rule” would force investors to exit the entire equity market, an obviously untenable response.

Still, despite overwhelming evidence that CEO pay is extremely high, it does not follow that CEO pay is “excessive.” A figure can only be considered excessive if it is higher than the “correct” price, and numerous unanswerable questions confront anyone attempting to determine the correct price for the services of a CEO. For example: How many people actually have the necessary skills to be a good CEO? How much better is a given CEO than the other candidates? How much of the company’s success or failure is attributable to the CEO?

5 PWP, supra note 4, at 1.
10 Id.
11 Id.
12 See Gordon, supra note 8, at 677; Franklin G. Snyder, More Pieces of the CEO Compensation Puzzle, 28 DEL. J. CORP. L. 129, 144-46 (2000).
13 Snyder, supra note 12, at 144.
14 Id. at 146
15 Id. at 145.
What is the “fair” allocation of profits as between the CEO and the shareholders? Does “excessive” refer to an absolute pay level, or is pay excessive only if, whatever the amount, it is insufficiently tied to actual performance? In the face of such unanswerable questions, one is left with the market. In short, a fair price for a CEO is the price the market will bear. But one can use the market to legitimize ostensibly excessive CEO compensation only if the market is “fair,” in the sense that it has not been manipulated by the participants.

Lucian Bebchuk and Jesse Fried, in their seminal book *Pay Without Performance: The Unfulfilled Promise of Executive Compensation*, condemn CEO pay for just such manipulation. According to Bebchuk and Fried, boards of directors and CEOs do not engage in real arm’s length bargaining over CEO pay. Rather, CEOs exert “managerial power” to extract economic rents above and beyond what they could have obtained in an arm’s length negotiation. The result is excessive CEO pay, insufficiently aligned with the CEO’s performance. To address the problem, Bebchuk and Fried propose granting shareholders greater power vis-à-vis the board of directors. For example, they would allow large shareholders to nominate candidates for the board, and would require the company to pick up the expenses for any proxy fight if the shareholder’s nominee received more than a designated minimum level of support.

Bebchuk and Fried’s book has received considerable academic attention, with some commentators taking issue with its conclusion that CEOs are in fact overpaid, and others objecting to its proposed remedies. This article accepts the book’s fundamental point that the CEO pay-setting process is flawed and that reforms are necessary. Nonetheless, it recognizes that high CEO pay may be attributable to numerous factors other than managerial power, and it questions whether

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16 Id. at 146.
17 Without answering this question, I will be using the term “excessive” to refer to both scenarios.
18 See PWP, supra note 4.
19 Id. at 61-64.
20 Id.
21 Id.
22 Id. at 201-16.
23 Id. at 210-12.
24 See infra Part III.
25 See infra Part IV.
certain of Bebchuk and Fried’s proposed solutions might, by altering the balance of power between shareholders and directors, have unintended negative consequences for matters beyond CEO pay. Therefore, to remedy the process problems identified by Bebchuk and Fried, this article suggests that shareholders of those corporations with excessive CEO pay can and should amend corporate bylaws to enable qualified large shareholders to appoint non-executive “compensation representatives.”

Compensation representatives, who would have no right to manage the corporation, would look after the interests of all shareholders on matters relating exclusively to CEO pay. This article contends that the use of compensation representatives could address the most significant problems described in Bebchuk and Fried’s book, without fundamentally altering the traditional relationship between the shareholders and the board of directors. As such, it would constitute a prudent solution to the problem of excessive CEO pay.

Part II of this article discusses in detail Bebchuk and Fried’s thesis, as well as their suggested reforms. Part III describes and evaluates a number of objections to their managerial power thesis. Part IV discusses the many objections to Bebchuk and Fried’s proposal to permit large shareholders to place board nominees on the corporate ballot. Part V introduces the compensation representative approach and outlines its numerous advantages over both the current system and the reforms suggested by Bebchuk and Fried. Part V addresses the feasibility of the compensation representative approach under existing law. Part VI raises and responds to potential objections to the compensation representative approach and concludes by demonstrating that adoption of a compensation representative system is justified by its low costs coupled with its potential benefits to shareholders.

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26 See infra Part V.
II. THE MANAGERIAL POWER THESIS

A. Bebchuk and Fried’s Problems with Current CEO Compensation

1. Factors Enabling CEOs to Exert Managerial Power over Compensation

Ideally, say Bebchuk and Fried, boards and CEOs should engage in arm’s length bargaining over CEO compensation. In such a scenario, boards would vigorously negotiate to receive the best deal for the benefit of the company’s shareholders. In fact, argue Bebchuk and Fried, CEOs exert managerial power to ensure that their compensation is superior to what they would receive in an arm’s length bargain. Bebchuk and Fried point to five major factors that enable CEOs to exert managerial power. First, although most compensation committees are comprised of independent directors, CEOs have significant control over who will serve on the board from which the committee members will be drawn. Although exchange rules no longer permit CEOs to serve on the nomination committee, a nomination committee is unlikely to propose directors opposed by the CEO. CEOs are not likely to support a critic of high executive pay. As long-time General Electric CEO Jack Welch told an audience of recently appointed CEOs:

Put someone in charge who is nearing the end of their career, so they’re not jealous of you as a younger CEO, is immensely rich, much richer than you, and enjoys seeing other people get rich. . . . Never, ever make a distinguished academic your compensation committee chair because you’ll be a poor man by the end of it.

Warren Buffett, a long-time critic of excessive CEO pay, had in mind a similar tendency when he noted, “Though I have served as a director of twenty public companies, only one CEO has put

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27 PWP, supra note 4, at 17-18.
28 Id. at 23-44.
29 Id. at 26.
30 Id.
31 Id.
me on his compensation committee. Hmmmm . . .”33 Second, CEOs are in a position to steer benefits to board members, though their ability to do so has been reduced by the 2003 changes to listing standards of the major securities exchanges.34 Third, social and psychological factors discourage board members from bargaining aggressively with CEOs over compensation.35 Friendship, loyalty, and team spirit encourage directors to be pliant, often at the expense of the interests of parties, such as shareholders, who are present at the table.36 Also, board members who are highly paid CEOs in their own right are likely to rationalize high CEO pay as being in the best interests of shareholders.37 A former SEC commissioner described it more nefariously as the “giraffe effect”:

The compensation committee, composed solely of outside directors who were CEOs of their own public corporations, knew that what goes around comes around. Pushing the pay envelope for the CEO who had selected them for his board was only natural, since they would not want anyone they were associated with to rank in the bottom half of surveys, and getting CEOs’ scale up could only help them when their scales were reviewed by their outside directors.38

Fourth, since board members typically own only a very small fraction of the company’s stock, and since the reputations of directors are unlikely to suffer from approving a CEO’s pay package unless the terms of the package are truly egregious, directors who comply with CEO pay demands will usually not pay a high financial or reputational cost.39 Finally, the limits to board members’ time and information all but compel them to rely on the advice provided by the company’s human resources department and the compensation consultants that have traditionally been hired by that department.40

34 PWP, supra note 4, at 27-28.
35 Id. at 32.
36 Id.
37 Id. at 33.
39 PWP, supra note 4, at 34-36.
40 Id. at 36-37. As discussed infra text accompanying note 197, New York Stock Exchange (“NYSE”) rules now require that a compensation committee’s charter give the committee sole power to retain and fire the compensation consultant. Still, a compensation committee will likely make its decision based in part on the
2. Existing Mechanisms Cannot Effectively Constrain Pay in the Face of Managerial Power

   a. Shareholder Litigation

   Bebchuk and Fried argue that existing mechanisms such as litigation, shareholder voting, the labor market, the market for corporate control, and the product market, cannot effectively constrain pay in the face of managerial power.\(^41\) Litigation’s effectiveness is blunted by both the procedural hurdles placed in front of shareholder plaintiffs and the extremely high standard applied to challenges to executive compensation.\(^42\) In order to prevail, plaintiffs in a shareholder litigation must establish that either (i) when nominally independent directors approved CEO compensation, they were in fact engaged in a self-dealing transaction for their own personal benefit, or (ii) the compensation scheme constituted “waste,” that is, it was so egregious that no rational person could have approved it.\(^43\)

   The difficulty of using shareholder litigation to challenge extraordinary pay was recently confirmed in the Delaware case In re Walt Disney Co. Derivative Litigation.\(^44\) In Disney, the Delaware Court of Chancery was called upon to rule whether Disney directors had breached their fiduciary duty when, among other things, they approved an employment contract for Michael Ovitz which entitled Ovitz to a ninety million dollar severance package after a mere fourteen months as President of Disney.\(^45\) The court indicated that, prior to

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\(^{41}\) Id. at 45-65.

\(^{42}\) Id. at 45-48.

\(^{43}\) Id. The difficulty of prevailing in a waste claim was colorfully expressed by the Delaware Court of Chancery:

   Absent an allegation of fraud or conflict of interest, courts will not review the substance of corporate contracts; the waste theory represents a theoretical exception to the statement very rarely encountered in the world of real transactions ... [R]arest of all—and indeed, like Nessie, possibly non-existent—would be the case of disinterested business people making non-fraudulent deals (non-negligently) that meet the legal standard of waste!


\(^{45}\) Id. at *25.
Ovitz’s termination, “the Disney board had never met in order to vote on, or even discuss, the termination at a full session . . . . [T]he Disney directors had been taken for a wild ride, and most of it was in the dark.”46 In describing the boardroom culture at Disney, the court wrote of “how ornamental, passive directors contribute to sycophantic tendencies among directors and how imperial CEOs can exploit this condition for their own benefit, especially in the executive compensation and severance area.”47 It described CEO Michael Eisner’s relationship with other board members as follows:

By virtue of [Eisner's] Machiavellian (and imperial) nature as CEO, and his control over Ovitz’s hiring in particular, Eisner to a large extent is responsible for the failings in process that infected and handicapped the board's decisionmaking abilities. Eisner stacked his (and I intentionally write “his” as opposed to “the Company’s”) board of directors with friends and acquaintances who . . . were certainly more willing to accede to his wishes and support him unconditionally than truly independent directors.48

Nonetheless, despite board conduct that contained “many lessons on what not to do,”49 the Court of Chancery held, in a decision affirmed by the Delaware Supreme Court,50 that the Disney directors had not violated their fiduciary duties.51

b. Shareholder Voting

If litigation provides no real constraint on excessive compensation, what about shareholder voting? Bebchuk and Fried argue that it too is inadequate in the face of managerial power.52 It is true that in certain instances, such as the adoption of a stock option plan, the major exchanges’ listing rules require that a corporation submit the plan to a shareholder vote.53 However, the vote does not effectively

46 Id.
47 Id. at *28 n.373.
48 Id. at *40 (internal citation omitted).
49 Id. at *39 (emphasis added).
50 In re Walt Disney Co. Derivative Litig., 2006 WL 1562466, at *33-34.
51 In re Walt Disney Co. Derivative Litig., 2005 WL 2056651.
52 PWP, supra note 4, at 48-51.
53 See, e.g., NASDAQ Rule 4350(i) (2006); NYSE Listed Company Manual 303A.08, http://www.nyse.com/lcm (follow the “Click here to open the NYSE Listed Company Manual” hyperlink, the “Section” hyperlink, the “Section 3 Corporate Responsibility” hyperlink, the “Section 303A Corporate Governance Standards” hyperlink, and the “Section 303A.08 Shareholder Approval of Equity Compensation Plans” hyperlink) (last visited Nov. 8, 2006).
constrain CEO compensation since it concerns only general matters, such as the total number of options that may be issued under the plan, rather than the compensation of any particular executive.\textsuperscript{54} It is also true that Section 162(m) of the Internal Revenue Code disallows deductions for compensation exceeding $1 million per executive unless it is “performance based.”\textsuperscript{55} One of the requirements for “performance based” compensation is that the material terms of the excess amount over $1 million be approved by a majority of the shareholders in a separate vote.\textsuperscript{56} However, even if shareholders are knowledgeable enough to vote intelligently on compensation issues,\textsuperscript{57} they are constrained by the fact that they are not presented with any alternative to the plan approved and proposed by the board.\textsuperscript{58} Therefore, if the shareholders were to reject the board’s plan before an alternative became available, senior management could resign and throw the company into crisis.\textsuperscript{59} To prevent this, a board might simply pay executives the cash equivalent of the rejected plan, since the exchange rules do not require a shareholder vote on cash compensation.\textsuperscript{60} That result could make shareholders even worse off, since cash payments would not necessarily be linked to performance of the stock price. If shareholders did not approve the compensation, it would not be deemed “performance based,” and amounts over $1 million would not be tax deductible.\textsuperscript{61}

c. “Outrage Costs” and “Camouflage”

In addition to arguing that litigation and shareholder voting cannot effectively constrain CEO pay, Bebchuk and Fried assert that neither the labor market, the market for corporate control, the capital market, nor the product market

\textsuperscript{54} PWP, supra note 4, at 49. See also Developments in the Law—Corporations and Society, 117 HARV. L. REV. 2169, 2213 (2004).
\textsuperscript{55} I.R.C. § 162(m) (2006).
\textsuperscript{56} Id.
\textsuperscript{57} This is not always a valid assumption, given the complexity of the documents and the frequent need to tailor the details of the compensation plan to the specifics of the particular industry. See Randall S. Thomas & Kenneth J. Martin, The Effect of Shareholder Proposals on Executive Compensation, 67 U. CIN. L. REV. 1021, 1033-34 (1999).
\textsuperscript{58} PWP, supra note 4, at 49.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 49-50.
\textsuperscript{61} Id.
constrains executive pay. Thus, the only remaining restraints on inappropriate compensation are “outrage costs,” which Bebchuk and Fried define as outsiders’ negative reactions to unjustified, abusive, or egregious pay practices. Even outrage costs can be rendered ineffective, since companies endeavour to camouflage the extent and form of their compensation.

Because perceptions are so important, the designers of compensation plans can limit outside criticism and outrage by dressing, packaging, or hiding—in short camouflaging—rent extraction... [M]anagers will prefer compensation practices that obscure the total amount of compensation, that appear to be more performance based than they actually are, and that package pay in ways that make it easier to justify and defend.

Indeed, the very fact that CEOs feel the need to camouflage their pay (as is not the case with movie stars, athletes, and other highly paid stars) strongly suggests to Bebchuk and Fried that most compensation packages are not arrived at by arm’s length negotiation.

Examples of camouflage cited by Bebchuk and Fried include: long-time managerial resistance to the expensing of options; the widespread use of tax-inefficient supplemental executive retirement plans or “SERPs,” which do not enable the company to reap tax benefits, but may allow CEOs to reap camouflage benefits; deferred compensation arrangements, which permit the CEO to enjoy an undisclosed, above-market rate of return prior to vesting; and post-retirement perks and consulting compensation, which need not be disclosed because the recipient is no longer CEO at the time he receives the benefits. For example, Bebchuk and Robert Jackson conducted a study of the pension plans among the CEOs of the Fortune 500 who either retired during 2003 or the first five months of 2004, or were at or close to retirement age in 2004. Although the companies were not required to disclose the total

62 Id.
63 Id. at 65.
64 PWP, supra note 4, at 67.
65 Id. at 21.
66 Id. at 150.
67 Id. at 97-100.
68 Id. at 105.
69 Id. at 110.
costs of such plans to shareholders, they were required to disclose the existence of the plans and the method for determining the annual benefit. Only by examining each company’s proxy materials, 8-K filings, and CEO employment contract, as well as by estimating the likely payout by taking into account factors such as each CEO’s tenure at the company, age, and expected life span, were the authors able to estimate the costs of such plans to shareholders. They found that, for recently retired CEOs, the average cost exceeded $21 million, and for incumbent CEOs between the ages of sixty-three and sixty-seven, the average cost exceeded $26 million.74

According to Bebchuk and Fried, unrestrained managerial power, coupled with camouflage, leads to “pay without performance,” in which CEOs enjoy extraordinarily high pay irrespective of whether they increase shareholder value. For example, CEOs of companies in the S&P 500 averaged $2 million in cash salary and bonus in 2002, but the variation in cash pay among the CEOs was not correlated to performance relative to their respective industries. Although option grants were meant to overcome the alignment problems found in cash compensation, Bebchuk and Fried point out that standard, non-indexed, at-the-money option grants often provide CEOs with windfall benefits. After all, the rise in a

71 Id. at 828. New rules approved in July 2006 will require companies to include a pension benefits table disclosing the actuarial present value of each of the accumulated benefits under each pension plan of the CEO and other designated executives. See supra note 2.
72 Bebchuk & Jackson, supra note 70, at 828.
73 Id.
74 Id. at 837-38.
75 Id. at 831.
76 PWP, supra note 4, at 122-23.
77 In a standard, non-indexed, at-the-money grant, the CEO receives the option at any time during a designated period (typically ten years) to purchase shares of the company at the market price (known as the “exercise” or “strike” price) prevailing as of the date of the grant. Thus, for example, if the CEO received 100 options at an exercise price of $20 and five years later, he or she exercised the option when the market price for the stock was $40, the CEO would reap a benefit of ($40-$20) x 100, or $2,000. An “in-the-money” option would set the exercise price below the market price on the date of the grant, while an “out-of-the-money” option would set the exercise price above the market price on the grant date. If the option were indexed, then the exercise price would rise or fall in tandem with a specific index, such as the S&P 500. In the foregoing example, assuming that the option was indexed to the S&P, and the S&P increased 50% over the five-year period, the exercise price would also rise 50% to $30. The CEO’s gain on exercise would be reduced to ($40-$30) x 100, or $1,000. See THE NEW PALGRAVE DICTIONARY OF MODERN FINANCE 83-89 (1992) (defining and discussing “option pricing theory”).
78 PWP, supra note 4.
given company’s stock may simply be part of a general rise in the market, resulting from the mere passage of time, or from circumstances beyond the CEO’s control, such as a reduction in interest rates.\textsuperscript{79} Although boards could solve much of the windfall problem by “indexing” options so that the exercise price would rise or fall in tandem with a given index, such as the S&P 500, indexed options are rare—a fact that Bebchuk and Fried view as further support for the managerial power thesis.\textsuperscript{80} And while boards do not index options upward, they do often re-price them downward when the shares drop deeply out of the money, essentially providing CEOs with a gift, despite the poor performance of the company’s shares.\textsuperscript{81}

An even more egregious practice, which has come to light since the publication of Bebchuk and Fried’s book, has been the widespread use of backdated options, particularly, though by no means exclusively, among high technology

\textsuperscript{79} Id. at 138-39. Warren Buffett has pointed out another method by which CEOs can ensure that, over time, the value of un-indexed stock options will increase—consistently withholding dividends and buying back company stock. Buffett imagines a Company called Stagnant Corporation, which has granted a ten year, at-the-money option to its CEO, Fred Futile, to purchase 1% of the company. During the ten year period Stagnant Corporation enjoys no growth, each year earning $1 billion on $10 billion net assets, equal to $10 per share on each of its outstanding 100 million shares. If, rather than paying any dividends, Fred uses the $1 billion to repurchase shares, and the shares continue to sell at 10 times earnings, the shares will have appreciated 158% over the ten years. “That’s because repurchases would reduce the number of shares to 38.7 million by that time and earnings per share would therefore increase to $25.80. Simply by withholding earnings from owners, Fred gets very rich, making a cool $158 million, despite the business itself improving not at all.” Letter from Warren E. Buffett to the Shareholders of Berkshire Hathaway, Inc., \textit{supra} note 33, at 16.

\textsuperscript{80} PWP, \textit{supra} note 4, at 141-43. There may be good reasons, however, not to index option grants. For example, suppose Company A’s board indexed CEO options to the movement of the S&P 500. If the S&P dropped 10% while Company A shares stayed flat, shareholders might complain that Company A’s CEO is being unfairly rewarded for the fall in the price of other shares. Or imagine the CEO of Big Oil, Inc. As a result of rising oil prices, the S&P plummets as Big shares rise spectacularly. Big’s CEO would be doubly rewarded for events beyond his control. In order to avoid the problem of sectors whose stocks move counter to a broad index, Big’s stock options could be tied to the "energy sector." But defining the sector could be difficult, and it could open the way to manipulation \textit{ex ante}. Query: was Enron in energy or financial services? If, in order to avoid definitional problems, Big indexed options to the stock of a few companies in its peer group, the pay to Big’s CEO could vary wildly simply as a result of a large scandal at, or a large windfall to, a competitor. Even a perfectly designed index could present new problems. Saul Levmore has suggested that indexing options might encourage CEOs to take on excessively risky projects, since they will receive the same payout (zero) from their options whether they index returns or take a big risk that fails spectacularly, but will receive a huge payoff if their gamble succeeds. Saul Levmore, \textit{Puzzling Stock Options and Compensation Norms}, 149 U. Pa. L. REV. 1901, 1922-23 (2001).

\textsuperscript{81} PWP, \textit{supra} note 4, at 165-67.
Options granted on a given date are made effective retroactively, as of a date when the stock price was lower. This decreases the exercise price of the option and enables executives to reap a larger benefit from the option grant. Despite the claim that stock option grants incentivize executives to increase the company’s stock price in the future, backdating rewards executives merely for short term volatility in the recent past. SEC investigations into the practice have only just begun, but one academic study using statistical analysis of 7,774 companies’ stock option grants between 1996 and 2005 has found that an estimated 29.2%, or 2,270 companies, manipulated stock grants at some point. Even in those companies that do not engage in backdating, Bebchuk and Fried point out that CEOs can often blunt the risks (and alignment of interests) associated with stock options by selling their shares promptly upon exercise of the underlying options or by hedging against the performance of the shares, thereby protecting themselves against a future drop in the company’s stock price. In short, Bebchuk and Fried make a persuasive case that, as a result of managerial power, executive pay is both higher and less aligned with shareholder interests than it would be if it were determined by arm’s length bargaining, and they demonstrate the current difficulty facing those who would challenge objectionable pay arrangements.

B. Bebchuk and Fried’s Proposed Solutions

Bebchuk and Fried indicate that their primary goal is to call attention to the problem of executive compensation, rather than to propose solutions. Nonetheless, they do suggest several specific reforms. First, they advocate steps to enhance transparency, such as expensing options, placing a monetary value on all compensation, and disclosing what fraction of executives’ option gains resulted from performance that was

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84 Id.
85 Randall A. Heron & Erik Lie, What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated?, ___ J. FIN. ECON. (forthcoming 2007) (on file with author).
86 PWP, supra note 4, at 176-79.
87 Id. at 189.
superior to that of its industry peers.\footnote{Id. at 192-94.} These suggestions are relatively uncontroversial; several have already been implemented. For example, since fiscal year 2006, companies have been required to expense employee stock option grants.\footnote{Staff Accounting Bulletin No. 107, 70 Fed. Reg. 16693 (Apr. 1, 2005) (codified at 17 C.F.R. pt. 211).} Furthermore, the newly-approved disclosure rules, to be effective December 15, 2006, will require companies to disclose in tabular form the actuarial present value of the accumulated benefits under each pension plan of the CEO and other designated executives.\footnote{Executive Compensation and Related Party Disclosure, 71 Fed. Reg. 6542, 6611-12 (Feb. 8, 2006) (to be codified at 17 C.F.R. pts. 229.402(c), 228.402(c), 229.10).} Indeed, the new rules include an additional reform not mentioned by Bebchuk and Fried: the requirement that the company insert into the proxy statement a “compensation discussion and analysis” statement, written in plain English and signed by the CEO and Chief Financial Officer.\footnote{Executive Compensation and Related Party Disclosure, 71 Fed. Reg. 6611 (Feb. 8, 2006) (to be codified at 17 C.F.R. pt. 229.402(b)).}

Disclosure alone will not solve what is arguably the most significant problem in the pay-setting process—the board’s lack of accountability to the shareholders. Therefore, Bebchuk and Fried advocate strengthening the influence of shareholders in three ways. First, they would require companies to obtain specific shareholders’ approval for certain “suspect” forms of compensation, such as non-indexed options, re-priced options, and large severance payments.\footnote{PWP, supra note 4, at 195-98.} Second, they would grant shareholders more say in the appointment and reappointment of directors.\footnote{Id. at 195-96.} Currently, while shareholders have the right to elect directors, nominations for directorships of a publicly-traded company are made, not by the shareholders, but by the nomination committee of the board itself.\footnote{See NYSE Listed Company Manual 303A.00, http://www.nyse.com/lcm (follow the “Click here to open the NYSE Listed Company Manual” hyperlink, the “Section” hyperlink, the “Section 3 Corporate Responsibility” hyperlink, the “Section 303A Corporate Governance Standards” hyperlink, and the “Section 303A.04 Nominating/Corporate Governance Committee” hyperlink) (last visited Nov. 8, 2006).}

Bebchuk and Fried would permit any shareholder who for one year has held, say, five percent of the shares to gain
access to the corporate ballot for board elections. Instead of the existing rule, which requires a shareholder to pay its own costs in any proxy fight, Bebchuk and Fried would require the company to cover the costs of proxy campaigns that garner significant support. Third, Bebchuk and Fried would give shareholders the power to initiate changes to the corporate charter.

III. OBJECTIONS TO THE MANAGERIAL POWER THESIS

The managerial power thesis has drawn considerable criticism among commentators. Some have claimed that CEO pay in the United States is not in fact excessive, but that high CEO compensation is justified by the size and complexity of large organizations. For example, one commentator has pointed out that asset managers, who seem to have less complex duties than CEOs, typically receive a higher percentage of “assets under management” than CEOs, even after accounting for the asset managers’ costs of doing business. Surely, he argues, CEOs are entitled to pay on par with that of asset managers. As for international comparisons, one commentator has posited four possible explanations for the relatively high pay of U.S. CEOs: (i) U.S. CEOs contribute more to their firms’ value than do foreign CEOs; (ii) the tournament to become a U.S. CEO is

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95 PWP, supra note 4 at 197-98.
96 Currently, Rule 14a-8, pursuant to which a shareholder can shift the costs of a proxy proposal by compelling a corporation to place it on the corporate proxy, is not available for disputes over the election of particular board members. See 17 C.F.R. § 240.14a-8 (2005). See infra notes 166-74 and accompanying text for further discussion of Rule 14a-8.
97 PWP, supra note 4, at 210-11.
98 Id. at 212-13. Bebchuk and Fried also suggest that companies should link CEO pay more closely to performance by indexing options, limiting executives’ ability to unwind holdings, and avoiding “soft landings” in which unsuccessful CEOs are given generous severance payments upon departure. Id. at 190-91.
100 Id.
101 Id.
102 The international compensation differential may be shrinking. See Geraldine Fabrikant, U.S.-Style Pay Deals for Chiefs Become All the Rage in Europe, N.Y. TIMES, June 16, 2006, at A1 (noting that the differential between U.S. and European CEOs is declining as European CEOs demand pay in line with that of their U.S. counterparts).
bigger, due to the greater power U.S. CEOs wield compared to their foreign counterparts; (iii) U.S. executives are more mobile and can change companies in order to receive higher pay; (iv) the presence of poison pills and the absence of control shareholders in U.S. companies has shifted bargaining power to management.\textsuperscript{104}

Other commentators have argued that even if CEO pay is high, it can nonetheless be justified since, over time, U.S. shares have performed better than those of markets where CEOs are paid less.\textsuperscript{105} Certainly, rational shareholders would prefer to pay an extra $1 million to CEOs if that would lead to an additional shareholder return in excess of $1 million.

Still other commentators have attempted to refute the managerial power thesis by pointing out that increased CEO pay is part of the larger labor market phenomenon known as the “superstar effect.” The superstar effect takes hold in markets where, as a result of the large scale of an organization, even small differences in the quality of those responsible for the organization’s success can have extremely large impact on the organization’s results. This leads to dramatic increases in the compensation at the top of such organizations.\textsuperscript{106} Various types of stars, other than CEOs, have been enjoying large pay increases as the scales of their organizations have increased over time. For example, professional baseball players have been receiving significantly higher pay as the amount of money in professional baseball has been increasing, even though baseball players cannot manipulate the negotiation process.\textsuperscript{107} Similarly, as corporations get larger, such that even slightly better management can cause a dramatic increase in total shareholder value, one could expect that CEO pay would rise as well, whether or not CEOs exert managerial power.\textsuperscript{108} And indeed a recent empirical study of CEO compensation at S&P 500 companies between the years 1980 and 2003 has argued that the six-fold increase in CEO pay during that period can be explained by the six-fold increase in the asset value of the

\textsuperscript{104} Id.


\textsuperscript{107} Snyder, supra note 12, at 155-59.

companies in the S&P 500 over the same period.\textsuperscript{109} While the mere fact that recent increases in CEO pay have tracked increases in company size does not prove that current pay levels are appropriate,\textsuperscript{110} it does suggest that not all of the increases in CEO pay can be attributed to managerial power.

Bebchuk and Fried have also been faulted for failing to distinguish between the legitimate bargaining power of talented people and the illegitimate manipulation of the negotiation process.\textsuperscript{111} One study of CEO compensation during the years 1992 to 2000 indicated that externally hired CEOs, who do not tend to have power over the existing board, made on average ninety-six percent more compensation than CEOs hired from within the corporation.\textsuperscript{112} This finding implies that the high salaries of outsiders result from their strong, but legitimate, bargaining power.\textsuperscript{113}

Other commentators concede that boards and CEOs do not engage in idealized arm’s length bargaining over CEO salaries, but deny that the arm’s length negotiation model is the correct standard by which to judge the negotiations.\textsuperscript{114} They claim that the relationship between the CEO and the board (or company) would be best described as a long term

\begin{footnotes}

\textsuperscript{110} For one thing, it is not clear that the pay levels in 1980 were themselves appropriate. For another, it seems implausible that running a 2003 sized corporation requires six times the effort that it did to run a 1980 sized corporation. And even assuming that a CEO is entitled to more pay for running a larger company, one might expect that as companies grow larger, CEOs would be called upon to offer “volume discounts” as other commercial actors do, in which case pay, as a percentage of assets at least, would have decreased since 1980.

\textsuperscript{111} Snyder, supra note 12, at 152-55.

\textsuperscript{112} Kevin J. Murphy, \textit{Explaining Executive Compensation: Managerial Power Versus the Perceived Cost of Stock Options}, 69 U. CHI. L. REV. 847, 853-54 (2002).

\textsuperscript{113} Bebchuk and Fried attempt to address this point by arguing that the directors would still have a strong incentive to please the new externally-hired CEO, since he or she would have influence over the director’s re-election prospects. The directors may also be disinclined to bargain with the CEO candidate over pay, since they “want to get things off to a pleasant start.” PWP, supra note 4, at 40. Yet this hardly explains why the pay of externally hired CEOs would be \textit{higher} than that of internal hires. A better argument might begin by pointing out that managerial power distorts the market price for all CEOs. Since an externally hired CEO is often either the CEO of another firm or an executive who has the possibility of one day becoming CEO, a firm wishing to hire externally would need to compensate the candidate for the forgone opportunities in his current role. In that sense, externally hired CEOs may be indirect beneficiaries of the widespread exercise of managerial power in the market for CEOs generally.

\textsuperscript{114} See, e.g., Longstreth, supra note 38, at 767-68; Snyder, supra note 12, at 149-52.
\end{footnotes}
relational contract. In such contracts, parties tend not to fight for every advantage, but recognize that a given negotiation is only part of a broader relationship.

The directors’ perception that they should support the CEO, their reluctance to override substantive decisions except under unusual circumstances, and their desire to be part of the “team” are not necessarily abdications of authority but may instead reflect the board’s view that the long-term interest of the corporation is furthered by cooperation and team-building.

As a senior consultant and former board member of Teachers Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF) succinctly put it, “[b]oards have to be tough. They have to be collegial at the same time, though.” Or, to use the words of a former SEC Commissioner, “[m]oney may be ‘left on the table.’ And, yet, the best interests of shareholders may have been served.” If, instead, a board adopted an overly adversarial attitude towards the CEO, the costs to shareholder returns could outweigh any benefits arising from robust CEO pay negotiations. For example, the CEO could simply withhold information from board members he or she considered hostile, thereby rendering the board less effective.

Turning to the specific pay practices criticized by Bebchuk and Fried, such as non-indexed at-the-money options, Kevin Murphy claims that there is a better explanation than managerial power for their widespread adoption. Boards may simply have considered such options a “cheap” form of compensation, since they require no immediate cash outlay and, until recently, they did not need to be treated as an expense for accounting purposes. On the other hand, risk averse and undiversified managers discount the value of high

115 Snyder, supra note 12, at 149.
116 Id. at 151. See also Donald C. Langevoort, The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability, 89 GEO. L.J. 797, 810 (2001) (suggesting that collegiality is necessary to enable mutual commitment and to make consensus-reaching practical).
118 Longstreth, supra note 38, at 768.
120 Murphy, supra note 112, at 859-60
121 Id.
risk options, and demand large option grants in lieu of cash.\textsuperscript{122} In short, boards’ and managers’ respective assessments of the cost and value of such options may explain their increased use better than does managerial power alone.\textsuperscript{123} As evidence of this, one study found “that nearly 80% of [the] options granted in S&P 500 Industrials, S&P 500 Financials, and New Economy firms in 2000 were granted to executives and employees below the top five,” presumably employees without significant power over the board.\textsuperscript{124} Thus, critics of Bebchuk and Fried have countered the managerial power thesis with a variety of plausible arguments.

**IV. REACTIONS TO BEBCHUK AND FRIED’S PROPOSED REFORMS**

Given the controversy surrounding Bebchuk and Fried’s diagnosis of the problem of CEO pay, one could expect similar reactions to their proposed solutions. In fact, as described in this part, while commentators have not objected to their proposals to increase transparency, they have raised numerous objections to their proposals to allow shareholders to appoint nominees to the board and to initiate changes to the corporate charter. Critics have pointed out that institutional shareholders are often unwilling to become engaged in the internal matters of corporations in which they invest, since their costs in time and liquidity would likely exceed the expected benefits.\textsuperscript{125} Rational institutional investors would rather sell the shares of companies that destroy shareholder value (either through inappropriate payment practices or otherwise) than hold on to under-performing shares long enough to effect the necessary improvements.\textsuperscript{126}

Moreover, commentators note, one cannot assume that those shareholders who are willing to become engaged in corporate governance issues will necessarily promote the financial interests of all the corporation’s shareholders.

\textsuperscript{122} Id. at 859.
\textsuperscript{123} Id. at 857.
\textsuperscript{124} Id.
Delaware Vice Chancellor Strine makes the point as follows: "Those institutions most inclined to be activist investors are associated with state governments and labor unions, and often appear to be driven by concerns other than a desire to increase the economic performance of the companies in which they invest."127 For example, a large union pension fund might threaten to mount a proxy fight for the election of board members who would accede to the union’s wage demands. Indeed, some have argued that such a scenario was at the heart of the decision by California Public Employees’ Retirement System (“CalPERS”) (a former president of which was the regional director of the United Food and Commercial Workers) to withhold support for the election of the Safeway CEO, following a strike at Safeway.128

Commentators have also pointed out that, even assuming shareholders do not pursue non-economic agendas, differing types of shareholders could have widely divergent interests.129 For example, a hedge fund with a short term investment horizon might clamor for policies that sacrifice long term interests for short term gain.130 Similarly, diversified shareholders (who have eliminated firm-specific risk) might advocate the implementation of projects that undiversified shareholders would consider to be too risky.131 Companies generally attempt to reconcile these divergent interests by placing the authority to make decisions on behalf of the corporation into the hands of the board of directors.132 Courts facilitate this centralization of authority when they apply the business judgment rule133 to insulate most board decisions from

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127 Leo E. Strine, Jr., Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America, 119 Harv. L. Rev. 1759, 1765 (2006); see also Bainbridge, supra note 125, at 1754-55.
129 Id.
130 Id. at 591.
131 Id. at 577-92.
133 The business judgment rule has been characterized by the Delaware Supreme Court as “a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). Absent a showing of fraud, overreaching, lack of good faith, or being uninformed, a court will defer to the business judgment of the directors, and will not substitute its
Granting shareholders greater power might enhance the board’s accountability, but only at a cost to board authority.\textsuperscript{135} To exacerbate matters, Bebchuk and Fried’s proposal could make directors more accountable, not to shareholders generally, but simply to those shareholders that attempted to assert their newfound power. As demonstrated above, there is no guarantee that the assertive shareholders’ interests are always aligned with those of other shareholders.\textsuperscript{136} In short, commentators have pointed out that Bebchuk and Fried’s proposed reforms could entail great costs. Thus, they should only be undertaken if they would bring shareholders even greater benefits.

Turning to the putative benefits of Bebchuk and Fried’s proposed reforms, critics have argued that they would be rather small in comparison to the costs described above. After all, they argue, there is evidence that despite the absolute size of CEO pay, the amounts involved may not be material to judgment for that of the board. \textit{See Unocal Corp. v. Mesa Petroleum Co.}, 493 A.2d 946, 958 (Del. 1985).

\textsuperscript{134} \textit{See} Dooley, supra note 132.

The business judgment rule can only be understood as intended to protect the authority of the board and thus to promote the value of Authority. . . . [T]he power to hold a party accountable is the power to interfere and, ultimately, the power to decide. Thus, affording shareholders the right to demand frequent judicial review of board decisions has the effect of transferring decision-making authority from the board to the shareholders. \textit{Id.} at 470.

\textsuperscript{135} Stephen Bainbridge describes the dichotomy between authority and accountability as follows:

A complete theory of corporate governance . . . requires balancing the virtues of discretionary fiat against the need to ensure that such power is used to further the interests of shareholders. Because the power to hold to account differs only in degree and not in kind from the power to decide, fiat and accountability also are antithetical.

Bainbridge, \textit{supra} note 125, at 1747 (internal citations omitted). Or, as he states elsewhere in the same article: “[T]here are limits on one’s ability to reduce agency costs without undermining the centralization of fiat that makes the modern corporation work.” \textit{Id.} at 1741.

\textsuperscript{136} Commentators have pointed out a number of other unintended consequences that might arise if shareholders had the power to nominate board members. For example, perfectly independent board members who significantly improve compensation practices might nonetheless be unqualified to fulfill other more important tasks, such as selecting good projects and making good investment decisions. The net result could be negative for shareholders. \textit{See} Core et al., \textit{supra} note 105, at 1162-63.
shareholders. If shareholders really felt that CEO pay was a material concern, one would expect that they would often reject option plans submitted for shareholder approval. In fact, a study of shareholder voting on stock option plans during the 1998 proxy season found that less than one percent failed to receive the approval of shareholders. One former SEC Commissioner put the materiality point forcefully as follows:

The Chartered Financial Analysis Institute, representing more than 70,000 money managers, investment advisers, and Chartered Financial Analysts (CFAs), teaches CFAs how to study a corporation and how to determine what matters and what does not matter in assessing the buy, sell, or hold decision. It even teaches CFAs about the voting decisions and how, with professional confidence, to reach conclusions on which many will rely. The CFA represents the best of the breed. When and if they start to attribute telling importance to executive compensation arrangements in deciding what to recommend, this matter will become important to investors . . . . Until this time comes, the issue, by definition, lacks materiality . . . .

In sum, critics have opposed Bebchuk and Fried’s proposed solutions due to their concern that, once empowered, shareholders would either fail to use their new power, or would use it to the detriment of the corporation. In any event, they argue, the costs associated with the reforms would likely outweigh the benefits.

V. COMPENSATION REPRESENTATIVES: A PRUDENT APPROACH

The controversy can now be summarized as follows: Bebchuk and Fried have pointed out numerous defects in the process for determining CEO pay, and have demonstrated how the process falls short of the ideal of the arm’s length negotiation. They have argued that the defects have led to excessive CEO pay, largely attenuated from CEO performance.

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137 See Loewenstein, supra note 9, at 11 (referencing a study indicating that had the CEOs of the 1000 largest US corporations worked without compensation in 1992, shareholder returns would have increased by only 0.06%).
139 Longstreth, supra note 38, at 770-71. But another explanation for CFAs’ apparent apathy is that, to the extent that the excessive compensation is endemic to publicly traded U.S. corporations, CEO pay is not material for determining relative returns. If, however, CEO pay were to decline or to become better aligned with actual performance, material benefits would accrue, especially to the diversified investor.
140 See supra Part II.A.
To address the problem, they have suggested, among other things, making boards more responsive to shareholders by empowering shareholders (i) to specifically approve certain “suspect” forms of compensation, (ii) to nominate directors, and (iii) to initiate changes to the corporate charter. Critics have responded by arguing that CEO pay may not, in fact, be excessive, and that CEOs may simply be using their legitimate bargaining power to command high pay. They have justified mega option grants by noting that options are viewed by the corporation as inexpensive and by CEOs as risky. As for Bebchuk and Fried’s proposal to increase shareholder power, critics have argued, in effect, that the proposed cure is worse than the disease, especially since the amounts involved may not be material to investors.

A. Reconciling the Debate

The arguments on both sides of this debate appear to have merit, but can they be reconciled? To a certain degree, the answer is yes. On the one hand, the recent increases in the compensation of highly talented persons generally, along with the demonstrated correlation between company size and CEO pay, do imply that not all of the rise in CEO compensation is attributable to managerial power. Critics of Bebchuk and Fried also have a point when they argue that, as Vice Chancellor Strine put it, “the current American approach to corporate governance appears, on balance, to produce good results.” They are therefore right to be skeptical of significant changes to the balance of power between boards and shareholders, particularly while there is some question regarding the financial materiality of CEO pay to shareholders, the putative beneficiaries of reform. On the other hand, it is

141 See supra Part II.B. For other proposed reforms, see, e.g., Charles M. Elson, Director Compensation and the Management-Captured Board – The History of a Symptom and a Cure, 50 SMU L. REV. 127 (proposing that all directors be paid only in stock of the relevant corporation); Holmstrom, supra note 119 (proposing the institution of generally accepted compensation practices, analogous to GAAP, which can be audited); Loewenstein, supra note 9 (proposing that shareholders be allowed an advisory up or down vote on CEO pay).

142 See supra Part III.

143 See supra notes 121-24 and accompanying text.

144 See supra Part IV.

145 Strine, supra note 127, at 1769.

146 This article does not take a position on whether allowing shareholders to nominate directors would be advisable to help address broader corporate governance
important to note that none of the critics have defended the existing pay-setting process, except by claiming that arm’s length negotiations by a divided and adversarial board could be even worse.\textsuperscript{147} Even a prominent critic of the managerial power thesis implicitly admitted that the process is seriously flawed when he made the following concession:

Judgment calls tend systematically to favour the CEO. Faced with a range of market data on competitive pay levels, committees tend to err on the high side. Faced with a choice between a sensible compensation plan and a slightly inferior one favoured by the CEO, the committee will defer to management. . . . The amounts at stake in any particular case are typically trivial from a shareholder’s perspective, but the overall impact of the bias has likely contributed to the ratcheting of pay levels [described in this article].\textsuperscript{148}

B. Adopting a System of Prudent Reform

1. Characteristics of Prudent Reform

What then should be done? In view of the uncertainty regarding the extent of excessive pay, as well as the risks associated with adopting radical changes to corporate governance, reformers should strive to adopt a prudent approach that addresses the process problems without simultaneously creating new problems. Prudent reform would have five distinct characteristics. First, it would insert into the compensation-setting process parties who are immune to CEO pressure and responsive to shareholder concerns. Second, it would address compensation process flaws in a targeted way, with minimal spill-over into other areas of corporate governance. In other words, it would not fundamentally alter the existing balance between directors and shareholders, or jeopardize the collegiality of many well-functioning boards. Third, it would provide a substantial enough improvement over the existing system to justify its adoption. It would further the interests of shareholders, while being mindful of the limits and possible disadvantages, discussed above, of direct shareholder involvement. It would avoid imposing on shareholders demands that exceed their expertise or costs that exceed concerns. It simply argues that shareholder nominations may constitute too strong a remedy if the primary concern is executive compensation.\textsuperscript{147} See supra note 119 and accompanying text.\textsuperscript{148} Kevin J. Murphy, Executive Compensation, in HANDBOOK OF LABOR ECONOMICS 2485, 2518 (Orley Ashenfelter & David Card eds., 1999).
expected benefits, and it would involve shareholders only to the extent likely to promote the long-term interests of the corporation. Fourth, prudent reform would be achievable with minimal changes to existing law, a particularly important characteristic since one could expect that powerful members of the business lobbying community would strongly resist significant legal changes that might be viewed as impinging on power of directors or threatening the pay of CEOs.\textsuperscript{149} Finally, prudent reform would be flexible. Rather than requiring significant changes to all firms, irrespective of individual circumstances, it would allow arrangements to be tried in the marketplace and vindicated or discredited by the market itself.\textsuperscript{150}

2. The “Compensation Representative”

Bearing in mind the foregoing principles for prudent reform, this article proposes that shareholders of those corporations with excessive CEO pay should amend corporate bylaws to create a special non-executive position, tentatively entitled “compensation representative,” to represent the interests of shareholders with respect to CEO compensation. The amended bylaw could provide that the three largest eligible shareholders of the corporation, acting by consensus, would appoint the compensation representative. If they are unable to agree on a candidate, they may submit the decision to a neutral arbitrator of their choosing. In order to be eligible to participate in the appointment of the compensation representative, a large shareholder must: (i) have held its shares for at least one year; and (ii) not have material business

\textsuperscript{149} A case in point is provided by the modest reforms that the SEC proposed in 2003 in order to enhance shareholder nomination rights in limited circumstances. See Security Holder Director Nominations, 68 Fed. Reg. 60784 (Oct. 23, 2003) (codified at 17 C.F.R. pts. 240, 249, 274). The negative reaction by the Business Roundtable and other lobbying organizations was decisive. According to the SEC staff, “The vast majority of commentators supported modifying the proxy rules and regulations related to the nomination and election of directors. Commentators who did not support such a modification included all of the corporations and corporate executives, most of the legal community, and the majority of associations (mostly business associations).” SEC Div. of Corp. Fin., Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors (July 15, 2003), available at http://www.sec.gov/news/studies/proxyrpt.htm. The reforms were ultimately not adopted.

\textsuperscript{150} Prudent reform would not set a ceiling on CEO pay, whether in absolute terms or as a multiple of worker salaries. If, as some commentators claim, high CEO pay results from the limited supply of exceptional CEOs and their legitimate use of the resulting bargaining power, a corporation should not be restricted from awarding appropriately high compensation.
deals with the company, other than in its capacity as a shareholder. Finally, to help guard against opportunistic behavior, both the appointing shareholders and the compensation representative would be required to sign an agreement with the company requiring them to fulfill their duties under the system in the interests of the shareholders as a whole.\textsuperscript{151}

\textit{a. Rights and Duties of the Compensation Representative}

Compensation representatives would not have the right to vote either as members of the compensation committee or the board of directors. They would not be authorized to manage the business or affairs of the corporation. Their rights and duties would instead be limited to the following: (i) to attend all compensation committee meetings (formal or informal), as well as all board of director meetings, to the extent such board meetings concern CEO compensation matters; (ii) to inspect all documents relating to CEO compensation; (iii) to demand compensation-related information from compensation committee members, compensation consultants, and other board members; (iv) to advise and give opinions on CEO compensation matters, including its form, amount, conditions for receipt, and timing; (v) to submit to compensation committees any objections to proposed compensation plans, and, in the event that the full board participates in the determination of CEO compensation, to submit objections to the full board; and (vi) finally, if unsatisfied with the response of compensation committees or boards, as the case may be, to submit objections to the shareholders that appointed them. Following receipt of a compensation representative’s objections, an appointing shareholder could take any action thereon which it saw fit. For example, one or more of the appointing shareholders could meet with members of the compensation committee to learn more about the reasons for the proposed compensation package and to discuss ways in which it might be improved. In extreme cases, as discussed below, an objecting shareholder could force the corporation to include in its proxy a proposal to reject any

\textsuperscript{151} For a discussion of other protections against possible conflicts of interest between appointing shareholders and other shareholders of the corporation, see infra notes 158-60 and accompanying text.
portions of the compensation package submitted for shareholder approval. It could also force the corporation to include in the proxy pay-related precatory proposals, in which the shareholders formally recommend that the board take certain actions without purporting to require that the board do so.\textsuperscript{152}

\textit{b. Advantages of a Compensation Representative System}

There are numerous advantages to the compensation representative system over either the current system or the reforms proposed by Bebchuk and Fried. First and foremost, the use of a compensation representative would address the most serious process problem raised by Bebchuk and Fried—the current failure of boards to adequately represent the interests of shareholders. It would insert into the compensation process a party who is beholden not to the CEO, but to the shareholders. Since the compensation representative would not be nominated or appointed by the board or CEO, he or she would be less susceptible to managerial power than are directors under the current system. Moreover, the large shareholders that appointed the compensation representative would have a sufficient stake in the corporation to ensure that the representative would be accountable to the shareholders; and representatives who wish to be repeat players would have a strong incentive to develop a reputation for protecting shareholder interests.

The compensation representative proposal is preferable to Bebchuk and Fried’s proposals, since it is a targeted response to the specific problem of CEO compensation. Its effects would not spill over into other matters, since the role of a compensation representative would be limited to investigating and advising on compensation matters, and would not extend to the management of the corporation’s affairs. This limited role ensures that the use of a compensation representative would not substantially alter the traditional balance of power between a corporation’s board and its shareholders.\textsuperscript{153} It also would enable a compensation

\textsuperscript{152} See infra notes 166-88 and accompanying text.
\textsuperscript{153} Presumably, Bebchuk for one would not view this limited role as a virtue, since he feels that granting shareholders greater rights would benefit corporate governance more generally. See, e.g., Lucian A. Bebchuk, The Case for Increasing
representative, who would not be a board member, to be tough with the CEO without sacrificing board collegiality. The representative could serve as the “bad guy,” making it easier for the board to take a harder line with the CEO. Rather than telling the CEO, “Bob, we don’t think you’re worth that much,” a board with a compensation representative could say, “Bob, we’d love to grant you the additional one hundred thousand options—and we really think you deserve it—but if we do, that S.O.B. is going to make a big stink about it, and the publicity would be bad for all of us.”

One might argue that a compensation representative provides no improvement on the current system. After all, shareholders are already entitled to vote on significant portions of most compensation packages. However, a system that merely allows shareholders the right to reject an inappropriate proposal is clearly inferior to one that could prevent the board from submitting the inappropriate proposal in the first place. A compensation representative could become engaged in the details of the compensation package early in the process. He or she would be in a position to detect manipulation, excess, or potential CEO windfalls from the outset, before the compensation committee or the board presents its recommendation to the shareholders. Take an example in which a huge bonus is conditioned upon the CEO’s achievement of certain objective goals. A diligent compensation representative would be better able than shareholders to judge whether the goals could be achieved easily or only through extraordinary CEO performance. He or she could encourage the compensation committee to adopt demanding goals and could otherwise influence the details of the package to ensure the alignment of pay with performance, all prior to the shareholder vote. Furthermore, a compensation representative certainly would be better able than shareholders to detect and object to egregious practices such as the backdating of option grants.

Another advantage to a compensation representative system is that compensation representatives would likely become repeat players, working with more companies than

Shareholder Power, 118 Harv. L. Rev. 833, 865-70 (2005) (arguing that shareholder value would be increased if shareholders were allowed to initiate changes in the corporate charter, to nominate board members, to change the company’s state of incorporation, and to initiate mergers and similar transactions).

154 See supra notes 53-56 and accompanying text.
even the most active and sought after board member. Over time, they could develop expertise, market knowledge, and insight into the proper design of compensation packages, as well as into the way such packages can be manipulated. Thus, compensation representatives could not only benefit the shareholders, but they could also educate the compensation committee and board of directors on compensation best practices, thereby alleviating another problem identified by Bebchuk and Fried, the limits on the time and information available to independent directors.155

The early involvement of a compensation representative would also benefit shareholders in those (hopefully rare) instances where the inclusion of a shareholder proxy proposal became necessary. Currently, as mentioned above, when shareholders vote on a compensation scheme, they are not generally provided with an alternative to the board’s proposal, and may therefore feel compelled to approve inappropriate arrangements.156 If, however, a shareholder were to respond to the compensation representative’s objections by including a proxy proposal under Rule 14a-8 of the Securities Exchange Act of 1934, the shareholder would have 500 words in which to state not only its objection to the board’s proposal, but the material terms of the recommended alternative pay arrangement, thereby providing a real alternative to the board’s proposal.157 Regardless of whether the general shareholders ultimately accepted the shareholder proposal, its very inclusion in the proxy could encourage directors to be more transparent regarding executive pay, since they would need to clearly justify their proposed arrangements in response to the specific objections set forth in the shareholder proposal.

What about the potential dissention and conflict among participating shareholders? Since neither the compensation representative nor the appointing shareholders would be engaged in the management of the corporation, the likelihood of significant conflict among shareholders would be small. All shareholders would benefit proportionally if a compensation representative either lowered CEO pay, enhanced CEO performance, or both.158 However, if a conflict were to arise

155 PWP, supra note 4, at 36-37.
156 See supra note 57 and accompanying text.
157 17 C.F.R. § 240.14a-8(c), (d) (2005). For details regarding the use of Rule 14a-8, see infra notes 166-74 and accompanying text.
158 Anabtawi, supra note 128, at 593.
between long and short term shareholders, the proposal set forth in this article specifically favors long term shareholders, since only shareholders who have held their shares for at least one year could participate in the appointment of the compensation representative. Likewise, conflicts between insiders and outsiders would be resolved in favor of outsiders, since shareholders with material business dealings with the corporation could not participate in the appointment of the compensation representative.159

What if a shareholder wished to use the compensation representative to sabotage the corporation for private gain? Imagine, for example, that Company S, the largest shareholder of Company A, owns one percent of Company A, as well as twenty percent of Company B, a competitor of A. What if Company S tried to appoint an unduly aggressive and confrontational compensation representative in order to force the CEO of A to resign, to the detriment of Company S’s investment in Company A, but to the much larger benefit of its investment in Company B? Or imagine scenario two, in which Company S tried to use the compensation representative to force Company A to acquire Company B at an excessive price, enabling Company S to capture a large premium on its investment in Company B sufficient to offset the loss on its smaller investment in Company A? Finally, imagine scenario three, in which Company S, a large financial institution, manages Company A’s very profitable pension program. What if Company S hesitated to appoint a hard-nosed compensation representative, for fear of jeopardizing its relationship with the CEO of Company A?

The proposal set forth in this article presents significant hurdles to all three scenarios. As to scenario one, even if a shareholder wanted to use the compensation representative to force the resignation of a valuable CEO, it could not likely convince the other two appointing shareholders to appoint such a representative. If a bad faith compensation representative threatened to contest the board’s compensation proposal unless his or her demands were met, the threats would ring hollow,  

159 See Parthiban David et al., The Effect of Institutional Investors on the Level and Mix of CEO Compensation, 41 ACAD. MGMT. J. 200, 205 (1998) (an empirical study indicating that institutional investors that have merely an investment relationship with the firm influence compensation in accordance with shareholder preferences, but that institutional shareholders that depend on the firm for their own business have no such influence).
since unreasonable proxy proposals would likely be rejected by the full shareholder vote. A shareholder’s attempt to effect scenario two would be subject to the same difficulties as scenario one. In addition, the shareholder in scenario two would be stymied by the fact that a compensation representative cannot engage in the management of the corporation, making it difficult for the representative to pressure the corporation to take specific actions, such as a merger. Finally, as for scenario three, the use of a lap-dog compensation representative would be no worse than the current system, in which the board makes its decision without the input of any shareholder representative. In any event, the precise scenario described could not occur, since shareholders with significant commercial dealings with the corporation would be excluded from the appointment process.

c. A Compensation Representative System is Feasible Under Existing Law

Assuming that the proposal set forth in this article would, if implemented, benefit shareholders, is it feasible under existing law? Very much so. In fact, as described below, it could be implemented in Delaware without the active involvement of courts, legislatures, or, perhaps most importantly, company boards. Under existing Delaware corporate law, a company’s bylaws would simply need to be amended to grant the three eligible shareholders the right to appoint a compensation representative having the rights and duties described above. In Delaware, this bylaw amendment could be effected by either the board of directors or the shareholders. Under Section 109(a) of the Delaware General Corporation Law, the power to adopt, amend, or repeal the bylaws is held by the shareholders, provided that the certificate of incorporation may confer such power on the board. But “[t]he fact that such power has been so conferred upon the

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160 Rule 14a-8 would allow Company S to include the same compensation-related proxy proposals whether or not the company has a compensation representative. The participation of a bad faith compensation representative would add little to the threat posed to the CEO from such a proposal.

161 In this sense, the proposal set forth in this article differs from Bebchuk and Fried’s proposal to force companies to pay the costs for board proxy contests that receive sufficient support. Under current law, all such costs must be borne by the contesting shareholders.

directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.”163 The Revised Model Business Corporation Act provides both boards and shareholders with similar rights to amend bylaws.164 Under the reasonable assumption that most boards would not unilaterally propose such a bylaw amendment, shareholders who meet certain rather easy eligibility requirements165 may, under SEC Rule 14a-8 of the Securities Exchange Act of 1934, compel the corporation to include it in its proxy.166

Rule 14a-8(i) provides, however, that a company may exclude a proposal from its proxy “[i]f the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company’s organization.”167 Recently, Professor Bebchuk has attempted to use Rule 14a-8 to propose that CA, Inc. (formerly Computer Associates International, Inc.) amend its bylaws to limit the board’s ability to issue poison pills.168 Such proposals, however, are subject to the objection that they conflict with Section 141(a) of the Delaware General Corporation Law, which provides: “The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.”169 Indeed, the conflict with Section 141(a) was the stated reason that the board of CA, Inc. refused to include the proposal in its proxy. Neither the SEC nor the

163 Id.
164 Article 10.20(a) of the RMBCA provides that “[a] corporation’s shareholders may amend or repeal the corporation’s bylaws.” Article 10.20(b) permits the board of directors to amend or repeal the bylaws as well, but gives shareholders the final word, since the board may not amend or repeal bylaws if “the shareholders in amending, repealing, or adopting a bylaw provide that the board of directors may not amend, repeal, or reinstate that bylaw. See Revised Model Bus. Corp. Act § 10.20(b)(2) (2003).
165 Under Rule 14a-8(b), in order to be eligible to submit a proposal, a shareholder must have continuously held at least $2,000 in market value, or 1%, of the company’s securities entitled to be voted on the proposal at the meeting for at least one year by the date the shareholder submits the proposal, and must continue to hold those securities through the date of the meeting.
166 SEC v. Transamerica, 163 F.2d 511 (3d Cir. 1947).
168 See Bebchuk v. CA, Inc., 902 A.2d 737, 738 (Del. Ch. 2006).
169 For a discussion of the conflict under the corporate law of Delaware and other states between corporate law provisions granting shareholders the right to pass and amend bylaws and those granting the board of directors the power to manage the affairs of the corporation, see generally Brett H. McDonnell, Shareholder Bylaws, Shareholder Nominations, and Poison Pills, 3 Berkeley Bus. L.J. 205 (2005).
Delaware courts have expressed an opinion on the merits of the board's refusal; the former refusing to grant a no-action letter pending the resolution of the matter under Delaware law,\(^{170}\) and the latter refusing to decide the matter on ripeness grounds.\(^{171}\) The Oklahoma Supreme Court, however, when interpreting provisions of its corporate code which are substantially identical to those of Delaware, held in a similar case that the shareholders may propose a bylaw to require shareholder approval for the issuance of poison pills.\(^{172}\)

In any event, an adverse ruling on Bebchuk's CA, Inc. proposal would not seem to cast doubt on the legality under Delaware law of a compensation representative bylaw, since the two bylaws could be clearly distinguished. Delaware General Corporation Law provides that bylaws “may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”\(^{173}\) Unlike Bebchuk's proposed bylaw, a bylaw merely calling for the appointment of a compensation representative could not be said to conflict with Section 141(a), since the representative would be explicitly precluded from managing the business or affairs of the corporation. Neither would the bylaw conflict with articles of incorporation that explicitly grant the compensation committee or the board of directors the authority to determine officer and director compensation. After all, the compensation representative would not be a member of either the compensation committee or the board, nor would he or she have the authority to vote on the actual compensation being proposed. He or she would merely represent the interests of shareholders and call to their attention compensation plans that shareholders might find objectionable. The legality of a bylaw calling for a compensation representative is further strengthened by Section 141(h), which permits corporations to use bylaws to restrict the compensation of directors.\(^{174}\)


\(^{171}\) Bebchuk, 902 A.2d at 737.


\(^{173}\) DEL. CODE ANN. tit. 8, § 109(b) (2001).

\(^{174}\) “Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors.” Id. § 141(h) (emphasis added).
Another possible hurdle to the use of bylaws to adopt compensation representatives might be found in Rule 14a-8(i)(8), which allows companies to exclude from the proxy a proposal which relates to an election to “the board of directors or analogous governing body.” Apart from the obvious fact that a compensation representative is not a board member and does not otherwise have the right to govern the affairs of the company, the ability of companies to use Rule 14a-8(i)(8) to exclude shareholder proposals has been weakened by the recent Second Circuit holding in *American Federation of State, County & Municipal Employees v. American International Group, Inc.*175 The court held that a shareholder proposal to require that AIG include certain shareholder board nominees on the corporate ballot under Rule 14a-8 could not be excluded from the corporate proxy materials.176 The court rejected the SEC’s interpretation of its own rule, holding that, although Rule 14a-8(j)(8) would allow a corporation to exclude specific nominees from an election, it would not allow it to exclude a bylaw proposal to permit shareholder nominees to be included on the corporate ballot in the future.177 *A fortiori*, a company should not be able under Rule 14a-8(i)(8) to exclude a resolution relating to a mere compensation representative.

Once the bylaw has been approved by the shareholders, no further legal issues should arise unless and until a compensation representative objects to the board’s compensation plan and a shareholder submits a proxy proposal calling on the shareholders to reject it. If the proxy proposal concerns a portion of the plan that is subject to a shareholder approval, there should be no legal hurdles to the proxy proposal, since the proposing shareholder would simply be exercising its right under the securities law. Thus, for example, a shareholder could include a proxy proposal to reject an equity-based compensation plan, since the listing rules of both the New York Stock Exchange and NASDAQ require that the shareholders approve any such plan.178 Similarly, a shareholder could include a proxy proposal regarding any individual’s compensation in excess of $1 million for which the

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176 *Id.* at 123.
177 *Id.* at 127.
178 See supra notes 53-54 and accompanying text.
corporation wished to claim a deduction under § 162 (m) of the Internal Revenue Code.\textsuperscript{179}

More problematic would be a shareholder proxy proposal that purported either (i) to reject other portions of a compensation plan for which neither the tax law nor the exchange rules requires a shareholder vote, or (ii) to compel the corporation to adopt a specific compensation plan that had not already been proposed by the board. Whether or not a corporation could exclude such proxy proposals would depend upon state corporate law since, as discussed above, Rule 14a-8 allows a corporation to exclude any proposal that is invalid under the law of the corporation’s jurisdiction of organization.\textsuperscript{180}

Therefore, the legality of a proposal to reject, for example, cash compensation under $1 million would depend in Delaware on whether the corporate charter or bylaws permitted the shareholders to approve officer and director compensation in such a case. Certainly, a corporation could amend its charter to require such a vote. Under Delaware law, however, any charter amendment must be first initiated by the board, following which the shareholders must approve it.\textsuperscript{181} It seems unlikely that many boards would unilaterally initiate charter amendments that subject their compensation decisions to a shareholder vote. As for bylaw amendments, their terms are generally subordinate to contrary provisions in the charter.\textsuperscript{182} Thus, a shareholder could probably only initiate a bylaw amendment to require a shareholder vote on executive compensation if the charter contained no contrary provision.\textsuperscript{183}

The same problem would confront a proxy proposal purporting to compel the board to adopt a compensation plan containing specific terms. Such a proposal would not be valid unless a provision of the charter or bylaws actually granted shareholders the right to dictate executive compensation, as opposed to simply granting them the right to approve a plan proposed by the board. Presumably such a provision would be rare, certainly among listed companies, all of which are required under exchange rules to appoint compensation

\textsuperscript{179} See supra notes 54-56 and accompanying text.
\textsuperscript{180} See supra note 167 and accompanying text.
\textsuperscript{182} See, e.g., Gaskill v. Gladys Belle Oil Co., 146 A. 337, 340 (Del. Ch. 1929).
\textsuperscript{183} But, in view of the potential conflict of interest, it is not inconceivable that a court in equity could give preference to the bylaws. See Gow v. Consol. Coppermines Corp., 165 A. 136, 138-42 (Del. Ch. 1933) (holding that a bylaw determining the number of directors prevails over a contrary clause in the charter).
committees satisfying criteria specified by the relevant exchange. 184

Although a corporation could exclude a proxy proposal to reject certain portions of a pay package or to compel the board to adopt a particular compensation plan, a shareholder could still require the company to include a non-binding, or “precatory” proxy proposal. 185 Some may be skeptical of the effectiveness of precatory proposals, since they have tended not to garner significant shareholder support. A study of such proposals in the 1994 proxy season conducted by Randall Thomas and Kenneth Martin found that precatory proposals relating to compensation garnered, on average, support of only 12.8%. 186 However, precatory proposals submitted on the recommendation of the compensation representative should have greater credibility among shareholders than have past precatory proposals, which were often made by shareholders, such as unions or governmental actors, who held non-financial objectives. Another empirical study by the same authors relating to the 1993-1997 proxy seasons found that “shareholders are statistically more likely to support executive compensation proposals that raise corporate governance issues than those that raise social responsibility issues.” 187 Still, one might wonder whether, if a precatory proposal were to pass, the board would act on it, since it has no legal obligation to do so. Yet Thomas and Martin’s study found that in the two-year period following the inclusion of compensation-related precatory proposals, total compensation declined by a statistically significant average of $2.7 million, although not a single proposal they studied actually passed. 188 One can expect

184 See, e.g., NYSE Listed Company Manual Rule 303A.05(a), http://www.nyse.com/lcm (follow the “Click here to open the NYSE Listed Company Manual” hyperlink, the “Section” hyperlink, the “Section 3 Corporate Responsibility” hyperlink, the “Section 303A Corporate Governance Standards” hyperlink, and the “Section 303A.05 Compensation Committee” hyperlink) (last visited Nov. 8, 2006).

185 Since precatory proposals are not binding on the board, they are not deemed by the SEC to conflict with the requirement that the board have the authority to manage the affairs of the corporation. “In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.” Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 41 Fed. Reg. 52,994, at *7 (Dec. 3, 1976).


187 Thomas & Martin, supra note 57, at 1022.

188 Id. at 1065, quoted in PWP, supra note 4, at 68-69.
a precatory proposal submitted following the report of a compensation representative to be at least as effective. Indeed, such a precatory proposal, even if it does not pass, should be more effective than those studied by Thomas and Martin, since the board would realize that the proposal had the support of at least one major shareholder. If such a precatory proposal were to pass, one could expect the impact to be even greater, especially if the precatory proposal were to be accompanied by the shareholders’ actual rejection of those portions of the compensation plan submitted for their approval. In the face of such a rejection, a board would ignore the precatory proposal at its peril.

d. Flexibility of Compensation Representative System

As discussed above, one advantage of implementing the compensation representative system by bylaw is that it would obviate the need for new legislation.\(^\text{189}\) A related advantage to case-by-case implementation is flexibility, especially since the extent of the CEO compensation problem may vary greatly by firm.\(^\text{190}\) For example, at some firms, such as those controlled by a large independent shareholder, executive compensation may not be a serious issue, and the controlling shareholder may have the means and motivation to monitor executive compensation better than could a compensation representative. Indeed, empirical studies have indicated that firms with a shareholder controlling more than five percent of the shares may already be engaged in significant monitoring,\(^\text{191}\) and that

\(^{189}\) See supra note 161 and accompanying text.

\(^{190}\) For evidence that flexibility in matters of corporate governance improves company performance, see Sridhar R. Arcot & Valentina G. Bruno, One Size Does Not Fit All, After All: Evidence from Corporate Governance (May 16, 2006) (unpublished working paper), available at http://www.ssrn.com/abstract=887947 (an empirical study finding that rigid adherence to “best practices” does not necessarily lead to superior performance, due to the heterogeneity of circumstances facing different companies). See also Stephen M. Bainbridge, A Critique of the NYSE’s Director Independence Listing Standards, 30 SEC. REG. L.J. 370 (2002) (arguing that independent directors are not an unalloyed good, in part because different companies may require different accountability mechanisms).

\(^{191}\) See, e.g., David et al., supra note 159 (finding that the presence of institutional owners without significant business ties to a company is associated with lower levels of CEO pay); Donald C. Hambrick & Sydney Finkelstein, The Effects of Ownership Structure on Conditions at the Top: The Case of CEO Pay Raises, 16 STRATEGIC MGMT. J. 175 (1995) (finding that the pay of CEOs at firms containing a large outside shareholder was tied significantly more strongly to profitability than was the case at firms without such a shareholder).
the doubling of the percentage holdings of large outside shareholdings is associated with a twelve to fourteen percent drop in CEO pay. Shareholders of such a firm might see no benefit to adding an additional layer of bureaucracy on top of an already well-working system.

On the other hand, shareholders of an underperforming firm that is dominated not by an outside shareholder, but by an unresponsive CEO and his or her complicit board of directors, may find that the executive compensation system lies at the heart of the company’s problems. They may discover that the introduction of a compensation representative both captures the attention and increases the accountability of the CEO and the board, to the substantial benefit of shareholders.

In short, rather than mandating a procrustean system that could lead to unforeseen negative effects, the proposal set forth in this article would give shareholders, the intended beneficiaries of the new system, the ability to determine for themselves whether its adoption addresses their concerns. If it does, the system will likely be adopted by numerous corporations, and may evolve into corporate best practice. Indeed, if it became widely adopted, its benefits could subsequently be reflected in law. For example, courts could adopt a different standard of review of executive compensation depending upon whether a compensation representative was involved. Compensation plans involving a compensation representative could continue to enjoy the deferential waste standard or could be entirely immunized from judicial review, while plans adopted without such involvement could be subjected to a stricter scrutiny. Alternatively, state corporate law could be amended to provide for compensation representatives in all cases, unless a company’s articles of incorporation explicitly opted-out of the system. If, on the


193 Ironically, since Bebchuk and Fried’s proposal gives nomination rights only to shareholders holding five percent or more of the company’s shares, the only companies impacted by their proposal would be the very companies which, statistically at least, are least likely to have compensation problems.

194 In a similar development, shareholder proposals seem to be affecting statutory law relating to the election of directors. Currently, under the Delaware General Corporation Law and the Model Business Corporation Act, a nominee need only receive a plurality of shareholder votes to be elected to the board. Recently, however, numerous corporations have received shareholder proposals to require the resignation of directors who receive less than a majority vote. In response, the
other hand, the use of compensation representatives provided no material shareholder benefit, additional corporations could refrain from adopting it, and those which had adopted it could repeal it by a simple shareholder vote, without the need for legislative or judicial action.

VI. RESPONSES TO POTENTIAL OBJECTIONS

This article concludes by addressing a few possible objections to the compensation representative proposal. One objection might be that another layer of corporate bureaucracy is unnecessary, since most companies already have a compensation committee, along with a compensation consultant, to advise them. But as pointed out by Graef Crystal, a compensation consultant and long-time critic of executive pay, the presence of a compensation consultant is no panacea.195 Quite the contrary:

Ostensibly, compensation consultants were hired by the CEO to perform an objective analysis of the company’s executive pay package and to make whatever recommendations the consultant felt were appropriate. In reality, if those recommendations did not cause the CEO to earn more money than he was earning before the compensation consultant appeared on the scene, the latter was rapidly shown the door. I learned this fact of life early on . . . .196

One might argue that Crystal’s description no longer applies, since the listing rules of the New York Stock Exchange now require companies listed thereon to: (i) have a compensation committee “composed entirely of independent directors;” and (ii) have a written charter that gives the compensation committee “sole authority to retain and terminate” any compensation consultant employed by the company.197 The mere fact, however, that a member of the compensation committee is independent for purposes of the exchange listing rules does not address another major problem with compensation consultants: the possibility of other, much

Committee on Corporate Laws of the American Bar Association Section of Business Law has recently approved changes to the Model Business Corporation Act which would permit, among other things, the irrevocable resignation of a director who receives less than a specified shareholder vote. See Changes in the Model Business Corporation Act – Proposed Amendments to Chapters 8 and 10 Relating to Voting by Shareholders for the Election of Directors, 61 BUS. LAW. 399, 421-23 (2006).

196 Id.
197 Commentary to NYSE Listed Company Manual Rule 303A.05(b)(ii).
larger contracts between the consultant and the company. These contracts would be managed by the company's human resources department, under the control of the CEO rather than the compensation committee. Consultants would likely be very chary of jeopardizing these contracts by taking a tough line on CEO pay. Hewitt Associates, a compensation consultant for Verizon Communications, provides a real-life example of the problem. In its role as compensation consultant, it reports to the compensation committee of the board. However, in its other consulting roles, it reports through the corporate hierarchy, and ultimately to the Verizon CEO. In 2005 it assisted the compensation committee in devising a CEO pay package worth $19.4 million, a forty-eight percent increase over that of 2004.\footnote{Gretchen Morgenson, \textit{Gilded Paychecks: Troubling Conflicts; Advice on Boss's Pay May Not Be So Independent}, \textit{N.Y. Times}, Apr. 10, 2006, at A1.} Without passing judgment on whether such an increase was justified, in view of the twenty-six percent decline in Verizon stock over the same period, the fact that, since 1997, Hewitt Associates has received more than half a billion dollars in consulting revenue from Verizon and its predecessor companies does call into question its independence.\footnote{Id.} One suspects that a compensation representative appointed by the major shareholders might have viewed such a pay package differently than either the compensation committee or its compensation consultant did.

Other skeptics of compensation representatives might contend that it is unfair to give the three largest eligible shareholders a right not available to the other shareholders, that is, the right to appoint the representative. The large shareholders, however, would be entitled to appoint the representative only if the majority of the shares voted to grant them that right. There is no obvious reason to paternalistically deny shareholders the right to vote in line with their perceived best interests, especially since, as stated above, Delaware law allows the bylaws to contain any provision relating to the affairs of the corporation as long as the provision is not contrary to law or the company's certificate of incorporation.\footnote{See supra note 173 and accompanying text.}

In any event, there is a practical reason to place the right to appoint the representative in the hands of large shareholders; namely, there is no good alternative. Even if the representative were appointed by a vote of all the shareholders,
someone would first have to nominate the candidate. Giving the nomination right to the board would defeat the purpose of employing a compensation representative, since the representative would then be neither more nor less accountable to the shareholders than are other board members, who are also nominated by the board and elected by the shareholders. If every shareholder, regardless of the size of its holdings, were permitted to nominate a candidate, shareholders with only a small economic stake in the corporation might abuse the compensation representative to further their own political or other non-financial agenda. If only those shareholders who held, say, five percent of the outstanding shares were allowed to nominate, compensation representatives could never be nominated for companies which did not have any large shareholders—precisely the sort of companies in which, as discussed above, a compensation representative could be most useful. Also, if there were multiple five percent shareholders who each nominated competing candidates, smaller shareholders would have difficulty making an informed decision among them.

One possible solution to this problem would be to permit the three largest eligible shareholders jointly to nominate a single candidate, subject to the approval of the shareholders. But since the purpose of adopting the compensation representative system would be to ensure the appointment of a party independent of the board of directors, the board could not be allowed to nominate an alternative. As a result, the shareholder vote would devolve into the empty formality of electing a candidate without opposition. Having said that, if shareholders wanted to include a voting procedure into the bylaw adopting compensation representatives, there is no obvious policy reason (other than a desire for simplicity) to prohibit it.

Other skeptics might argue that, although a bylaw implementing a compensation representative system can be adopted by a mere shareholder vote, in fact, shareholders will not approve proxy resolutions opposed by management. After all, it may be contended, large shareholders vote overwhelmingly with management. Pension funds may support management, in part at least, in order to secure

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201 This concern was part of the motivation behind the SEC’s decision in 2003 to require mutual funds and investment advisors to disclose their actual proxy votes. See 17 C.F.R. §§ 239, 249, 270, and 274 (2003).
business with the company.\textsuperscript{202} Other large investors may be motivated by a desire to gain privileged access to information.\textsuperscript{203} Neither type of investor, it might be argued, would likely sacrifice these benefits for the sake of a compensation representative system. However, substantial shareholder benefit can be achieved even if only a small percentage of companies actually adopt the bylaw, particularly if, as one might expect, the adopting companies are the very ones with the most egregious pay arrangements.\textsuperscript{204} Not only would the bylaw help to rectify pay practices at the most objectionable companies, but it might have an \textit{in terrorem} effect, encouraging CEOs at other companies to moderate their own pay demands.

Finally, some might suspect that, even if the bylaw were to pass, large shareholders would not be willing to participate in the compensation representative system, since the costs to such shareholders would exceed the benefits. The total costs to participating shareholders, however, would be trivial. Out-of-pocket costs would be close to zero, since fees for the compensation representative would be paid by the corporation. Likewise, the costs of searching for an appropriate representative should be quite low, particularly for institutional shareholders that repeatedly appoint the same representatives for the various corporations in their portfolio. Costs in time and effort should also be low, since the actual tasks relating to reviewing, discussing, and, if necessary, amending the compensation plans would be delegated to the compensation representative. The only significant task required of participating shareholders would be to respond in those limited instances in which a compensation representative has objected to the board’s final compensation determination.


\textsuperscript{204} A recent empirical study of shareholder proposals between the years 2000 and 2004 has indicated that proposals relating to executive compensation have received less support than those relating to poison pills or board declassification. Still, proposals relating to executive compensation received majority support at 6.4\% of the applicable corporations in 2003, although, as mere precatory proposals, they were non-binding on the board. See Jason M. Loring & C. Keith Taylor, \textit{Shareholder Activism: Directorial Responses to Investors’ Attempts to Change the Corporate Governance Landscape}, 41 WAKE FOREST L. REV. 321 (2006).
VII. CONCLUSION

Given the low costs to participating shareholders, even modest benefits would be sufficient to justify the use of compensation representatives. In fact, the potential benefits to shareholders could be significant. First, compensation representatives would provide a means of objectively evaluating whether a CEO’s pay is excessive. When they find that a pay package is inappropriate, compensation representatives could suggest improvements to the package before it is even submitted to the board. Thus, they would be more efficacious than the newly mandated disclosure rules, which merely require corporations to better inform shareholders about a fait accompli. Second, if the use of a compensation representative led to lower CEO pay at a given company, one could expect the pay of other high-ranking executives at the company to decrease proportionally—hardly a trivial consideration when the top five executives are receiving 9.8% of all corporate earnings. Third, oversight by compensation representatives could improve the alignment between executive pay and performance, thereby potentially enhancing shareholder returns by reducing agency costs. Fourth, even if compensation representatives brought only minor benefits for any individual company, they could, if widely employed, provide substantial benefits to diversified institutional investors, which could enjoy lower executive pay and better alignment between pay and performance for each company in their portfolios. Finally, compensation representatives could have a substantial prophylactic benefit for investors. At a bare minimum, they could help put an end to the “ratcheting effect” by which CEO pay might otherwise continue indefinitely to increase without obstruction. This possibility alone should be enough to encourage investors to consider introducing compensation representatives, a prudent solution to excessive CEO pay.

205 See Bebchuk & Fried, supra note 7.
In 

Crawford v. Washington

, Justice Scalia wrote for a seven-Justice majority that the Confrontation Clause prohibits admission of an absent witness’s “testimonial” statements against a criminal defendant unless the witness is unavailable to testify in person and the accused had a prior opportunity for cross-examination. That holding was based in part on a claim that, at the time of the framing, those two conditions governed admissibility of pretrial examinations taken under the Marian bail and committal statutes. Those two statutes—passed during the reign of Queen Mary in the sixteenth century—required justices of the peace to examine felony suspects and their accusing witnesses before bailing the suspects or committing them to jail to await trial. Because those Marian examinations were a routine feature of felony prosecutions at...
the time the Sixth Amendment was framed, their admissibility is relevant to any general theory of the Confrontation Clause.

If framing-era Marian examinations were conducted ex parte, were admissible despite being ex parte, and were nonetheless noncontroversial, that would be important evidence against *Crawford*’s holding. In his recent article, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, Professor Thomas Davies makes those claims. He argues that *Crawford*’s historical analysis is flawed because the earliest reported English cases stating that the Marian statutes did not authorize admission of ex parte examinations were published no earlier than May 1789, too late to have been widely available to Americans when they drafted the Sixth Amendment later that year. Davies rejects all English sources published after or shortly before the framing and all American sources published more than a few years after the framing as invalid historical evidence; he finds many of those sources ambiguous in any event. From earlier sources, he concludes that a Marian examination was admissible if the witness was unavailable, whether or not there had been an opportunity for cross-examination. He relies on that conclusion as the basis for a series of broad critiques of *Crawford* and originalism generally.

This Article responds. I argue that *Crawford* is well supported by the historical evidence, and that Davies reaches a contrary conclusion only because he ignores relevant evidence, treats highly ambiguous sources as clearly supporting his view, and understates the degree to which post-framing sources reject his position. Contrary to Davies’ argument, there is a more than adequate historical basis to conclude that the Framers did not believe ex parte committal examinations were admissible under the Marian statutes or their state equivalents.

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6 See id. at 159-61.
7 See id. at 155, 162-73, 180.
8 See id. at 108, 188-89.
9 See, e.g., id. at 206-17.
10 Although Professor Davies understands me to be making an argument substantially different from the one Justice Scalia made in *Crawford*, see Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford’s “Cross-Examination Rule”: A
Part I of this Article examines Davies’ evidence that Marian examinations were admissible without regard to whether the defendant had an opportunity to cross-examine. I conclude that properly taken Marian examinations were admissible, but that Davies’ sources show no more than that. Part II turns to the affirmative case for the cross-examination rule, focusing first on the prisoner’s right to be present. I conclude that prisoners would have been routinely present when witnesses were deposed at Marian committal hearings, and argue that presence was widely viewed as a procedural right by the time of the framing. Part III turns to cross-examination as such. I find that many believed a prisoner had a right to cross-examine witnesses at his committal hearing, but that the point was still disputed at the time of the framing. In Part IV, I explain why the Confrontation Clause would have been understood to resolve that dispute in favor of cross-examination.

I. ADMISSIBILITY

Whether the Marian statutes permitted ex parte depositions to be read against a criminal defendant is, at bottom, a question of timing. Even setting aside the 1787, 1789, and 1791 cases whose significance Professor Davies disputes, admissibility clearly became conditioned, at some point, on whether the defendant had an opportunity to cross-examine. Between 1795 and 1824, for example, at least seven English treatises and four English case reports expressly


11 *See* 4 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 423 (Thomas Leach ed., London 7th ed. 1795) (“[A]n examination of a person murderously wounded, taken by a justice of the peace . . . in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of Philip and Mary direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts alleged.”); THOMAS PEAKE, *A COMPENDIUM OF THE LAW OF EVIDENCE* 40-41 (London, Rider 1801) (“[I]f in a case of felony one magistrate takes the deposition on oath of any person in the presence of the prisoner, whether the party wounded, or even an accomplice; and the deponent dies before the trial, the depositions may be read in evidence; but if the prisoner be not present at the time of the examination, it cannot.”); William David Evans, *On the Law of Evidence, in 2 ROBERT JOSEPH POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS* app. 16, at 141, 230 (William David Evans trans., London, Strahan 1806) (“[S]uch examinations, if taken in the presence of the party charged, shall be admitted as evidence, in case of the witness’s death in the mean time.”); S.M. PHILLIPS, *A TREATISE ON THE LAW OF EVIDENCE* 277 & n.3 (London, Strahan 2d ed. 1815) (1814)
conditioned admissibility on either an opportunity to cross-examine or the prisoner’s presence at the examination. Similarly, between 1794 and 1858, at least sixteen reported American cases conditioned admissibility on those criteria.13

(admissible if “taken in the presence of [the] prisoner”); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 79 (London, Valpy 1816) (examinations “must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses, and contradicting their testimony, or the examinations cannot be received in evidence”); JOHN FREDERICK ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES *85 (New York, Gould & Son 1st Am. ed. 1824) (1822) (“Depositions, to be thus given in evidence, must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness.”); 1 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *96 (Boston, Wells & Lilly 1st Am. ed. 1826) (1822) (“The depositions of witnesses before magistrates, under the statutes of Philip and Mary, are not evidence, unless the prisoner had an opportunity to cross-examine those witnesses . . . .”); see also LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 296-301 (Dublin, Fitzpatrick 1802) (semble).

See King v. Eriswell, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter’s note 1797) (“Nor [are Marian depositions admissible] since that statute, unless the party accused be present . . . .”); Rex v. Forbes, Holt 599 n.*, 599 n.*, 171 Eng. Rep. 354 n.*, 354 n.* (1814) (reported in 1818 in a note to Rex v. Wilson, Holt 597, 171 Eng. Rep. 353 (1817)) (“The intention of the statute of Philip and Mary is sufficiently plain. It is, that the prisoner shall be present whilst the witness actually delivers his testimony; so that he may know the precise words he uses, and observe throughout the manner and demeanour with which he gives his testimony.”); Rex v. Smith, Holt 614, 615, 171 Eng. Rep. 357, 360 (1817) (reported 1818) (“Undoubtedly, . . . the decisions established the point, that the prisoner ought to be present, that he might cross-examine.”); Rex v. Smith, 2 Stark. 208, 210-11 & n.(a), 171 Eng. Rep. 622, 623 & n.(a) (1817) (reported 1820) (similar); see also Rex v. Smith, Russ. & Ry. 339, 340 n.(c), 168 Eng. Rep. 834, 835 n.(c) (1817) (reported 1825) (endorsing “Mr. Starkie’s excellent note” on the case).

See State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (Super. L. 1794) (state felony committal statute “clearly implies the depositions to be read, must be taken in [the prisoner’s] presence,” so that he has “liberty to cross examine”); State v. Moody, 3 N.C. (2 Hayw.) 31, 31-32 (Super. L. 1798) (Haywood, J.) (conditioning admissibility on whether the deposition was “regularly taken pursuant to the act . . . . more especially [i.e., more specifically] if the party to be affected by the testimony were present at the examination”); Johnston v. State, 10 Tenn. (2 Yer.) 58, 59-60 (1821) (admitting deposition taken “under proper circumstances,” i.e., “in the presence of the prisoner”); State v. Hill, 20 S.C.L. (2 Hill) 607, 608-11 (App. L. 1835) (“[I]f the accused is present and has an opportunity of cross examining the witness, the depositions, according to the rule, are admissible in evidence. . . . [N]o rule would be productive of more mischief than that which would allow the ex parte depositions of witnesses, and especially in criminal cases, to be admitted in evidence. . . .”); Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836) (deposition before committing magistrate admissible because “the defendant did meet the witness who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation”); People v. Rostell, 3 Hill 289, 297 (N.Y. Sup. Ct. 1842) (“The deposition [under the Marian statutes] must not only be taken in a judicial proceeding, but it must be taken when the defendant is present and has the opportunity to cross-examine the witness; otherwise it will not be received.”); Bostick v. State, 22 Tenn. (3 Hum.) 344, 344-45 (1842) (“It is certain that such a deposition, taken in the absence of the prisoner, and where he had no opportunity to cross-examine the witness, could not be read in evidence against him . . . .”); State v. Campbell, 30 S.C.L. (1 Rich.) 124, 130 (App. L. 1844) (“Neither the Marian statutes nor their state equivalent] has any express provision, that the
Were these authorities representative of the public understanding of the confrontation right at the time the Sixth Amendment was adopted? Or do they represent post-framing developments? Professor Davies takes the latter view. He reaches that conclusion in large part because he refuses to consider English sources published after 1789 and American sources published more than a few years after the framing as evidence of original meaning—a limitation I consider in due course. But he also relies on pre-framing sources which, he contends, show that Marian examinations “were understood to be admissible in felony trials, without regard to whether there had been an opportunity for cross-examination, if a witness became unavailable prior to trial.” I evaluate that claim here.

Davies’ evidence falls into two categories. The first consists of statements in treatises and manuals, most notably Sir Matthew Hale’s, to the effect that Marian examinations were admissible if the witness was dead, too sick to travel, or kept away by the accused. The second consists of the 1696 depositions shall go to the jury in any case. But the Statute P. & M. has been so expounded:—Provided the accused was present, and had the opportunity of a cross-examination, and the witness be dead, &c.”; State v. Hooker, 17 Vt. 658, 669 (1845) (admitting magistrate’s testimony because proceedings were “adversary” (emphasis omitted)); Tharp v. State, 15 Ala. 749, 753 (1849) (”Depositions taken before the examining court, in the presence of, and on cross-examination by, the prisoner . . . are received as evidence, if the witnesses are dead.”); Davis v. State, 17 Ala. 354, 357 (1850) (committal examination admissible if “the witness was duly sworn by competent authority and the accused had the opportunity of cross-examining him”); Kendrick v. State, 29 Tenn. (10 Hum.) 479, 487 (1850) (committal examination admissible because “evidence of the deceased witness was given on oath before the committing court, in the presence of the accused, who had the right to cross-examine”); United States v. Macomb, 26 F. Cas. 1132, 1134 (C.C.D. Ill. 1851) (No. 15,702) (examination admissible “provided the defendant was present, had the liberty to cross-examine, and the witness was dead”); Collier v. State, 13 Ark. 676, 678 (1853) (examination inadmissible where the record “fail[s] to show that the prisoner was present at the examination”); State v. McOBlenis, 24 Mo. 402, 414-15 (1857) (admitting “deposition of a witness regularly taken in a judicial proceeding against the accused in respect to the same transaction and in his presence”); State v. Houser, 26 Mo. 431, 438 (1858) (deposition admissible only if taken “in the presence of the accused, when an opportunity for cross-examination is afforded”); cf. Dunwiddie v. Commonwealth, 3 Ky. (Hard.) 290, 290 (1808) (“It appears to this court to be unnecessary to enter into any reasoning to show the impropriety of the decision of the inferior court. It is sufficient to say, that the principle decided by that court, viz. That in the case of bastardy, the warrant before the justice ought to be received as evidence by the court, of the person charged being the father of the child,’ is a violation of the most fundamental rules of evidence; withholds from the person accused an advantage which was most unquestionably his right—the benefit of a cross-examination; and, if admitted, it would also confine to a justice of the peace, the exclusive right of inquiring into the truth of the fact charged.”).

14 See Davies, supra note 5, at 118-19.
15 See id. at 155, 180.
16 Id. at 108.
Paine decision and subsequent interpretations of that case in treatises and manuals. I discuss each category in turn.

A. Hale and the Unavailability Rule

The Marian statutes required justices of the peace to examine felony suspects and witnesses at committal hearings, and also included similar provisions for coroners’ inquests. The results were to be certified to the court, but the statutes said nothing about whether they were meant to take the place of trial testimony. That question fell to judicial construction when Lord Morly was tried for murder before the House of Lords in 1666 after killing his opponent in a duel. The judges convened before trial to decide how to advise the House on evidentiary questions expected to arise, among them the admissibility of certain depositions taken by the coroner. They resolved that a deposition was admissible if the witness was dead, too sick to travel, or kept away by the accused, but not otherwise.

17 See 1 & 2 Phil. & M., c. 13 (1554) (“And that the said Justices or one of them being of the Quorum, when any such prisoner is brought before them for any Manslaughter or Felony, before any Bailment or Mainprise, shall take the examination of the said Prisoner and information of them that brings him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing before they make the same Bailment . . . .”); 2 & 3 Phil. & M., c. 10 (1555) (“That from henceforth such Justices or Justice before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination . . . .”). I have altered the spelling in all quotations from Statutes of the Realm.

18 See 1 & 2 Phil. & M., c. 13 (1554) (“And that every Coroner, upon any Inquisition before him found, whereby any person or persons shall be indicted for murder or manslaughter, or as accessory or accessories to the same before the murder or manslaughter committed, shall put in writing the effect of the evidence given to the Jury before him being material . . . .”).

19 The statutes’ intent in that regard has long been debated. See, e.g., Rex v. Smith, 2 Stark. 208, 211 n.(a), 171 Eng. Rep. 622, 623 n.(a) (1817) (reporter’s note 1820) (observing that the statutes “seem to have been passed without any direct intention on the part of the legislature, to use the examinations and depositions as evidence upon the trials of felons”); JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 24-34 (1974) (contending that “the Marian draftsman did not intend to institute a system of written evidence”).

20 Lord Morly’s Case, Kel. 53, 84 Eng. Rep. 1079 (1666) (also reported as Lord Morley’s Case, 6 How. St. Tr. 769 (H.L. 1666)).


22 See id. at 55, 84 Eng. Rep. at 1080 (“[I]n case any of the witnesses which were examined before the coroner, were dead or unable to travel, and oath made thereof, . . . the examinations of such witnesses, so dead or unable to travel might be
Lord Morly’s case involved coroners’ depositions, but that “unavailability rule” was extended to committal examinations as well. Sir Matthew Hale, one of the judges who had presided at Lord Morly’s case, wrote in his *History of the Pleas of the Crown* that “examinations and informations thus taken and returned may be read in evidence against the prisoner, if the informer be dead, or so sick, that he is not able to travel, and oath thereof made; otherwise not.”23 As Davies notes, similar statements appear in treatises by William Hawkins and Francis Buller, and in colonial manuals for justices of the peace.24

Professor Davies relies on those statements to argue that Marian depositions “were understood to be admissible in felony trials, without regard to whether there had been an opportunity for cross-examination, if a witness became unavailable prior to trial.”25 He concludes that absence of opportunity to cross-examine had no effect on the admissibility of depositions of unavailable witnesses in founding-era criminal trials.26 Those conclusions, however, do not follow. Rather, they rest on implicit assumptions about Marian procedure.

If the right to confrontation prohibited *ex parte* depositions at trial, there are two ways in which Marian procedure could be consistent with that right. First, a trial court could condition the admissibility of a Marian examination on whether the accused had an opportunity to cross-examine at the committal hearing. In that case, even if Marian examinations were often taken *ex parte*, they would not contravene the cross-examination rule, because *ex parte* examinations would be excluded at trial. Second, an opportunity for cross-examination could be a natural or routine feature of a committal hearing. In that case, it would not matter whether a trial court conditioned admissibility on opportunity to cross-examine. That opportunity would be a

read, the coroner first making oath that such examinations are the same which he took upon oath, without any addition or alteration whatsoever.”); see also Bromwich’s Case, 1 Lev. 180, 180, 83 Eng. Rep. 358, 358 (K.B. 1666) (“[T]he depositions of two other witnesses taken before the coroner, which were now dead, were read to the same effect, as they were read before the lords on the trial of the Lord Morly, by the opinion of all the Judges of England.”).

24 See Davies, supra note 5, at 146-52, 182-86.
25 *Id.* at 108.
26 *Id.*
consequence of the way an examination was normally conducted.

Professor Davies acknowledges the distinction between those two forms of consistency late in his article. But he largely ignores its significance for the unavailability rule. That rule addressed the conditions under which a Marian examination was admissible, not the manner in which an examination was normally conducted. That a Marian examination was admissible if the witness was unavailable does not show that *ex parte* examinations would routinely be admitted. It would show that only if Marian examinations were routinely conducted *ex parte*.

Nor does the unavailability rule necessarily show that opportunity to cross-examine was not a condition of admissibility. The rule says nothing about cross-examination one way or the other; Davies must rely on a negative inference drawn from that omission. The strength of that inference, however, depends entirely on how Marian examinations were normally conducted. If they were often taken *ex parte*, the negative-inference argument has some force. If they were not, the argument is much weaker; opportunity to cross-examine could then simply be implicit in the fact that a deposition was properly taken under the Marian statutes.

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27 The distinction is reflected in his “strong” and “nuanced” interpretations of Crawford’s description of the 1787, 1789, and 1791 decisions. See id. at 162-78.

28 Although many treatises and manuals state the unavailability rule in terms similar to Hale’s, some arguably provide more support for Professor Davies’ position. For example, Buller’s treatise states:

It is a general Rule, that Depositions taken in a Court not of Record shall not be allowed in Evidence elsewhere. So it has been holden in Regard to Depositions in the ecclesiastical Court, though the Witnesses were dead. So where there cannot be a Cross-Examination, as Depositions taken before Commissioners of Bankrupts, they shall not be read in Evidence; yet if the Witnesses examined on a Coroner’s Inquest be dead, or beyond Sea, their Depositions may be read; for the Coroner is an Officer appointed on Behalf of the Public, to make Enquiry about the Matters within his Jurisdiction; and therefore the Law will presume the Depositions before him to be fairly and impartially taken.—And by [the Marian statutes] Justices of the Peace shall examine of Persons brought before them for Felony, and of those who brought them, and certify such Examination to the next Gaol-Delivery; but the Examination of the Prisoner shall be without Oath, and the others upon Oath, and these Examinations shall be read against the Offender upon an Indictment, if the Witnesses be dead.

FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 342 (Dublin 1768). Burn’s manual includes a similar passage, although it combines the references to coroners’ depositions and committal examinations while omitting the rationale for admissibility of coroners’ depositions. See 1 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 336 (London, Woodfall & Strahan 1764). Davies
Authorities before and after the framing confirm that Hale and other proponents of the unavailability rule were widely understood not to have suggested that an unavailable witness’s Marian deposition was admissible regardless of the circumstances under which it was taken. An early example comes from the 1696 debates over Sir John Fenwick’s bill of attainder for treason in the House of Commons. The prosecution sought to admit the examination of an unavailable witness taken in Fenwick’s absence. Fenwick’s counsel opposed admission because Fenwick was not “present or privy” and thus had “no opportunity . . . to cross-examine the person.” Counsel contended that such examinations were “never admitted” in “criminal cases” and that “it was never attempted in any court of justice, that the examination of witnesses behind a man’s back, could be read in any place whatsoever.”

Debate ensued among Members of Parliament. One disputed counsel’s broad claim that ex parte examinations were inadmissible in criminal cases by invoking Hale’s discussion of the Marian statutes: “No less a man than my L. C. Justice Hales . . . in his Pleas of the Crown . . . says; First, by the [Marian statutes], the justice hath power to examine the offender and informer; and . . . these examinations, if the party

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29 13 How. St. Tr. 537 (H.C. 1696). Fenwick was charged with treason, not felony, so the Marian statutes did not apply. Nevertheless, the debates are relevant.

30 Id. at 591 (Powys); see also id. at 592 (“[I]f that should be allowed for evidence, then what is sworn behind a man’s back, in any case whatsoever, may as well be produced as evidence against him . . . .”).

31 Id. at 592 (Shower); see also id. (“[N]o deposition of a person can be read, though beyond sea, unless in cases where the party is to be read against was privy to the examination, and might have cross-examined him, or examined to his credit, if he thought fit; it was never pretended, depositions could be read upon other circumstances.”).
be dead or absent, may be given in evidence.” 32 Another Member responded, however, that Hale’s rule applied only when the examination was taken in the prisoner’s presence (and then only in felony cases): “I don’t think [counsel] were ignorant of the case quoted out of my L. C. J. Hales, but they thought it was not applicable to this business before the House; but only related to felonies, and when depositions were taken in the presence of the party.” 33

Davies relegates Fenwick’s case to a footnote because he “know[s] of no evidence [the Framers] were conversant with” it. 34 But the case was plainly available to them; Crawford cites Howell’s 1812 report, but the same report appears in earlier editions of the State Trials as far back as 1719. 35 Several colonial libraries had copies of the State Trials, 36 and scholars have assumed the Framers were familiar with their contents. 37 Fenwick’s case in particular is discussed and cited to the State Trials by both Blackstone and Hawkins. 38 The case shows that, even as early as 1696, there was disagreement over whether Hale’s rule implied that the Marian deposition of an unavailable witness was admissible regardless of the circumstances under which it was taken.

A 1794 North Carolina decision, State v. Webb, is also instructive. 39 There, the Attorney General invoked the state’s equivalent of the Marian statutes in seeking to admit an unavailable witness’s deposition taken ex parte. He cited the passages from Hale, Hawkins, and Buller on which Davies

32 Id. at 596 (Sloane). Hale’s History of the Pleas of the Crown was not published until 1736; Sloane is referring to Hale’s earlier Summary. See Davies, supra note 5, at 129-30 & n.80.
33 Id. at 602 (Musgrave) (emphasis added).
34 Davies, supra note 5, at 121-22 n.50.
37 See, e.g., id. (“[I]t is not to be presumed that [the Framers] were ignorant of the famous State Trials.”).
39 2 N.C. (1 Hayw.) 103 (Super. L. 1794).
But the court rejected his interpretation of those authorities:

These authorities do not say that depositions taken in the absence of the prisoner shall be read, and our [committal statute] clearly implies the depositions to be read, must be taken in his presence: it is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine; and though it be insisted that the act intended to make an exception in this instance, to the rule of the common law, yet the act has not expressly said so, and we will not by implication derogate from the salutary rule established by the common law.41

Webb thus expressly conditioned admissibility on an opportunity for cross-examination; and it viewed that condition, not as departing from the unavailability rule, but as consistent with that rule.42

Subsequent cases and treatises that conditioned admissibility on presence or opportunity for cross-examination uniformly interpreted the earlier sources in that fashion—as stating that unavailability was a condition of admissibility but not implying that the deposition of an unavailable witness was admissible regardless of the manner in which it was taken. An 1818 case report, for example, cited Hale and Hawkins for the


41 Id. at 104.

42 Despite having previously acknowledged that Webb supports Crawford's cross-examination rule, see Davies, supra note 5, at 181-82, Davies now claims the case is inapposite because the witness was not "genuinely unavailable," see Davies, supra note 10, at 627-28. His new interpretation, however, is implausible. Although the report never expressly states that the witness was unavailable, the case was obviously argued and decided on that premise. The Attorney General clearly thought the witness was unavailable because the authorities he relied on expressly conditioned admissibility on unavailability. See supra note 40. His argument makes no sense if the witness was available. And the court's holding had nothing to do with availability; rather, the court held that the state's equivalent of the Marian statutes "clearly implie[d]" that witnesses must be examined "in [the prisoner's] presence" at the committal hearing (so that the prisoner had "liberty to cross examine"), and for that reason, "[t]hese authorities" on which the Attorney General relied—which, again, relate only to unavailable witnesses—"do not say that depositions taken in the absence of the prisoner shall be read." Webb, 2 N.C. (1 Hayw.) at 104. Furthermore, the court's rationale—that the committal statute itself "clearly implie[d]" a right to be present at the committal hearing—necessarily applied to witnesses who later became unavailable to testify at trial, since there is typically no way to predict which witnesses will become unavailable at the time the prisoner exercises his right to be present at the committal hearing. In short, Davies dismisses Webb only by attributing a nonsensical argument to the prosecutor and ignoring the court's express holding in favor of a rationale the court said nothing about. I am certainly willing to admit that some of the sources I rely on are ambiguous, but this is not one of them.
point that “it seems now to be settled” that a Marian deposition was admissible if “the informant is dead, or not able to travel, or . . . kept away by the means and contrivance of the prisoner,” but also stated that it was “plain” under the Marian statutes that “the prisoner shall be present whilst the witness actually delivers his testimony.” An 1814 treatise cited Hale, Hawkins, and Buller for the point that a Marian deposition was admissible if the witness was unavailable, but said the rule applied only to an examination taken “in the presence of [the] prisoner.” An 1816 treatise cited Hale, Hawkins, and Buller for the unavailability rule, but also stated that examinations “must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses.” And an 1822 treatise cited Hale’s unavailability rule but stated that “[d]epositions, to be thus given in evidence, must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness.”

The unavailability rule stated in Lord Morly’s case was construed the same way. An 1808 treatise, commenting on an earlier claim that Lord Morly’s case proved the admissibility of ex parte coroners’ depositions, stated: “Mr. J. Buller is reported to have said that it was so settled in [Lord Morly’s case and a companion case]; certainly nothing of the kind appears in those books.” And an 1844 decision characterized Lord Morly’s case as “quite uncertain, as to the precise point of the absence of the accused at the taking of the depositions,” and stated that it could not “conceive how judges could have resolved, that the depositions of deceased witnesses, when examined by the coroner, should be received as competent evidence . . . but by assuming that the written testimony had been taken under all the guards and tests of the common law, and especially those of the cross-examination.”

44 PHILLIPS, supra note 11, at 277 & nn.1-7.
45 1 CHITTY, supra note 11, at 79-81 & nn.(w)-(y).
46 ARCHBOLD, supra note 11, at *85.
47 THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 n.(m) (London, Hanfard & Sons 3d ed. 1808); see also 2 STARKIE, supra note 11, at *490 (similar). Peake was commenting on Buller’s opinion in Eriswell, as to which see infra notes 128-44 and accompanying text.
Of course, these post-framing interpretations were not available to the Framers in 1789 or 1791. But that does not make them irrelevant. The way that Hale, Hawkins, and Buller were understood in 1794 or even 1822 is some evidence of how they were understood at the time of the framing—not conclusive evidence, but better evidence (temporally speaking) than the way Professor Davies (or even Justice Scalia) might interpret them today. Those later sources show that the unavailability rule was widely understood not to imply that the Marian deposition of an unavailable witness was admissible regardless of the circumstances under which it was taken.

B. Paine and the Felony/Misdemeanor Distinction

Professor Davies’ other line of authority consists of the 1696 decision in King v. Paine\(^{49}\) and later commentaries on that case by Hawkins, Geoffrey Gilbert, and American manuals quoting Hawkins. Paine was charged with criminal libel, a misdemeanor. He was represented by Sir Bartholomew Shower, who (perhaps not coincidentally) was also defense counsel in Fenwick’s case.\(^{50}\) The Crown sought to admit the *ex parte* examination of a dead witness who had implicated Paine. The court rejected the evidence, but the rationale for its decision differs across the five reports of the case.

In the Modern Reports, defense counsel argued that the examination was inadmissible because “the defendant had lost all opportunity of cross-examining” and “this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for *felony*, because they have power by a particular statute to take such examinations both of the fact and circumstances, and to put it in writing and certify it at the next general gaol.

\(^{49}\) There are five reports of the evidentiary decision in the case: King v. Paine, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696); Rex v. Pain, Comb. 358, 90 Eng. Rep. 527 (K.B. 1697); Rex v. Pain, Holt 294, 90 Eng. Rep. 1062 (K.B. 1697); Rex v. Paine, 1 Salk. 281, 91 Eng. Rep. 246 (K.B. 1696); and Rex v. Payne, Ld. Raym. 729, 91 Eng. Rep. 1387 (K.B. n.d.). *Paine* is customarily dated to January 1696 (i.e., Hilary Term, 7 Will. 3), as reported by Modern and Salkeld, see, e.g., 3 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1364, at 22 & n.53 (2d ed. 1923), but there is reason to believe that Comberbach and Holt's date of 1697 is the correct one. If *Paine* had been decided in January 1696, it surely would have been mentioned in the debates in Fenwick's case later that year, especially since the same lawyer represented both defendants. See infra note 50 and accompanying text; cf. 3 WIGMORE, supra, § 1364, at 22 n.53.

\(^{50}\) Compare Pain, Comb. at 359, 90 Eng. Rep. at 527, with Fenwick's Case, 13 How. St. Tr. 537, 592-93 (H.C. 1696).
The prosecutor responded that “the statute makes no difference in this case, for the power of a justice of peace to take examinations is not grounded upon it; for he might examine a criminal by virtue of his office.” The court held simply that “these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.”

According to the Comberbach and Holt reports, the examination was inadmissible “for two reasons”: “1. It appears, that the defendant was not present when the examination was taken, so that he could not cross-examine him. 2. There is a difference between capital offences and cases of misdemeanour, for in case of felony the justices are by the [Marian statutes] to take the examinations in writing, and certify them to the gaol-delivery, &c. and if the party be dead or absent, they may be given in evidence.” Finally, the Salkeld and Lord Raymond reports rely on the Marian statutory limitation to felonies without mentioning cross-examination.

Read together, the five reports suggest that two factors—the absence of opportunity to cross-examine and the Marian statutory limitation to felonies—were both relevant to the outcome. But the reports leave unclear how those two strands of analysis relate to each other. One reading—Professor Davies’—is that they were interrelated grounds for decision: The examination was inadmissible because it was taken outside the authority of the Marian statutes, and non-Marian examinations were admissible (if at all) only upon a prior opportunity for cross-examination. On that reading, Paine’s distinction between felonies and misdemeanors arguably does support the claim that Marian examinations were admissible without regard to opportunity for cross-examination.

51 5 Mod. at 164, 87 Eng. Rep. at 585.
52 Id.
53 Id. at 165, 87 Eng. Rep. at 585.
55 1 Salk. at 281, 91 Eng. Rep. at 246 (“[I]n cases of felony such depositions before a justice, if the deponent die, may be used in evidence by the [Marian statutes]. But this cannot be extended farther than the particular case of felony [sic], and therefore not to this case.”); Ld. Raym. at 730, 91 Eng. Rep. at 1387 (“[I]n indictments for felony, by [the Marian statutes] such informations may be read, the deponent being dead. But in indictments or informations for misdemeanors, or in civil actions, or appeals of murder, no such information can be given in evidence . . . .”).
56 See Davies, supra note 5, at 140-43.
Another interpretation, however, is that the two grounds for decision were independent: The examination was excluded both because there was no opportunity for cross-examination and because there was no statutory authority to take examinations in misdemeanor cases, either ground alone being sufficient to exclude. In other words, misdemeanor examinations were never admissible, regardless of how they were taken; felony examinations were admissible, but only if there was an opportunity for cross-examination. The “difference” between felony and misdemeanor examinations was not that felony examinations were admissible even if ex parte, but simply that they were admissible at all.

Comberbach and Holt do speak of “two reasons” why the examination was excluded, suggesting those reasons were alternative grounds for decision. And every report that addresses the felony/misdemeanor distinction does so in connection with the authority-to-examine issue, not the cross-examination issue. Davies himself interprets Paine to hold that examinations were never admissible in misdemeanor cases. But he thereby undermines his other argument that

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58 Comberbach and Holt address the “difference” between Marian and misdemeanor examinations in their discussions of authority to examine, not their separate references to opportunity to cross-examine. Comb. at 359, 90 Eng. Rep. at 527; Holt at 294, 90 Eng. Rep. at 1062. Salkeld and Lord Raymond (who stake the decision solely on authority grounds) report the court’s distinction between Marian and misdemeanor examinations; Modern (which stakes the decision solely on cross-examination) does not. Compare 1 Salk. at 281, 91 Eng. Rep. at 246, and Ld. Raym. at 730, 91 Eng. Rep. at 1387, with 5 Mod. at 165, 87 Eng. Rep. at 585. The only passage in any report that even arguably connects the Marian/misdemeanor difference to the cross-examination rule is defense counsel’s argument in Modern. See 5 Mod. at 164, 87 Eng. Rep. at 585 (examination inadmissible because “the defendant had lost all opportunity of cross-examining him; that this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for felony, because they have power by a particular statute to take such examinations both of the fact and circumstances, and to put it in writing and certify it at the next general gaol delivery”). Even that passage is ambiguous, however, and since Paine’s counsel was the same lawyer who argued in Fenwick’s case that ex parte examinations were “never admitted” in “criminal cases” and that it was “never attempted in any court of justice, that the examination of witnesses behind a man’s back, could be read in any place whatsoever,” 13 How. St. Tr. 537, 592 (H.C. 1696), it seems unlikely he meant to concede the admissibility of ex parte Marian examinations in Paine. More probably, he was arguing that the examination was inadmissible both because “the defendant had lost all opportunity of cross-examining” and because “this case was not like an information before a coroner, or an examination by justices of peace of persons accused, and afterwards committed for felony.” 5 Mod. at 164, 87 Eng. Rep. at 585.
59 Davies, supra note 5, at 137-40. Davies attributes the contrary view to Justice Scalia, id. at 137, apparently because Crawford states that “admissibility . . .
Paine shows Marian examinations were admissible even absent opportunity to cross-examine: If misdemeanor examinations were never admissible, they were “different” from felony examinations, whether or not the cross-examination rule applied to the latter. Furthermore, if misdemeanor examinations were never admissible and felony examinations were always admissible, it is hard to see why Paine bothered to say anything about cross-examination at all.

Several English authorities read Paine in precisely the fashion suggested here. An 1814 treatise, for example, cited the Modern version of Paine for the point that a Marian examination had to be taken “in the presence of [the] prisoner.”60 It then cited the Lord Raymond version for the point that an examination “cannot be given in evidence on an indictment for a misdemeanor” at all.61 Similarly, an 1816 treatise cited Modern for the point that Marian examinations “must be done in the presence of the party accused, in order that he may have the advantage of cross-examining the witnesses,”62 while citing Modern, Salkeld, Comberbach, and Lord Raymond for the point that “the depositions cannot, in any case, be given in evidence on an indictment for a misdemeanour.”63

depended on whether the defendant had had an opportunity to cross-examine.” Crawford v. Washington, 541 U.S. 36, 45 (2004).

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60 PHILLIPPS, supra note 11, at 277 & n.3.
61 Id. at 278 & n.2.
62 1 CHITTY, supra note 11, at 79 & n.(l).
63 Id. at 81 & n.(a); see also Cox v. Coleridge, 1 B. & C. 37, 48 & n.(a), 107 Eng. Rep. 15, 19 & n.(a) (K.B. 1822) (reporter’s note to counsel’s argument) (citing Salkeld and Modern for the point that a Marian deposition may “be read in evidence against the prisoner, on the ground that he has had the opportunity for [a] cross-examination”); ARCHBOLD, supra note 11, at *85 (citing Modern, Salkeld, and Lord Raymond for the point that a Marian examination, “to be thus given in evidence, must have been taken in the presence of the prisoner, so that he might have had an opportunity of cross examining the witness,” while citing Salkeld for the point that an examination cannot “be read in the case of misdemeanors, at all; the statute extending only to manslaughter and felony”). Other English authorities read Paine as holding that misdemeanor examinations were never admissible, and also stated that ex parte felony examinations were inadmissible, without attributing that latter point to Paine.

An 1820 reporter’s note cited Paine for the point that “examinations and depositions taken in a case of misdemeanor, cannot be read in evidence, because the statutes apply to cases of felony only.” Rex v. Smith, 2 Stark. 208, 211 n.(a), 171 Eng. Rep. 622, 623-24 n.(a) (1817). But even Marian examinations, the author added, became admissible only “upon the rules and principles of evidence already established,” and admissibility at common law depended on “an opportunity to cross-examine.” Id. Likewise, an 1801 treatise cited Paine for the point that examinations were never admissible in misdemeanor cases, but stated in the preceding sentence that a felony examination was inadmissible “if the prisoner be not present at the time of the examination.” PEAKE (1801), supra note 11, at 41.
American authorities read *Paine* the same way. An 1835 South Carolina case relied on it to conclude that the Marian statutes did not permit admission of *ex parte* depositions: “The case of the King v. Paine is authority at least for the general position that the *ex parte* examination of a witness, although taken in the course of a judicial proceeding, is not admissible in evidence, although the witness be dead, and I have before remarked that the [Marian committal] statute does not prescribe any new rule of evidence.”64 The same court cited *Paine* in 1844 for the point that the Marian statutes authorized admission “[p]rovided the accused was present, and had the opportunity of a cross-examination, and the witness be dead.”65

An 1842 New York case is especially instructive.66 The witness there had been examined first by the committing magistrate and then pursuant to a court order.67 The court held the second examination inadmissible for lack of authority, citing the Salkeld, Lord Raymond, and Comberbach reports of *Paine* for the point that “there is no authority at the common law [i.e., absent statute] for taking depositions out of court in criminal cases.”68 The court then held the first examination inadmissible because, even though the magistrate had authority to examine under the state’s equivalent of the Marian statutes, the witness had not been sworn for the cross-examination.69 The court said: “It is settled upon the construction of the statutes of Phil. & Mary, that the defendant must be present at the examination of the witnesses against him . . . . [T]he defendant shall have the opportunity to cross-examine, and if that right is not enjoyed, the deposition cannot be read in evidence against him on the trial”—and as to that point, the court cited the Modern and Comberbach versions of *Paine*.70

Davies’ contrary authorities are not all supportive of his position. For example, Hawkins (and the American manuals that quoted him) wrote only that “it is said to have been adjudged . . . , upon an Indictment for a Libel, that Depositions

66 People v. Restell, 3 Hill 289 (N.Y. Sup. Ct. 1842).
67 Id. at 291-94.
68 Id. at 298.
69 Id. at 303-04.
70 Id. at 300.
taken before a Justice of Peace relating to the Fact could not be given in Evidence, tho’ the Deponent were dead; and that the Reason why such Depositions may be given in Evidence in Felony depends upon the [Marian statutes]. And that this cannot be extended farther than the particular Case of Felony.”

This entails the same ambiguity as Paine itself. Is the rule that “cannot be extended farther than the particular Case of Felony” that examinations are admissible even if taken ex parte, or merely that properly taken examinations are admissible at all? Notably, when Thomas Leach revised Hawkins’s treatise in 1795 to state that the Marian statutes required an “opportunity of contradicting or cross-examining,” he made no change to this discussion of Paine. Davies relies on that fact as if it somehow supported his position, but it proves the opposite: Leach evidently thought Hawkins’s discussion was consistent with applying the cross-examination rule to the Marian statutes.

Some English sources arguably support Davies’ interpretation. Gilbert, for example, wrote that Paine “would not allow the Examinations . . . to be given in Evidence, because Paine was not present to cross-examine, and tho’ tis Evidence in Indictments for Felony in such case by Force [of the Marian statutes] yet ’tis not so in Informations for Misdemeanors”—a description that, while ambiguous,

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71 2 HAWKINS (1721), supra note 38, at 430. For the American manuals, see Davies, supra note 5, at 183 n.246, 184 n.250, 184 n.253, and accompanying text.

72 Hawkins adds: “But in the Report of this Case in 5 Mod. it is said that the Reason why such Depositions could not be read was, because the Defendant was not present, when they were taken, and therefore had not the Benefit of a Cross Examination.” 2 HAWKINS (1721), supra note 38, at 430 (footnote omitted). This sentence could merely be making the point that, although some reports of Paine held misdemeanor examinations never admissible, Modern relied only on the absence of cross-examination and thus left open the possibility that a misdemeanor examination might be admissible if an opportunity for cross-examination were provided.

73 4 HAWKINS (1795), supra note 11, at 423.

74 Id.

75 Davies, supra note 5, at 149.

76 GEOFFREY GILBERT, THE LAW OF EVIDENCE 100 (Dublin 1754). The passage was written before Gilbert’s death in 1726, three generations before the framing; “it is generally agreed that Gilbert’s work reflects an understanding of evidence formed no later than the opening decade of the eighteenth century.” Stephan Landsman, The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 CORNELL L. REV. 497, 592 (1990). Nevertheless, the passage was not substantively revised even as late as Lofft’s 1791 edition. See 1 GEOFFREY GILBERT, THE LAW OF EVIDENCE 215 (Capel Lofft ed., London, Strahan & Woodfall 1791).

77 The passage could be saying either that (1) the examination was inadmissible for two independent reasons: Paine was not present to cross-examine
perhaps more naturally read as Davies suggests. Two eighteenth-century English cases also seem to interpret Paine in that fashion.78

Nevertheless, the fact remains that Paine was widely interpreted as not only consistent with a Marian cross-examination requirement, but as affirmatively supporting such a requirement. Indeed, so far as I can tell, reported American cases uniformly interpreted Paine that way. That those sources were post-framing does not make them irrelevant. Paine itself was available to the Framers, the decision is ambiguous on its face, and the fact that it was widely interpreted over the ensuing decades as establishing a cross-examination rule applicable even to Marian examinations is relevant evidence of how the case was understood in 1789 or 1791. An interpretation cannot be dismissed as “fictional” when that same interpretation was ultimately adopted as settled law.

C. Conclusion

Neither Hale’s rule that a Marian examination was admissible if the witness was unavailable nor the decision in King v. Paine shows that Marian examinations were admissible even absent an opportunity to cross-examine. Rather, Hale and his successors were widely read as simply not addressing that issue, and Paine was widely read as taking the exact opposite view.

II. PRESENCE

I now turn to the affirmative case in support of the cross-examination rule. There are two ways in which a

*and* the force of the Marian statutes authorizes admission of depositions at all only in felony cases; or (2) the examination was inadmissible because Paine was not present to cross-examine, and the force of the Marian statutes authorizes admission of ex parte depositions only in felony cases. In other words, the “tis” could mean either ex parte examinations or examinations generally, and “such case” could mean either ex parte examinations or unavailable witnesses generally.

78 See King v. Westbeer, 1 Leach 12, 12, 168 Eng. Rep. 108, 109 (1739) (citing Salkeld as authority for admitting a Marian deposition over the objection that it would deprive the prisoner of “the benefit which might otherwise have arisen from a cross-examination”), discussed infra text accompanying notes 158-62; King v. Eriswell, 3 T.R. 707, 722-23, 100 Eng. Rep. 815, 823-24 (K.B. 1790) (Kenyon, C.J.), quoted and discussed infra text accompanying notes 128-44. But see 2 STARKIE, supra note 11, at *488 n.(c), *491-92 (reading Kenyon’s citation to Paine in Eriswell as adopting the interpretation suggested here), quoted infra note 136.
prisoner could be denied the opportunity to cross-examine at a committal hearing. First, the magistrate could depose witnesses in the prisoner’s absence—a prisoner who was not present necessarily would have no opportunity to cross-examine. Second, the magistrate could depose witnesses in the prisoner’s presence but refuse to permit any questions. This section considers the former possibility. I first argue that, as a factual matter, eighteenth-century Marian examinations were routinely conducted in the prisoner’s presence. I then argue that, by the framing, there was an emerging consensus that presence was also a procedural right, so that depositions taken in the prisoner’s absence could not be read against him at trial under the authority of the Marian statutes.

A. Presence as a Routine Feature of Marian Procedure

The Marian committal statute provided that a justice of the peace “before whom any person shall be brought” must “before . . . commit[ting] or send[ing] such Prisoner to Ward . . . take the examination of such Prisoner, and information of those that bring him.”\footnote{2 & 3 Phil. & M., c. 10 (1555). The language of the bail statute is similar. 1 & 2 Phil. & M., c. 13 (1554).} The statute therefore contemplated depositions in very particular circumstances. Witnesses who believed someone had committed a felony would “br[ing]” him before a justice of the peace. When the witnesses and prisoner appeared before the justice, the prisoner would be in the witnesses’ custody, and thus their presence. The statute directed the justice to examine the prisoner and witnesses “before” committing the prisoner to jail; there is no suggestion that the prisoner be sequestered while witnesses are deposed. A reasonable inference is that the prisoner would typically remain in the custody (and therefore presence) of the witnesses who brought him.

That inference follows not only from the statutory text, but from the simple fact that Marian examinations are committal examinations. The function of a committal hearing is to decide whether to commit the prisoner, and a magistrate cannot commit a prisoner who is not there. Committal hearings are thus distinguishable from non-Marian pretrial proceedings such as warrant applications, where there is no particular reason to expect the prisoner’s presence. Chief Justice Marshall made that distinction in 1807 during a
colloquy in *Ex parte Bollman*: “If a person makes an affidavit before a magistrate to obtain a warrant of arrest, such affidavit must necessarily be *ex parte*. But how is it on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in presence of the prisoner?”

Marshall’s point here seems to be not so much that there is a legal requirement that committal proceedings be conducted in the prisoner’s presence, but that it would be strange to conduct them any other way.

Other evidence corroborates this theory. A 1747 print by William Hogarth depicts a committal examination in the Guildhall magistrates’ court; the accused is clearly shown to be present while his accuser is sworn to testify against him.

Other prints from the same era show “[p]eople waiting their turn—prosecutors, accused, constables, the curious—simply st[anding] about.” Committal examinations were often conducted in the relatively informal setting of the justice’s residence parlor, so it is not even clear where the prisoner would have been kept if sequestered while the witnesses who brought him were deposed.

The most compelling evidence of Marian procedure, however, is in the depositions themselves. I obtained from the

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81 As Professor Davies notes, see Davies, supra note 10, at 631-32, the Court in *Bollman* ultimately held that an *ex parte* affidavit was admissible at a committal hearing, over counsel’s objection that “[t]he party arrested and brought before the magistrate for commitment, has a right to be confronted with his accuser, and to cross-examine the witnesses produced against him.” 8 U.S. (4 Cranch) at 120, 129. But the Attorney General in that case had conceded that such evidence would be inadmissible at trial. See id. at 115 (“It is true that none of the evidence now offered would be competent on the trial . . . .”). That the Court was willing to allow an affidavit at a committal hearing does not prove the Court would treat it the same as a live Marian examination if the witness became unavailable before trial. Marshall’s question suggests that the committal procedure followed in *Bollman* was not typical.


London Metropolitan Archives a sample of committal depositions in twenty-seven cases from 1789. In twenty-two of the cases—more than 80%—the prisoner is expressly identified as being present in accusing witnesses’ testimony. In one case, for example, the deposition states that the witness “particularly remembers that on the night of the robbery and a very short time before this Informant left his Shop the person now present who calls himself Joseph Pocock came into his Shop.” Another states that the witness “looked up and saw the Prisoner Present who says his name is James Netherhood take some Copper out of said Barge and give it to the other prisoner present.” Twenty other cases contain similar references. Two of those cases are particularly striking in

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85 I located these materials by using the Old Bailey Proceedings Online database. See The Proceedings of the Old Bailey, http://www.oldbaileyonline.org (last visited Nov. 27, 2006). The depositions are not available online (unlike the trial proceedings), but the creators of the site did add archive citations for depositions and other “associated records” where those records survived. To construct my sample, I searched for trials from 1789 with associated records likely to be committal depositions. Because I constructed the sample from the trial proceedings, it necessarily excludes cases where the prisoner was discharged before trial. I also excluded cases where the associated records were located somewhere other than the London Metropolitan Archives. Finally, because I was most interested in finding cases where the prisoner might have been represented by counsel at the committal hearing (which seemed more likely to yield evidence of cross-examination), I excluded cases where the prisoner appeared pro se at trial. I located 13 cases with associated records coded as “information” and “examination,” and 54 cases with associated records coded only as “information.” I chose a sample consisting of all 13 cases in the former category and an essentially random subset of 14 cases from the latter; I then obtained the records from the London Metropolitan Archives. For purposes of whether the prisoner was present at the committal hearing or not, I would expect this sample to be reasonably representative.

86 Informations of George Bemfleet (Benfield) et al. against Joseph Pocock et al., OBSP 1789 Feb/53-57, 87 (Jan. 31 & Feb. 3, 1789) (emphasis added) (also includes three other similar references).

87 Information of Corbin Sangley against James Netherhood & Timothy Hopkins, OBSP 1789 Sept/92 (Aug. 14, 1789) (emphasis added) (also includes one other similar reference).

88 See Information of James Park against James Walton (Wharton), OBSP 1789 Jan/20 (Dec. 15, 1788) (“the person present who saith his name is James Walton”); Examination of Robert Hutton against William Street & John Maidwell, OBSP 1789 Jan/19, 30 (Jan. 3 & 5, 1789) (“the two men present who say their names are William Street and John Maidwell”); Informations of William Morris et al. against Jacob Canter, OBSP 1789 Feb/16-23, 84 (Jan. 7 & 26, 1789) (“a person now present who calls himself Jacob Canter”; nine other similar references); Information of John Grimes against Cuthbert Rutledge et al., OBSP 1789 Jan/18, 53 (Jan. 8, 1789) (“he saw the persons present who say their names are Cuthbert Rutledge John Butler and John Freeman”); Information of George Forester against Christopher Daly (Daley), OBSP 1789 Feb/41 (Feb. 14, 1789) (“he saw the person present who saith his name is Christopher Daley”); Information of Chaffon Edgell against William Cook, OBSP 1789 Ap/69-70 (Mar. 25, 1789) (“the Person now present who calls himself William Cook”); Information of John Clarke against Thomas Denton et al., OBSP 1789 Ap/10 (Mar. 27,
that the prisoners were examined on one day and the witnesses deposed on another, yet the witnesses still identified the prisoners as present—evidently the prisoners were brought back for those depositions.\textsuperscript{89} Of the remaining five cases, two contain ambiguous indications that the prisoner was present,\textsuperscript{90}

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\textsuperscript{89} See Examination of Robert Hutton against William Street & John Maidwell, OBSP 1789 Jan/19, 30 (Jan. 3 & 5, 1789); Informations of William Morris et al. against Jacob Canter, OBSP 1789 Feb/16-23, 84 (Jan. 7 & 26, 1789).

\textsuperscript{90} In one case, the deposition refers to the prisoner as “William Ward now under Examination.” Information of John Peacock against William Ward, OBSP 1789 Ju/17 (May 6, 1789). In the other, the deposition states that the witness “met the Prisoner who says her name is Eleanor Hays”; the prisoner’s own examination appears on the same document immediately after the witness’s deposition; and the prisoner begins by exclaiming that the witness has “Perjured himself,” suggesting she was
and three contain no indication either way.\textsuperscript{91} Overall, this evidence suggests that presence was not merely a routine feature of Marian procedure, but a near-universal one.

The notion that Marian examinations were conducted in the prisoner’s absence seems to have originated in a late nineteenth-century treatise by English historian James Stephen. In contrasting the Marian statutes with the 1848 legislation explicitly requiring opportunity for cross-examination, Stephen wrote that under the former “[t]he prisoner had no right to be, and probably never was, present.”\textsuperscript{92} He cited no source for that claim, however; it was not carefully researched the way much of Stephen’s work was. We can only speculate about his rationale. If Stephen was inferring that the prisoner probably never was present merely because he had no express statutory right to be present, his conclusion is a non sequitur. Whatever the rationale, Stephen’s claim seems impossible to reconcile with the evidence above, which shows that the prisoner was almost invariably present when his accusers testified against him at a committal hearing.\textsuperscript{93}

\section*{B. Presence as a Procedural Right}

Was presence more than a natural feature of Marian practice—was it also a procedural right? The general rule that evidence must be given in the presence of the accused was settled long before the framing. Hawkins, for example, had written that it was “a settled Rule, That in Cases of Life no Evidence is to be given against a Prisoner but in his Presence.”\textsuperscript{94} The exchange in Fenwick’s case suggested that

\begin{footnotesize}
\begin{enumerate}
\item Informations of Joseph Athinson et al. against William Patmore, OBSP 1789 Feb/72a-b (Jan. 20 & 31, 1789); Informations of James Kerton et al. against Francis Fleming et al., OBSP 1789 Feb/60, 86 (Jan. 28, 1789); Informations of Nunn Ilston & Edward Vaughan Williams against Thomas Taylor, OBSP 1789 Dec/79 (Dec. 9, 1789).
\item 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (London, MacMillan 1883).
\item Beattie writes in his Crime and the Courts in England that “[t]he Marian legislation gave the prisoner few rights at this stage of the investigation. He was not to be told precisely what the evidence was against him, nor to be present when the deposition of his accuser was taken.” BEATTIE, CRIME AND THE COURTS, \textit{supra} note 84, at 271. I am informed by the author, however, that the intent of this passage was merely to convey that the prisoner had no \textit{right} to be present, and that normally he would have been present nonetheless. E-mail from John Beattie to Robert Kry (Apr. 22, 2006) (on file with author).
\item 2 HAWKINS (1721), \textit{supra} note 38, at 428 (footnote omitted).
\end{enumerate}
\end{footnotesize}
this general rule might also apply in the specific context of Marian examinations. And the pervasive references to “presence” in the Marian depositions themselves raise a strong suspicion that presence was more than just a natural feature of Marian procedure. The strongest evidence, however, comes from three cases decided almost contemporaneously with the adoption of the Bill of Rights: King v. Radbourne, King v. Woodcock, and King v. Dingler.

Radbourne was a murder and petty treason trial of a maid accused of killing her mistress. William Garrow, the most celebrated criminal defense lawyer of his day, represented the prosecution. The victim had been examined before she died by a justice of the peace; the case report specifically mentions that the examination was taken “in the presence of the prisoner,” “heard by the prisoner,” and “distinctly read over to her in the presence of” the victim.

Garrow argued that the deposition was admissible under the Marian statutes:

Garrow, for the Crown, . . . contended that Mrs. Morgan’s deposition was admissible in evidence . . . as an information taken by a regular magistrate, under the statutes of Philip & Mary; for it had been given in the presence and hearing of the prisoner, upon an oath lawfully administered to Mrs. Morgan, who had thereby called God to witness that what she said was true, and who had in the presence of the prisoner, made an additional attestation of its truth, by putting her signature thereto . . . .

The deposition was admitted, and the defendant convicted of murder.
In *Woodcock*, the prisoner was charged with murdering his wife. The victim was found injured in a ditch and taken to a poor-house, where a magistrate examined her before she died. The court refused to admit the examination under the Marian statutes:

[A Marian] deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact. In the present case a doubt has arisen with the Court, to which doubt I entirely subscribe, Whether the examination of the deceased, taken in writing at the poor-house by Mr. Read, the Magistrate, is an examination of the nature I have last described? *It was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of contradicting the facts it contains.* It was not in the discharge of that part of Mr. Read's duty by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a voluntary and extrajudicial act, performed at the request of the Overseer; and although it was a very proper and prudent act, yet being voluntary, and under circumstances where the Justice was not authorized to administer an oath, it cannot be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken.\(^{104}\)

Reports is substantially the same as the version in Leach's 1800 third edition. See 2 THOMAS LEACH, CASES IN CROWN LAW 512-20 (London 3d ed. 1800). The version in Leach's 1789 first edition is shorter; it states that the victim "gave an information upon oath, before a Justice of the Peace, which was read deliberately over to her in the presence and hearing of the prisoner," but does not include arguments of counsel and therefore omits Garrow's express tying of presence to admissibility under the Marian statutes. See THOMAS LEACH, CASES IN CROWN LAW 399-401 (London 1st ed. 1789). Leach's 1792 second edition italicizes the words "to her in the presence and hearing of the prisoner," but otherwise is similar to the first edition. See THOMAS LEACH, CASES IN CROWN LAW 363-64 (London 2d ed. 1792). In the version in the Old Bailey Sessions Papers, Garrow argues that the information is admissible because it was "given in the presence of the prisoner," but he makes that point as a general principle of evidence law without specific reference to the Marian statutes:

[O]ne of the grounds of receiving such declarations, when made in the presence and hearing of the prisoner, is this; that when an innocent man is accused in a solemn manner, his innocent mind instantly revolts at the accusation; and he asserts his innocence, and denies his guilt; and therefore if he does not do so, when he hears the accusation, that is evidence at least to go to a Jury, that he did not object to it when he heard it.

Trial of Henrietta Radbourne, Old Bailey Sessions Papers, July 11, 1787, at 750, 752.\(^{104}\) King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789) (citation omitted; emphasis added).
The court nevertheless told the jury it could consider the testimony as a dying declaration if given under apprehension of death; the jury convicted. 105

_Dingler_ was another case in which the prisoner was accused of murdering his wife. Abingdon, the magistrate, had examined the victim at the infirmary before she died, after the husband was in custody but outside his presence. The defendant was represented at trial by William Garrow, the same lawyer who had represented the Crown in _Radbourne_ four years earlier. Garrow argued that the examination was inadmissible:

[The Marian committal statute] enacts, “That such Justice or Justices, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he or they shall commit or send such prisoner to ward, shall take the examination of such prisoner, and information of those that bring him, of the fact and circumstances thereof, and the same, or so much thereof as shall be material to prove the felony, shall put in writing,” &c. The Magistrate, therefore, is only authorized to take an examination of the person brought before him, and of those who bring him: this is the course which the law has prescribed to the Magistrate on these occasions; and when this course is pursued, the prisoner may have, as he is entitled to have, the benefit of cross-examination; but in the course which has been pursued by Mr. Abingdon, as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination. . . . The authority of the Magistrate in such cases grows out of the statute; it is commensurate with the terms of it; and therefore it is utterly impossible, unless the prisoner had been present, that depositions thus taken can be read; and he cited the case of _Rex v. Woodcock_. 106

The court sustained the objection “on the authority of the case cited.” 107

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105 _Id._ at 504, 168 Eng. Rep. at 354. The version of _Woodcock_ in the English Reports is the same in relevant respects as the versions in all of Leach’s prior editions. _See_ 2 _LEACH_ (1800), _supra_ note 103, at 563-68; _LEACH_ (1792), _supra_ note 103, at 397-401; _LEACH_ (1789), _supra_ note 103, at 437-42. The version in the Old Bailey Sessions Papers differs somewhat; among other things, where Leach reports the judge as stating that the deposition “was not taken, as the statute directs, in a case where the prisoner was brought before him in custody; the prisoner therefore had no opportunity of contradicting the facts it contains,” the Old Bailey Sessions Papers reports him as stating more ambiguously that Marian examinations are “taken where persons are in custody, and when the justice hears the examination of witnesses against persons in custody.” _Trial of William Woodcock, Old Bailey Sessions Papers, Jan. 14, 1789_, at 95, 111.


107 _Id._ at 563, 168 Eng. Rep. at 384. The version of _Dingler_ in the English Reports is substantially the same as the version in Leach’s 1800 third edition. _See_ 2
Radbourne, Woodcock, and Dingler confirm that, by the framing era, Marian examinations were normally conducted in the prisoner’s presence. The deposition in Radbourne was taken “in the presence of the prisoner.” Although Davies thinks that merely reflects the fact that the petty treason charge independently entitled the prisoner to be present, Garrow expressly argued that presence was relevant under the Marian statutes—the deposition was properly taken “under the statutes of Philip & Mary; for it had been given in the presence and hearing of the prisoner.” Likewise, in Woodcock, the court distinguished the deposition at hand from one taken “as the statute directs, in a case where the prisoner was brought before [the magistrate] in custody,” affording an “opportunity of contradicting the facts it contains.” And in Dingler, Garrow distinguished the deposition at issue from a committal examination on the ground that it was not taken in the prisoner’s presence. All three cases thus confirm that Marian examinations were normally conducted in the prisoner’s presence.

The three cases do more than reveal how Marian examinations were normally conducted—they also speak to admissibility. In Radbourne, the deposition was “admissible in

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109 Davies, supra note 5, at 165.
110 Radbourne, 1 Leach at 461, 168 Eng. Rep. at 332 (emphasis added). As noted supra note 103, this quotation appears in Leach’s 1800 third edition but not in his prior editions. Nevertheless, Leach’s third edition, together with the Old Bailey Sessions Papers report, see supra note 103, strongly suggest that Garrow argued presence was relevant for reasons unrelated to the treason statute.
evidence . . . for it had been given in the presence and hearing of the prisoner.” In Woodcock, the deposition was not admissible under the Marian statutes because the prisoner was not “brought before [the magistrate] in custody.” And in Dingler, Garrow argued that it was “utterly impossible, unless the prisoner had been present, that depositions thus taken can be read.” Presence was thus not only a natural consequence of Marian procedure, but a procedural right—unless the prisoner was present, the deposition could not be read at trial. Later sources confirm that interpretation, routinely citing these cases as holding that depositions taken in the prisoner’s absence were inadmissible.

Davies makes much of a distinction between what he terms the “strong” and “nuanced” versions of Justice Scalia’s claim that these cases “rejected” the “statutory derogation view.” As he notes, Woodcock and Dingler did not hold that depositions taken in conformity with the Marian statutes were inadmissible if taken ex parte; rather, they held that the depositions at issue were not taken in conformity with the Marian statutes. But that distinction is academic because the reason the depositions were held not to have conformed to the Marian statutes was that they were taken ex parte. There is no practical difference between excluding Marian depositions taken ex parte and holding that depositions taken ex parte are not Marian depositions and for that reason inadmissible. In either case, presence is a condition of admissibility.

Davies also objects to the timing of the decisions: Leach’s reports of Radbourne and Woodcock were not published until 1789, at most a few months before Congress proposed the

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113 Radbourne, 1 Leach at 460-61, 168 Eng. Rep. at 332 (emphasis added).
114 Woodcock, 1 Leach at 502, 168 Eng. Rep. at 353. The deposition was excluded because it was taken “under circumstances where the Justice was not authorized to administer an oath.” Id. One of those “circumstances,” however, was that the prisoner was not “brought before [the magistrate] in custody.” Id.
116 See People v. Restell, 3 Hill 289, 300 (N.Y. Sup. Ct. 1842) (citing Woodcock and Dingler); Rex v. Smith, Holt 614, 614-16, 171 Eng. Rep. 357, 357-60 (1817) (apparently citing Radbourne); ARCHBOLD, supra note 11, at *85 (citing Radbourne); 1 CHITT, supra note 11, at 79 & n.1 (citing Woodcock and Dingler); 4 HAWKINS (1795), supra note 11, at 423 (citing Woodcock and Dingler); PEAKE (1801), supra note 11, at 40-41 (citing Radbourne and Dingler); PHILLIPS, supra note 11, at 277 & n.3 (citing Woodcock); 2 STARKIE, supra note 11, at *487-89 (citing Woodcock and Dingler).
117 Davies, supra note 5, at 162-64; see Crawford v. Washington, 541 U.S. 36, 54 n.5 (2004) (“[T]o the extent [ex parte] Marian examinations were admissible, it was only because the statutes derogated from the common law.”).
118 See Davies, supra note 5, at 166-69.
Sixth Amendment for ratification; his report of Dingler was not published until after the Sixth Amendment was ratified. Davies argues that these decisions are not valid evidence of original meaning because the reports would not have been widely available in the United States when the Sixth Amendment was framed.¹¹⁹

That argument assumes, incorrectly, that English evidence is relevant only if published in a treatise or case report shipped to America before the framing. That is too narrow a view of the sources of information on which American legal thinkers relied. Many colonial lawyers, for example, trained in London and thus were directly exposed to English practices and ideas. One historian writes that “[a] far greater number [of colonial lawyers] than is generally known, received their legal education in London in the Inns of Court; and the influence, on the American Bar, of these English-bred lawyers, especially in the more southerly Colonies, was most potent.”¹²⁰ Another historian counts more than 115 American lawyers who trained between 1760 and 1775 in London, where they could “come into personal contact with some of England’s leading lawyers and judges.”¹²¹ He finds that “[t]he professional influence which these English-trained lawyers had on the colonial bar is beyond imagination.”¹²² At least nine of the thirty-one lawyers at the Constitutional Convention trained in England.¹²³ Because colonial lawyers were directly exposed to English practices and ideas, English evidence is relevant whether or not it appeared in a published treatise or case report shipped to the colonies.

Furthermore, the way Marian examinations were conducted in England in 1787, 1789, or 1791 is relevant to how they were conducted during the preceding decades. Radbourne, Woodcock, and Dingler do not purport to change Marian committal procedure in any way; they simply confirm what that procedure already was. None of the cases excluded a

¹¹⁹ Id. at 153-62. I take no position on whether 1789 or 1791 is the more relevant date for assessing original meaning because I do not view that two-year difference as having much practical significance.

¹²⁰ CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 188 (1911).


¹²² Id. at 36.

¹²³ See BERGER, supra note 36, at 87 n.160 (noting that four had studied in the Inner Temple and five in the Middle Temple); WARREN, supra note 120, at 211 (“four had studied in the Inner Temple, and one at Oxford, under Blackstone”).
committal deposition taken *ex parte*—Radbourne admitted a properly taken deposition, and Woodcock and Dingler rejected attempts to use the Marian statutes to admit non-committal depositions. The cases suggest that magistrates in the late eighteenth century were becoming more assertive in investigating crime by taking voluntary depositions unrelated to their statutory committal function, and that courts were unwilling to expand the statutes to reach those depositions. But they do not suggest any novelty in how committal examinations were conducted.

Radbourne, Woodcock, and Dingler are also evidence of the conditions of admissibility that were understood to exist during the preceding decades. They are relevant, not as a source of new legal rights, but as a reflection of existing understandings of legal rights. Significantly, the rule they acknowledged was not invented from scratch, but was a straightforward reading of the statutory text: The statutes authorized a justice of the peace to examine only a suspect and the witnesses who brought him; the prisoner in such a case would necessarily be present; and an examination not taken “as the statute directs” was not admissible under its authority. Several other English authorities followed that same line of textual reasoning. And the way English authorities interpreted statutory text is a reasonable proxy for how Americans would have interpreted similar text in their own committal statutes. As indeed they did: When the North

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124 This is consistent with other evidence that magistrates were taking a more aggressive role in investigating and prosecuting crime during this era. See, e.g., Beattie, *Public Justice*, supra note 83, at 9 (describing the “Bow Street runners,” the “first quasi-official detective policemen” directed by magistrates in the mid-eighteenth century); *id.* at 23-35 (describing the “re-examination” procedure first used by Bow Street magistrates in the mid-eighteenth century).


126 See King v. Eriswell, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter’s note 1797) (“Nor [are committal examinations admissible] since that statute, unless the party accused be present, . . . see the words of the [Marian statutes].”); Rex v. Forbes, Holt 599 n., 599 n., 171 Eng. Rep. 354 n., 354 n. (1814) (“The intention of the statute of Philip and Mary is sufficiently plain. It is, that the prisoner shall be present whilst the witness actually delivers his testimony . . . .”); 2 *STARKIE*, supra note 11, at 487-88 (“[W]here the informations are taken before a magistrate, the words of the statute strongly imply that the prisoner is supposed to be present, for the Justice is to take the examination of the prisoner, and the informations of those who bring the prisoner; and if they were to be taken in the prisoner’s absence he would lose the benefit of cross-examination . . . .”). But see Rex v. Smith, Holt 614, 615, 171 Eng. Rep. 357, 360 (1817) (“[T]he statute did not mention the prisoner’s presence at all. Undoubtedly, however, the decisions established the point, that the prisoner ought to be present, that he might cross-examine.”).
Carolina court held in *Webb* in 1794 that “our [committal statute] clearly implies the depositions to be read, must be taken in [the prisoner’s] presence,”\(^{127}\) it was drawing the same textual inference that *Woodcock* and *Dingler* had drawn just a few years earlier.

Nevertheless, the rule articulated by *Radbourne*, *Woodcock*, and *Dingler* was not universally accepted. In the 1790 case of *King v. Eriswell*, the King’s Bench divided over whether the *ex parte* examination of a pauper who had become insane could be admitted in a suit to charge a town with his care.\(^{128}\) In defending admissibility, Justice Buller relied by analogy on his construction of the Marian statutes: “Where an act is judicially done, it is not necessary that the person to be affected by it should be present in order to make it evidence against him, and therefore depositions taken by a justice of a person who afterwards died, though taken in the absence of the prisoner, must be read. So it was determined by all the Judges in *Radburn’s case*.\(^{129}\) Two other judges, Grose and Kenyon, disagreed with Buller as to pauper examinations but did not dispute his premise that *ex parte* Marian depositions were admissible, instead dismissing it as a statutory exception to the common-law rule. Grose wrote:

> Evidence, though upon oath, to affect an absent person, is incompetent, because he cannot cross examine; as nothing can be more unjust than that a person should be bound by evidence which he is not permitted to hear. Before the Statute of Philip & Mary, a deposition taken before the justice of the county where the murder was committed was not evidence, even though the party died or was unable to travel. Why? Because although the justice had jurisdiction to enquire into the fact, the common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross examine; and therefore that statute was made.\(^{130}\)

Chief Justice Kenyon added:

> Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them, and where each has an opportunity of cross-examining the witness . . . . It has been said that there are cases where examinations are admitted, namely, before the coroner, and before magistrates in cases of felony . . . . Those

\(^{127}\) State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (Super. L. 1794).


\(^{129}\) Id. at 713-14, 100 Eng. Rep. at 819 (Buller, J.) (citation omitted).

\(^{130}\) Id. at 710, 100 Eng. Rep. at 817 (Grose, J.) (reporter’s notes omitted).
exceptions alluded to are founded on the Statutes of Philip & Mary; and that they go no further is abundantly proved. . . . [W]ithout stating the cases which occur on this head, I will do little more than refer to the case of The King v. Paine. That was not loosely decided, but was the opinion of this Court assisted by the Court of Common Pleas. In Salkeld it is expressly said that the rule cannot be extended further than the particular case of felony; and in the other book the Chief Justice declared that the depositions were not evidence; and a weighty reason is given, namely, “The defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination.”

The fourth judge, Ashhurst, thought Buller’s position on pauper examinations compelled by precedent, though “[i]f this were a new case, I should be strongly of opinion that the evidence given ought not to have been received, as being hearsay evidence.” He stated no view on ex parte Marian depositions, but since he was on the court that decided Woodcock a year earlier, it is doubtful he agreed with Buller on that specific point.

Eriswell admittedly provides evidence that the admissibility of ex parte Marian depositions was still disputed at the time of the framing. Buller specifically states that Marian depositions were admissible even if “taken in the absence of the prisoner,” and Grose and Kenyon never clearly dispute that premise. While Buller says nothing about whether committal depositions were normally taken in the

131 Id. at 722-23, 100 Eng. Rep. at 823-24 (Kenyon, C.J.) (citation, reporter’s note omitted).
132 Id. at 720, 100 Eng. Rep. at 822 (Ashhurst, J.).
133 See King v. Woodcock, 1 Leach 500, 500, 168 Eng. Rep. 352, 352 (1789) (identifying Ashhurst as “present”). The presiding judge’s statement that “a doubt has arisen with the Court, to which doubt I entirely subscribe,” seems to indicate that the other judges present shared his concerns. See id. at 502, 168 Eng. Rep. at 353.
134 In 1801, the year after Buller died, ex parte pauper examinations were ruled inadmissible. See King v. Ferry Frystone, 2 East 54, 102 Eng. Rep. 289 (K.B. 1801).
135 Eriswell, 3 T.R. at 713-14, 100 Eng. Rep. at 819 (Buller, J.).
136 Starkie, however, did interpret Kenyon’s reference to Paine as disputing Buller’s premise. See 2 STARKIE, supra note 11, at *488 n.(c) (“It seems to have been the opinion of Ld. Kenyon . . . that depositions so taken [ex parte] were not admissible; and he refers to Payne’s case (as reported 5 Mod. 163), and terms the objection there taken to admitting the deposition in evidence, namely, the loss of cross-examination, a weighty objection.”); id. at *491-92 (“[H]e immediately afterwards laid great stress upon the case of The King v. Paine . . . . It cannot therefore be inferred that Lord Kenyon fully acceded to the admissibility of such evidence, although in the course of his argument, assuming them to be exceptions, he denied the consequences attempted to be deduced from them.”).
prisoner’s absence, he at least contemplates the possibility that they might be taken that way.\footnote{137}{Three years after Eriswell, a court in a (noncriminal) paternity case also cited the Marian statutes in passing for the point that an “examination . . . taken before a magistrate in the course of a judicial proceeding . . . is certainly admissible evidence,” even though the putative father there had argued that the paternity examination was “not taken in the presence of the party to be affected by it.” King v. Ravenstone, 5 T.R. 373, 374, 101 Eng. Rep. 209, 209 (K.B. 1793). For contrary American authority, see Dunwiddie v. Commonwealth, 3 Ky. (Hard.) 290, 290 (1808).}

It is remarkable, however, that the only authority Buller relies on—Radbourne—squarely refutes his position. The deposition there was “given in the presence and hearing of the prisoner,” and the prosecution counsel expressly stated that the Marian statutes required as much.\footnote{138}{King v. Radbourne, 1 Leach 457, 459-61, 168 Eng. Rep. 330, 331-32 (1787). As noted supra note 103, all the reports of Radbourne are clear that the deposition was taken in the prisoner’s presence (or at least read back to the witness in the prisoner’s presence), although only some include counsel’s argument making presence a condition of admissibility. Leach in his 1792 second edition italicized the words “to her in the presence and hearing of the prisoner” that had appeared in his 1789 first edition before Eriswell was decided, see Leach (1792), supra note 103, at 363; that revision was evidently a direct response to Buller’s argument.}

That discrepancy was not lost on commentators. When Thomas Peake reprinted Eriswell in 1801, he inserted a footnote in Buller’s opinion recounting that Leach’s report of Radbourne “expressly stated that the deposition was taken in the presence of the prisoner”; that Peake had reviewed the magistrate’s statement in the sessions papers and found it “agreeable to this report”; and that he had reviewed a manuscript copy of the case and found that it did not “appear that the point, whether a deposition taken in the absence of the prisoner was evidence or not, was at all submitted to the consideration of the judges.”\footnote{139}{Peake (1801), supra note 11, app. 1, at 144 n.\^a. The last reference is apparently to the statement of the case by the presiding judge on submission to the Twelve Judges. See supra note 103.}

Leonard MacNally wrote in 1802 that Leach’s account “varies materially” from Buller’s; that in the former the deposition was “deliberately read over to [the witness] in the presence and hearing of the prisoner”; and that “[t]he words in italics are omitted by the learned judge.”\footnote{140}{MacNally, supra note 11, at 307 n.\^a.}

Thomas Starkie wrote in 1824 that “[Buller] refers to Radbourne’s case . . . ; but in that case the deposition was taken in the hearing of the prisoner, and of course the question did not arise”;\footnote{141}{2 Starkie, supra note 11, at *485 n.(c) (citation omitted); see also id. at *491 (“It is however remarkable, that in Radbourne’s case the information was taken in the presence of the prisoner.” (footnote omitted)).} he described Kenyon as
merely having assumed the admissibility of such evidence for the sake of argument. Most striking is a footnote that the case reporters, Durnford and East, inserted in their 1797 edition. Where Grose had written “Before the statute of Philip & Mary, a deposition taken before the justice of the county where the murder was committed was not evidence, even though the party died or was unable to travel,” they added: “Nor since that statute, unless the party accused be present . . .; see the words of the [Marian statutes].”

This highly negative reception suggests that, even around the time Eriswell was decided, the prevailing view in the legal community was that Buller’s dictum had misstated the law. As a judge, Buller was respected for his legal abilities but was fairly reactionary on criminal procedure matters. Eriswell may well be an instance of that.

C. Conclusion

Marian depositions were routinely conducted in the prisoner’s presence, a natural consequence of the statutory text and the function of a committal hearing. At some point before the framing, that practice hardened into a procedural right. The timing is difficult to pinpoint because, so long as Marian depositions were conducted the way they were normally conducted, the question did not arise. The catalysts for the principle’s express recognition in reported cases were not ex parte committal hearings, but attempts to stretch the statutes to non-committal contexts where presence was not routine. Courts then had to decide what features of committal examinations rendered their admission acceptable. One such

142 See supra note 136.
143 3 CHARLES DURNFORD & EDWARD HYDE EAST, TERM REPORTS IN THE COURT OF KING’S BENCH 710 n.(c) (London, Strahan new ed. 1797). The note does not appear in Durnford and East’s original 1790 report, see 3 CHARLES DURNFORD & EDWARD HYDE EAST, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF KING’S BENCH 710 (London, Strahan & Woodfall 1790), or in Peake’s 1801 reprint, see PEAKE (1801), supra note 11, app. 1, at 140-41, but it appears in later editions of the Term Reports, including the 1817 edition in the English Reports, see King v. Eriswell, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790).
feature, they determined, was the prisoner’s presence; and thus a confrontation right was read into the Marian statutes.

III. CROSS-EXAMINATION

*Crawford* did not require mere presence as a condition of admissibility, but also opportunity for cross-examination. This section examines that further requirement.

A. Background

While the statutory text invites the inference that prisoners were routinely present for committal depositions, it contains no express indication whether cross-examination was contemplated. That does not mean, however, that one should assume no opportunity for cross-examination existed.

The admissibility of a Marian deposition has only ever depended on whether the prisoner had an opportunity for cross-examination—not on whether cross-examination actually occurred.\(^{145}\) The mere fact that cross-examination was unusual, therefore, would not disprove the cross-examination rule; all that matters is the opportunity. Furthermore, cross-examination need not have been affirmatively invited by the magistrate (although that was apparently done by the early nineteenth century).\(^{146}\) So long as the prisoner was present, opportunity for cross-examination would require only that the magistrate not interfere if the prisoner sought to ask questions. Viewed in that light, statutory silence should not be taken to indicate that no opportunity for cross-examination existed. The statutes did not mention cross-examination, but nor did they affirmatively direct the magistrate to prohibit it.

If cross-examination never took place, one could argue that the opportunity was so theoretical that the Framers would not have attached any significance to it. It therefore makes sense to inquire whether cross-examination at committal hearings likely ever occurred. Two considerations suggest it was probably very rare before the second half of the eighteenth century, although developments over that period may have made it less anomalous.

\(^{145}\) See, e.g., various sources cited *supra* notes 11-13.

\(^{146}\) In *Smith*, the prisoner was expressly offered the opportunity to cross-examine. See *Rex v. Smith*, Holt 614, 614, 171 Eng. Rep. 357, 357 (1817) (“The prisoner was asked whether he would choose to put any questions to him, but declined to do so.”).
The first concerns the prisoner's incentive to cross-examine. The Marian statutes did not give justices of the peace any express authority to discharge prisoners; their only options were to commit for trial or release on bail, according to the seriousness of the offense charged.147 Because the statutes did not contemplate discharge, the prisoner had little incentive to challenge adverse testimony at the committal hearing. As legal historians have documented, however, during the eighteenth century magistrates began exercising an extra-statutory power of discharge, releasing a felony suspect if the evidence was insufficient.148 As a result, the prisoner had a much greater incentive to test the sufficiency of the prosecutor's case.

The second development concerns the involvement of lawyers. At the start of the eighteenth century, counsel could appear for a criminal defendant at trial only in cases of treason or misdemeanor, not felony.149 The rule against felony counsel receded during the eighteenth century, starting in the 1730s.150 Nevertheless, for many decades, counsel could perform only limited functions at trial—a lawyer could examine and cross-examine witnesses but could not argue his client's case to the jury.151 Because of those restrictions, cross-examination was an utterly central component of a criminal defense lawyer's skill set—Langbein calls it “nearly the only tool in defense counsel’s kit.”152

The rule against felony counsel was a rule of appearance in the trial court; it did not extend to pretrial assistance.153 Nonetheless, if lawyers were not involved at trial,

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147 See Beattie, Crime and the Courts, supra note 84, at 272; Beattie, Policing and Punishment, supra note 82, at 95-97; Langbein, supra note 19, at 7.
148 See Beattie, Crime and the Courts, supra note 84, at 274-76; Beattie, Policing and Punishment, supra note 82, at 104-07; King, supra note 84, at 88; Langbein, supra note 144, at 47, 273-74.
150 See Beattie, Crime and the Courts, supra note 84, at 356-57; Langbein, supra note 144, at 167-77; Beattie, Scales of Justice, supra note 149, at 226-30; Landsman, supra note 76, at 533-48.
151 See Langbein, supra note 144, at 171, 254-55. The right to full assistance of counsel developed earlier in the American colonies than in England. See 1 Chroust, supra note 121, at 42-44.
152 Langbein, supra note 144, at 283; see also id. at 291-96; Beattie, Crime and the Courts, supra note 84, at 361-62; Beattie, Scales of Justice, supra note 149, at 234-35; Landsman, supra note 76, at 533-37, 539-42, 548-57.
153 See Langbein, supra note 144, at 129. Moreover, even after lawyers were permitted at trial, only barristers (counsel) could represent a defendant at trial, but either barristers or solicitors (attorneys) might participate in pretrial hearings.
their involvement in pretrial hearings was probably rare at best. By the mid-eighteenth century, however, lawyers began to appear at some committal hearings.154 A lawyer's involvement would increase the likelihood of cross-examination at such a proceeding. A lawyer would not have any greater right to cross-examine than the client he represented; and if a prisoner had a right to cross-examine, involvement of a lawyer was by no means necessary to his exercise of that right;155 but as a practical matter, the assistance of counsel would make it more likely that any opportunity to cross-examine would be exploited.156 Cross-examination at trial was already the most important component of defense counsel's work; a lawyer seeking to justify his fee for assisting at a committal hearing would likely take advantage of any opportunity to cross-examine the forum presented.157

As one might predict from those two developments, sources from this period do indeed reveal the advent of cross-examination at some committal hearings, as well as the first clear articulations of the view that opportunity to cross-examine—like presence—was a procedural right critical to the admissibility of a Marian deposition. I examine those sources in the following two sections, first considering reported cases and treatises and then turning to other sources.

B. Reported Cases and Treatises

Marian procedure collided with cross-examination rights in the 1739 case of King v. Westbeer.158 The defendant


154 See Beattie, Crime and the Courts, supra note 84, at 278-79 (citing a magistrate's complaint from the 1740s about "Newgate Solicitors" at committal hearings); Beattie, Policing and Punishment, supra note 82, at 112; May, supra note 153, at 89-90; Beattie, Public Justice, supra note 83, at 33-35, 43-44; infra notes 194-223 and accompanying text. As these sources make clear, there is no substance to Davies' claim that it "goes without saying that, even if the arrestee had been present for the taking of a witness's Marian deposition, he would not have been represented by counsel at that time." Davies, supra note 5, at 170.

155 See Cox v. Coleridge, 1 B. & C. 37, 54, 107 Eng. Rep. 15, 21 (K.B. 1822) (Best, J.) (noting that "opportunity for cross-examination" need not include "cross-examining by counsel or attorney").

156 See Langbein, supra note 144, at 34-35 (noting that most prisoners probably could not cross-examine effectively (quoting Beattie, Crime and the Courts, supra note 84, at 350-51)); Beattie, Scales of Justice, supra note 149, at 234 (same).

157 In addition, increasing lawyer involvement at trial would tend to crystallize evidentiary rules. See Langbein, supra note 144, at 243.

there was charged with theft; an accomplice, Lulham, had implicated him in a committal examination but died before trial. Defense counsel argued that “admitting his deposition to be read in evidence would injure the prisoner, inasmuch as he would lose the benefit which might otherwise have arisen from a cross-examination.” The report continues: “The [prosecution counsel] replied, and the point was very much debated. But the Court over-ruled the objection, and admitted Lulham’s information to be read; though they said it would not be conclusive unless it were strongly corroborated by other testimony.”

Although Westbeer admitted an examination over the objection that it denied the prisoner his right to cross-examine, the case does not necessarily show that magistrates refused to permit questioning by prisoners at committal hearings, or that depositions were routinely taken in the prisoner’s absence. The case is unusual in that the deposition was taken from an accomplice at what appears to have been the accomplice’s own committal hearing. The examination was thus conducted in the prisoner’s (Lulham’s) presence but became ex parte when read against a different defendant (Westbeer). Those circumstances suggest why the case was “very much debated” and the court’s ruling so qualified. Courts in 1739 were not yet willing to condition admissibility on presence or opportunity for cross-examination, but in unusual cases where the normal features of committal depositions were absent, their admission was controversial.

Contrast Westbeer with Woodcock and Dingler. In Woodcock, the deposition was excluded because “[i]t was not taken, as the statute directs, in a case where the prisoner was brought before [the magistrate] in custody; the prisoner

159 Id. at 12, 168 Eng. Rep. at 109.
160 Id.; see also Beattie, Crime and the Courts, supra note 84, at 273 & n.15 (mentioning a similar unreported case from 1749).
161 The accomplice “made a full confession in writing” before giving his sworn statement, Westbeer, 1 Leach at 12, 168 Eng. Rep. at 109; the unsworn confession suggests the accomplice himself was being committed. Leach and Peake, however, both apparently assumed the defendant was present. See 4 Hawkins (1795), supra note 11, at 423 (citing Westbeer for the point that an accomplice’s Marian deposition was admissible if taken “in the presence of the prisoner”); Peake (1801), supra note 11, at 40-41 (same).
162 Alternatively, the court’s corroboration requirement could reflect the more general accomplice-corroboration rule rather than the ex parte character of the testimony, although Langbein states that the accomplice-corroboration rule did not emerge until the 1740s. Langbein, supra note 144, at 203.
therefore had no opportunity of contradicting the facts it contains.”

The court thus treated presence as relevant not for its own sake, but because it would afford the prisoner an “opportunity of contradicting” the witness’s testimony. The use of the word “contradict” rather than “cross-examine” presents an ambiguity. But the defendant was not literally denied an opportunity to “contradict” the witness; he could have given a contradictory account at trial after the deposition was read. Implicit in the court’s holding is that the defendant was denied an opportunity to contradict the witness at a time when the witness could be required to respond to the contradictions—which is, in substance, an opportunity to cross-examine.

Garrow’s argument in Dingler, as reported by Leach, is unambiguous: “[W]hen [the statutory] course is pursued, the prisoner may have, as he is entitled to have, the benefit of cross-examination; but in the course which has been pursued by Mr. Abingdon, as the prisoner was not present, no judicial examination has been taken, as he could not have the benefit of cross-examination.”

Garrow thus saw opportunity to cross-examine as both a justification for the right to be present and as a free-standing right to which the prisoner was “entitled.”

Another account of Dingler published in the Old Bailey Sessions Papers in 1791 confirms the significance of cross-examination. In that report, Garrow sought to show what mischief would ensue from ex parte depositions by posing a hypothetical in which a witness testified ex parte that the defendant had killed the victim but omitted that he had done so in self-defense. Surely, Garrow argued, such a deposition, “not taken in my presence, and without the advantage of cross-

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163 King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (1789); see also supra note 114. As noted supra note 105, the reference to “contradicting” does not appear in the Old Bailey Sessions Papers report of the case.

164 It is true that presence would be advantageous to the prisoner even if he could not ask questions. See Davies, supra note 5, at 172-73. But the advantages Davies identifies seem unlikely to have been the ones the judge in Woodcock had in mind. Absence might hamper a prisoner in preparing to contradict the witness at trial, but it would be strange to describe that as a denial of the opportunity to contradict. And while absence might also hamper a prisoner in defending himself at his committal examination, the deposition in Woodcock was not taken in connection with any committal hearing. The judge’s use of the word “contradict” rather than “cross-examine” might reflect an assumption that the prisoner at a committal hearing would not question the witness directly, but would “contradict” his account and rely on the magistrate to demand responses. Cf. infra note 224.


166 Trial of George Dingler, Old Bailey Sessions Papers, Sept. 14, 1791, at 468.

167 Id. at 474.
examination, taken behind my back, not containing all the circumstances that he knows, but containing just so much as shall justify my commitment,” could not be admitted.\(^{168}\) Garrow then argued from the statutory text, as in Leach: “The language of the statute is, that the Justice has nothing to do but with a man coming before him to be committed. . . . [This] was not in the course of a judicial examination; the prisoner was not present; the prisoner was not on his defence . . . .”\(^{169}\) He then quoted at length from \textit{Woodcock}.\(^{170}\)

A colloquy ensued. The prosecution counsel inquired what had happened to the prisoner after his committal examination.\(^{171}\) The magistrate replied: “After I had committed him once, I sent for him again, that he might have all the advantage he could make of it.”\(^{172}\) Garrow interjected: “\textit{Had he the advantage of suggesting the questions to the woman?}”\(^{173}\) The magistrate conceded he had not.\(^{174}\) The prosecution counsel then argued that, whether or not the statute applied, the examination should be admitted as the best evidence available.\(^{175}\) But “[t]he examination [was] not allowed to be read.”\(^{176}\)

In Leach’s report, the court sustained Garrow’s objection “on the authority of the case cited” (\textit{Woodcock}); we cannot be sure how much of Garrow’s argument the court accepted, although presumably it agreed with whatever was implicit in \textit{Woodcock} itself.\(^{177}\) The Old Bailey Sessions Papers report suggests more strongly that inability to cross-examine was relevant to the decision, though it too is ambiguous. Whatever the basis for the court’s holding, however, the fact that Garrow believed there was a right to cross-examine at a committal hearing is significant in itself. Garrow was the most

\(^{168}\) Id.
\(^{169}\) Id. at 475.
\(^{170}\) Id. at 475-76.
\(^{171}\) Id. at 476.
\(^{172}\) Trial of George Dingler, Old Bailey Sessions Papers, Sept. 14, 1791, at 468, 476.
\(^{173}\) Id. (emphasis added).
\(^{174}\) Id.
\(^{175}\) Id. at 476-77.
\(^{176}\) Id. at 477.
famous criminal defense lawyer of his time. That he thought the right existed meant others probably did as well.

In 1794, Webb essentially replicated the reasoning of Woodcock and Dingler without citing either decision. The court held that the state's committal statute “clearly implies the depositions to be read, must be taken in [the prisoner's] presence”—tracking the logic of Woodcock and Dingler that a committal statute authorizes testimony only where the prisoner is brought before the magistrate in custody. And, just like Garrow in Dingler, the court then justified that presence requirement on the ground that it would afford an opportunity to cross-examine: “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine . . . .”

Treatises also endorsed the cross-examination rule to varying degrees. A 1789 treatise cited Hawkins for the point that “[t]he examination of an informer, taken on oath in pursuance of the statutes of Philip & Mary, and subscribed by him, may be given in evidence” if the witness becomes unavailable. It then added: “This shews the propriety and justice of permitting a prisoner by himself, or counsel to cross-examine any witness produced against him, before the magistrate, though some justices have strenuously contended against the right.”

In 1795, Leach cited Woodcock and Dingler in his seventh edition of Hawkins for the point that “an examination of a person murderously wounded, taken by a justice of the peace . . . in the absence of the prisoner, cannot be read in evidence on the subsequent trial of the prisoner for murder, for it is taken extrajudicially, and not as the statutes of Philip and Mary direct, in a case where the prisoner is brought before him in custody, and he has the opportunity of contradicting or cross-examining as to the facts allledged.” In other words, the Marian statutes “direct[ed]” that the prisoner have the

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178 See Langbein, supra note 144, at 243 (“the dominant Old Bailey barrister of the day”); Landsman, supra note 76, at 551 (“one of the foremost counsel of the era”). See generally Beattie, Scales of Justice, supra note 149, at 236-47.
179 State v. Webb, 2 N.C. (1 Hayw.) 103, 104 (Super. L. 1794); see also supra notes 39-42 and accompanying text.
180 Webb, 2 N.C. (1 Hayw.) at 104.
182 Id. I am indebted to Professor Davies for this reference.
183 4 Hawkins (1795), supra note 11, at 423.
“opportunity of contradicting or cross-examining” adverse witnesses. Later treatises and cases that conditioned admissibility on opportunity for cross-examination often similarly traced that requirement to Woodcock and Dingler.184

Marian examinations remained a source of controversy. Importantly, however, the typical complaint was that the opportunity for cross-examination at a committal hearing was inadequate, not that there was no opportunity at all. An 1806 treatise, for example, criticized the rule of admissibility as “very unsatisfactory” because Marian depositions were “taken under circumstances, in which the adverse party had not a fair opportunity of cross examination, or in which such an examination, being unusual, could not reasonably be expected to have taken place.”185 Among other things, the hearing was limited to the issue of cause to commit rather than guilt, and “the combating of the evidence by professional assistance, or by adverse testimony, is frequently disallowed.”186 An 1824 treatise advocated a strict unavailability rule because “[i]t is true that the prisoner has had the power to cross-examine the witness, but this was at a time and under circumstances very disadvantageous to the prisoner.”187 And a 1795 Virginia manual decried the rule of admissibility on the ground that “the accused party has not the same advantage of cross examination, which he would possess before a court, with the assistance of counsel.”188 These critiques are directed at the adequacy of the opportunity to cross-examine afforded by a committal hearing. None claims the accused might be denied that opportunity altogether.

C. Other Sources

Marian depositions themselves provide little evidence of cross-examination. That may be due in large part to the format: The depositions merely recount witnesses’ testimony;

184 See People v. Restell, 3 Hill 289, 300 (N.Y. Sup. Ct. 1842) (citing Woodcock and Dingler); 1 CHITTY, supra note 11, at 79 & n.11 (citing Woodcock and Dingler); 2 STARKIE, supra note 11, at *487-89 (citing Woodcock and Dingler); cf. Rex v. Smith, Holt 614, 615-16, 171 Eng. Rep. 357, 360 (1817) (apparently citing Radbourne); ARCHBOLD, supra note 11, at *85 (citing Radbourne).

185 Evans, supra note 11, at 232 (emphasis added).
186 Id.
187 2 STARKIE, supra note 11, at *487.
188 WILLIAM HENING, THE NEW VIRGINIA JUSTICE 148 (Richmond, Nicolson 1795) (emphasis added).
they do not transcribe questions and answers verbatim, nor do they report procedural colloquies between the magistrate and prisoner (or counsel). There are a few instances of testimony that might conceivably be a product of cross-examination. In one case, for example, an accomplice initially implicates the prisoners but then, in a passage of testimony apparently added afterward, minimizes their involvement. In other cases, witnesses admit not knowing particular facts in a manner arguably consistent with adverse questioning. Overall, however, the infrequency of such instances suggests that cross-examination was still rarely attempted; that it was attempted but rarely permitted; or that it was conducted but the answers rarely transcribed. The deposition format provides no means

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189 See Examination of Robert Hutton against William Street & John Maidwell, OBSP 1789 Jan/19 (Jan. 5, 1789) (first claiming that “William Street and John Maidwell came to his said Master, with two Waggons loaded with Sacks” (some of which were stolen), but later stating that “William Street was with his horses, and two men not present brought the said sacks to him, not Maidwell which last declaration is the Truth”). The latter passage appears in compressed writing, as if it were inserted after the magistrate had already recorded the following witness’s testimony.

190 See Information of John Higgs against William Street & John Maidwell, OBSP 1789 Jan/30 (Jan. 5, 1789) (stating that he “saw him [a prisoner] go forward where Roots Waggon was but cannot say if he went there or not”); Information of Phillip Jones against Francis Fleming et al., OBSP 1789 Feb/60 (Jan. 28, 1789) (admitting he “does not know what became of the said Tire” that was stolen); Information of John Thompson against Francis Fleming et al., OBSP 1789 Feb/60 (Jan. 28, 1789) (“[T]his Informant is not acquainted with the person of John Cumberledge [a prisoner] says he might have been in Company—Knows Holmes alias Shock [a prisoner] & thinks he was in his House does not recollect seeing Samuel Young alias Leggy [an accomplice] but says he might have been there as there was many persons”); Information of Daniel Adams against David Coleman, OBSP 1789 Ju/35 (May 6, 1789) (stating that an allegedly forged draft “was presented for payment but by whom this Informant cannot say”); Information of Fredreck Seabeck against Eleanor Hays, OBSP 1789 Dec/54 (Nov. 28, 1789) (stating that “a Man and four Women came into the Room (but does not know who they were)”).

191 The third possibility cannot be discounted. Although authorities generally advised the magistrate to record all testimony, exculpatory as well as inculpatory, see, e.g., 1 CHITTY, supra note 11, at 79; MICHAEL DALTON, THE COUNTRYE JUSTICE 265 (London 1618), the Marian statutes by their terms required the magistrate to take down only so much testimony “as shall be material to prove the Felony,” 2 & 3 Phil. & M., c. 10 (1555). Selective transcription remained a source of controversy into the nineteenth century. See People v. Restell, 3 Hill 289, 293, 304-05 (N.Y. Sup. Ct. 1842) (holding that a magistrate erred where “neither the questions nor answers [during cross-examination] were put down, because [he] did not think it material to put them down”); Tharp v. State, 15 Ala. 749, 755 (1849) (chastising a magistrate for writing down only “so much [testimony] as he considered material”); cf. Evans, supra note 11, at 232 (“[I]t is a very hard measure, that an authentic record may be taken of the evidence which tends to crimate, while there is not an equal opportunity of preserving the materials of defence.”). It may be that some magistrates would not record a witness’s responses to cross-examination unless they substantially undermined his other testimony.
of distinguishing among those possibilities.\footnote{192 As explained \textit{supra} note 85, I excluded from my deposition sample cases where the prisoner appeared \textit{pro se} at trial, in an effort to find cases where the prisoner might also have been represented by counsel at the committal hearing (which seemed more likely to yield evidence of cross-examination). Nevertheless, the depositions did not yield any evidence of lawyer involvement. It is unclear whether that is because lawyers were rarely involved or because magistrates saw no need to note their involvement.\footnote{193 I owe many of the following references to John Beattie.\footnote{194 \textit{Ayrton v. Addington} (Dec. 7, 1780), in 2 \textsc{James Oldham}, \textsc{The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century} 1023 (1992).\footnote{195 \textit{Id.} at 1023-24.\footnote{196 \textit{Id.} at 1024.\footnote{197 \textit{Id.}\footnote{198 \textit{Id.}\footnote{199 \textit{Id.} at 1025-26 ("[I]f he would put any question to him, & if he thought it proper, he would put it.").\footnote{200 2 \textsc{Oldham}, \textit{supra} note 194, at 1024-26.\footnote{201 \textit{Id.} at 1026.\footnote{202 \textit{Id.} at 1023.\footnote{203 \textit{Id.} at 1024.}}}}}}}}\footnote{192} Fortunately, other sources shed more light.\footnote{193} Particularly significant is an unreported case from 1780, \textit{Ayrton v. Addington}.\footnote{194} The case was a civil suit by Thomas Ayrton, an attorney, against William Addington, a magistrate presiding at Bow Street in London.\footnote{195} The dispute arose from a felony robbery charge brought by a third man, Webb, against a fourth, Wilson.\footnote{196} Wilson’s master had hired Ayrton to assist Wilson in his Marian committal hearing before Addington.\footnote{197} According to witnesses in the civil case, when Webb testified at the hearing, Ayrton sought to ask him “cross-questions” concerning the crime.\footnote{198} Addington informed the attorney that this was “not a trial but an examination of prisoners” and that “he would not suffer him to examine,” although the attorney could suggest questions for the magistrate to ask.\footnote{199} Ayrton replied that this was “very odd,” and “insisted he had a right to ask the [witness] any questions”—“the right as an Attorney to put any question for the benefit of his client.”\footnote{200} Ayrton persisted in his cross-examination, interrupting Addington’s own questioning, and Addington ordered him removed.\footnote{201} Ayrton then sued Addington for assault and false imprisonment.\footnote{202} In defense, Addington pled justification, claiming that Ayrton had interfered with his official duties.\footnote{203} The jury, however, returned a verdict for Ayrton, who
recovered one shilling in damages and £50 in court costs. Implicit in the verdict, evidently, is the jury’s approval of Ayrton’s conduct at the hearing. The case shows that, even in 1780, a right to cross-examine witnesses at committal hearings was thought to exist not only by a member of the legal profession but by the public at large.

Ayrton v. Addington is not the only instance of attempted cross-examination at a committal hearing. Early press accounts reveal at least two others, though with mixed results. In a 1774 case reported in the General Evening Post, John Matchem was charged with the robbery of two men, Lincon and Fidel. At the Bow Street committal hearing, Matchem was assisted by counsel who, “from the improbability of the prisoner being the offender, moved to cross-examine Lincon and Fidel.” According to the press account, however, “the Bench seemed unwilling to admit of such a proceeding.” Lincon and Fidel testified at trial, so Matchem was not ultimately denied the opportunity to cross-examine. Nevertheless, the case suggests that the right to cross-examine at a committal hearing was not firmly established at that time.

By contrast, in a 1786 examination for arson reported in the Daily Universal Register, cross-examination not only was permitted, but resulted in the exoneration of the prisoners. The principal witness at the hearing was the prisoners’ maid, who claimed they had directed her to set the fire. But “on her cross-examination by Mr. MacNally, who was counsel for the prisoners, she acknowledged that she had not accused her master and mistress, till after she was informed of her own danger [of being charged with the offense], and that to save herself she became evidence [for the prosecution].” The magistrates then discharged the prisoners for want of evidence.

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204 Id. at 1026. The trial was significant enough to be reported in the British Mercury, although without any relevant details. See Brit. Mercury & Evening Advertiser, Dec. 9, 1780, at 4; Brit. Mercury & Evening Advertiser, Dec. 11, 1780, at 3.
205 Gen. Evening Post, June 14-16, 1774, at 3.
206 Id.
207 Id.
208 See Trial of John Mattsham, Old Bailey Sessions Papers, July 6, 1774, at 243, 243-53.
209 Daily Universal Reg., June 5, 1786, at 3.
210 Id.
211 Id.
212 Id.
Cross-examination at committal hearings was also a point of controversy in the colonies. In 1766, colonists in New York complained to the authorities that “During the Course of the Examination of the Witnesses [a particular justice] would not admit any of the prisoners to ask or propose one Single Question to the Witnesses nor suffer anyone to do it in their Ste[ad].” According to the complainants, this was one of “several violent and arbitrary steps . . . manifestly tending to the subversion of the invaluable privilege of English Subjects they conceive [o]ught not to pass unnoticed.”

By 1801, lawyer participation in committal hearings had become sufficiently common that a group of Lancaster magistrates sought legal advice on their rights. Complaining that “[i]t frequently occurs upon the Examination of Persons charged with Felony, that Attornies are employed on their behalf to attend at their Examinations,” they posed a series of questions to five members of the bar, which were published that year with the answers in a pamphlet. The principal questions were whether attorney attendance at a committal hearing was by right or by discretion, and whether the attorney was entitled to copies of the examinations. Most respondents thought that attorney attendance was a matter of discretion and that copies of the examinations should not be given out. As relevant here, however, the magistrates also inquired whether an attorney had a right “to cross examine the Witnesses as if on Trial.”

213 JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE, 1664-1776, at 635 (1944) (internal quotation marks omitted).

214 Davies cites the same page of this source for the point that “[t]he royal officials in New York do not seem to have admitted any right to cross-examination at a preliminary hearing,” Davies, supra note 5, at 188 n.269 (quoting GOEBEL & NAUGHTON, supra note 213, at 635), but omits the fact that this refusal was the subject of colonial protest.


216 Id. at 5-7.

217 Id. at 5-18. In 1822, the King’s Bench definitively held that there was no right to counsel at a committal hearing, see Cox v. Coleridge, 1 B. & C. 37, 107 Eng. Rep. 15 (K.B. 1822), although one judge noted that, “in practice, magistrates do permit, on many occasions, the presence of advocates for the parties accused,” id. at 49, 107 Eng. Rep. at 19 (Abbott, C.J.), and another opined that “it may be very useful for a magistrate to grant [counsel] in many cases, and it is to be presumed that he will do so on all proper occasions,” id. at 51, 107 Eng. Rep. at 20 (Bayley, J.).

218 COPY OF CASE AND OPINIONS, supra note 215, at 5.
Three respondents addressed that issue. The most expansive view was taken by a Mr. Topping, who stated:

I conceive . . . that a Prisoner has a Right to have the Benefit of legal Advice upon his Examination if he chooses it . . . [A]nd if a Prisoner has a Right to the Assistance of a professional Man upon his Examination before a Magistrate, it seems to me that such professional Person may examine the Witnesses produced against him, in doing this, if he conducts himself contemptuously or indecently towards the Magistrate in the Execution of his Duty, he is liable to Punishment.219

At the other extreme was Mr. Serjeant Shepherd, who stated that a lawyer did not have “any right to cross examine the Witnesses.”220 Nevertheless, Shepherd explained:

The best Advice I can give to the Magistrates, is the Rule I should lay down myself were I in the Commission; if an Attorney of Character and proper Demeanor, or a Counsel of Integrity, attended in order to give a Prisoner fair Advice, I should always permit it, and having heard him state the Question he wished to put on Cross-examination, if it tended fairly to elucidate the Truth and protect the Prisoner, I should permit it; but I would not permit a general and desultory Cross-examination . . . .221

Third was the ubiquitous William Garrow, whose response was ambiguous but seemed to assume that a lawyer permitted to attend should be allowed to cross-examine:

There cannot exist a Right in any professional or other Person to interrupt the Magistrate, but I think it is incident to his Attendance that such Person should be permitted to advise the Prisoner as to his Conduct, nor do I think it would be proper to prevent such professional Persons making Minutes of what may pass, with respect to Cross-examination, I think the Magistrate may easily prevent this being extended to an inconvenient Degree, by observing that the Person is not now upon his Trial, that it is the Duty of the Magistrate to commit, that the Prisoner will have an Opportunity of making a full Defence upon his Trial, for which Occasion it will be for his Advantage to reserve himself.222

219 Id. at 16-17.
220 Id. at 10; cf. id. at 5-6 (Edward Law) (stating that the magistrate "may prescribe the Terms upon which alone he will allow" attorney attendance).
221 Id. at 11.
222 Id. at 15.
In sum, while the respondents differed over whether cross-examination was by right or by discretion, all three agreed it should normally be allowed to some degree.223

D. Conclusion

The evidence in the preceding two sections suggests that, at the time of the framing, the right to cross-examine at a committal hearing was not firmly established, but nor was the absence of such a right firmly established. Rather, there was disagreement over the point. Most criminal lawyers probably thought the right existed; most magistrates probably thought it did not; other opinion was divided. Cross-examination was probably still uncommon, so even those who thought the right existed likely expected only that the prisoner should be permitted to cross-examine, not that cross-examination would often actually occur. Some thought the prisoner could not question witnesses directly, but could suggest questions for the magistrate to ask.224 Opinion was clearly shifting in favor of the right to cross-examine over time. And some who thought there was no such right nevertheless thought an opportunity to cross-examine should be afforded as a matter of discretion.225

223 Furthermore, it is unclear to what extent the disagreement over counsel’s right to cross-examine reflected disagreement over the right to cross-examine or merely disagreement over the right to counsel. When the King’s Bench held in 1822 that there was no right to counsel at a committal hearing, one judge clearly implied that the prisoner himself could still cross-examine. See Cox v. Coleridge, 1 B. & C. 37, 54, 107 Eng. Rep. 15, 21 (K.B. 1822) (Best, J.) (“It has been argued that a prisoner under examination should have the assistance of an attorney, to cross-examine the witnesses for the Crown, the depositions taken being, in certain cases, evidence against him, on account of his having had an opportunity for cross-examination. But this does not mean cross-examining by counsel or attorney, for that formerly was not allowed to a prisoner, even on his trial.”); cf. id. at 51, 107 Eng. Rep. at 20 (Bayley, J.) (“If the party be really innocent, he will himself be able to suggest to the magistrate all such matters as may tend to elucidate the truth.”).

224 Even at trial, cross-examination was sometimes intermediated by the judge. See LANGBEIN, supra note 144, at 16. Permitting the prisoner to suggest questions for the magistrate to ask therefore probably would have been viewed by many as substantially respecting any right to cross-examine.

225 These conclusions are largely consistent with other observations about pretrial practice in this era. See BEATTIE, CRIME AND THE COURTS, supra note 84, at 273-74 (stating that the cross-examination rule’s applicability to Marian depositions was “plainly at issue by 1750” and “accepted in its most general terms” by 1790 or soon thereafter); id. at 277 (“Bly the end of the eighteenth century . . . [the] cross-examination of the prosecution witnesses . . . had produced a new kind of magistrates’ hearing.”); id. at 280-81 (“The public pretrial enquiry [in the eighteenth century] also enlarged the possibility that a suspected offender, aided by a lawyer, might challenge the evidence upon which his commitment to trial would be based . . . .”); KING, supra note 84, at 97 (“The eighteenth century witnessed a gradual growth in concern about
IV. CROSS-EXAMINATION – THE BROADER PICTURE

Conflicting historical evidence poses problems for constitutional interpretation. It transforms an effort to discover a single, universally accepted original meaning into an effort to determine which of two plausible meanings predominated. In those circumstances, it makes sense to consider a broader range of historical evidence and the inferences reasonably drawn from that evidence.

A. Consistency

The Confrontation Clause is phrased in categorical terms and was designed to secure a procedure the Framers thought fundamental over a broad range of circumstances. In the face of conflicting direct evidence, therefore, it seems reasonable to assume that an interpretation that results in consistent and rational application over a range of circumstances is more likely to reflect original meaning than one that results in arbitrary distinctions. Evidence concerning other forms of testimony beyond felony committal examinations is therefore relevant. That evidence shows two things. First, in a wide variety of circumstances, English law required that testimony be given in the presence of the accused. Second, the principal justification for that requirement was that it would afford the accused an opportunity for cross-examination.

Testimony at trial has long conformed to those principles. Blackstone and Hale waxed eloquent about the English tradition of live oral testimony and identified the opportunity to propound “occasional questions” upon witnesses the rights of the accused at preliminary hearings . . . linked to, and perhaps caused by, the fact that lawyers began to appear at some summary hearings in this period.”); LANGBEIN, supra note 144, at 274-75 (noting that in the late eighteenth century, “[a]t least in London, the magistrate’s pretrial inquiry increasingly took on the trappings of a public hearing” and “became an occasion at which a defense lawyer could challenge the prosecution case”); Beattie, Scales of Justice, supra note 149, at 250 (noting the practice “by the end of the eighteenth century” of “allowing the accused to be represented at the preliminary hearing by counsel, who might cross-examine the evidence upon which a committal to trial might be based”). Davies dismisses London as an “aberration,” Davies, supra note 5, at 201 n.306, but practices in London are uniquely relevant because they are the ones to which Americans studying in England would have been exposed. See supra notes 120-23 and accompanying text.

226 See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” (emphasis added)).
as a primary benefit of that tradition.\textsuperscript{227} Hawkins wrote broadly that “in Cases of Life no Evidence is to be given against a Prisoner but in his Presence,”\textsuperscript{228} and he justified the hearsay rule in part on the ground that hearsay denied the accused an “Opportunity of a cross Examination.”\textsuperscript{229} Finally, I noted above the centrality of cross-examination to a criminal defense lawyer’s work in the eighteenth century.\textsuperscript{230}

Opportunity for cross-examination was also a settled requirement in various pretrial contexts. On the civil side, for example, it was clear that depositions could not otherwise be read. According to Gilbert, it would be “against natural Justice” to admit a deposition against someone who “had not Liberty to cross-examine the Witnesses.”\textsuperscript{231}

A comparable rule applied to non-felony criminal cases. Whatever else Paine stands for, it clearly holds that opportunity to cross-examine is a necessary condition to the admissibility of a deposition in a misdemeanor case, even if the witness is dead. The sole ground for decision in Modern, and the first of two alternative grounds in Comberbach and Holt, was that the prisoner was not present and so had lost the

\textsuperscript{227} See 3 BLACKSTONE, supra note 38, at 373 (1768) (“[T]he occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled . . . .”); MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (London, Nutt 1713) (“[B]y this Course of personal and open Examination, there is Opportunity for all Persons concern’d, viz. The Judge, or any of the Jury, or Parties, or their Council or Attornies, to propound occasional Questions, which beats and bolts out the Truth much better than when the Witness only delivers a formal Series of his Knowledge without being interrogated . . . .”).

\textsuperscript{228} 2 HAWKINS (1721), supra note 38, at 428 (footnote omitted).

\textsuperscript{229} Id. at 431 (“As to the second Particular, viz. How far Hearsay is Evidence: It seems agreed, That what a Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side hath no Opportunity of a cross Examination . . . .” (footnotes omitted)). Throughout the eighteenth century, the principal justification for the hearsay rule remained absence of oath. See LANGBEIN, supra note 144, at 245. But cf. Thomas Y. Davies, Not “the Framers' Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & POL’Y (forthcoming 2007). The admissibility of Marian depositions, however, was not typically analyzed as a hearsay issue. Depositions were testimony, not hearsay; the question was how testimony must be given, not whether hearsay should be allowed. Cf. Davies, supra note 5, at 194.

\textsuperscript{230} See supra notes 151-52 and accompanying text.

\textsuperscript{231} GILBERT (1754), supra note 76, at 47 (“A Deposition can’t be given in Evidence against any Person that was not Party to the Suit, and the Reason is, because he had not Liberty to cross-examine the Witnesses, and ‘tis against natural Justice that a Man should be concluded in a Cause to which he never was a Party.”).
opportunity to cross-examine. The case has been cited throughout the centuries as standing for some cross-examination rule. Cross-examination was not a sufficient condition to admissibility, and there is room for debate over Paine's applicability to felonies, but neither qualification diminishes the case's core holding.

In treason cases, confrontation was secured by statute. A series of enactments dating back to the sixteenth century granted the defendant the right to confront witnesses “face to face” at his arraignment. The statutes did not mention a right to cross-examine. But when Hale discussed them in his treatise, he justified the presence requirement on the ground that it would afford an opportunity for cross-examination.

Justices of the peace had summary jurisdiction to try certain minor criminal offenses, and a 1745 case seemed to allow depositions in such cases even if taken in the prisoner’s absence. In 1761, however, the King's Bench effectively overruled that decision in Rex v. Vipont and held unanimously

232 King v. Paine, 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (K.B. 1696) (“the defendant not being present when they were taken before the mayor, and so had lost the benefit of a cross-examination”); Rex v. Pain, Comb. 358, 359, 90 Eng. Rep. 527, 527 (K.B. 1697) (“the defendant was not present when the examination was taken, so that he could not cross-examine him”); Rex v. Pain, Holt 294, 294, 90 Eng. Rep. 1062, 1062 (K.B. 1697) (same).

233 See, e.g., 2 HAWKINS (1721), supra note 38, at 430; GILBERT (1754), supra note 76, at 100; King v. Eriswell, 3 T.R. 707, 722-23, 100 Eng. Rep. 815, 824 (K.B. 1790) (Kenyon, C.J.); ARCHBOLD, supra note 11, at *85; State v. Hill, 20 S.C.L. (2 Hill) 607, 610 (App. L. 1835); People v. Restell, 3 Hill 289, 300 (N.Y. Sup. Ct. 1842); 3 WIGMORE, supra note 49, § 1364, at 22 & n.52.

234 Authority to examine was also required. See supra Part I.B.

235 See supra Part I.B.

236 See, e.g., 13 Car. 2, c. 1, § 5 (1661) (“[N]o person or persons shall be indicted arraigned condemned convicted or attainted for any of the Treasons or Offences aforesaid unless the same Offender or Offenders be thereof accused by the Testimony and deposition of two lawful and credible Witnesses upon Oath which Witnesses at the time of the said Offender or Offenders’ arraignment shall be brought in person before him or them face to face and shall openly avow and maintain upon Oath what they have to say against him or them concerning the Treason or Offences contained in the said indictment unless the party or parties arraigned shall willingly without violence confess the same.”). Earlier treason statutes included an exception for dead witnesses (but not unavailable witnesses generally); that exception was deleted from later statutes. Compare 5 & 6 Edw. 6, c. 11, § 9 (1552) (“if they be then living”), 1 & 2 Phil. & M., c. 10, § 11 (1554) (“if they be then living and within the Realm”), 1 Eliz., c. 1, § 21 (1559) (“so many of them as shall be living and within this Realm”), and 1 Eliz., c. 5, § 10 (1559) (“if they be then living”), with 13 Eliz., c. 1, § 9 (1571) (no death exception), and 13 Car. 2, c. 1, § 5 (1661) (no death exception).

237 1 HALE, supra note 23, at 306 (“[T]he statute requires, that [the witnesses] be produced upon the arraignment in the presence of the prisoner to the end that he may cross-examine them.”).

that testimony must be given in the prisoner's presence.\footnote{239} Each of the judges justified that requirement on the ground that presence would ensure the defendant an opportunity to cross-examine.\footnote{240} The court reaffirmed that rule in 1786.\footnote{241} This line of cases is particularly significant because the justices of the peace whom Vipont required to allow cross-examination in summary proceedings were the same justices who administered committal hearings under the Marian statutes. Langbein reports that examination techniques did not vary across those two contexts.\footnote{242} In some cases, it might not even be clear at the outset whether an examination would terminate in summary conviction or felony committal.\footnote{243} A right to cross-examine in summary proceedings would not necessarily imply a right to cross-examine in committal hearings (only the former involves a determination of guilt).\footnote{244} Nonetheless, cross-examination would have seemed more natural in a committal hearing once magistrates had to allow cross-examination in their other proceedings.

Even in felony cases, the Marian statutes applied only to committal examinations and coroners' depositions—\footnote{245} not to other forms of testimony that might be generated, such as prior trial testimony,\footnote{246} warrant applications,\footnote{247} or preservation

\footnote{239} See King v. Crowther, 1 T.R. 125, 127, 99 Eng. Rep. 1009, 1011 (K.B. 1786); see also id. at 126, 99 Eng. Rep. at 1010 (counsel's argument) (“It was a principle in our law that the evidence must be given in the presence of the defendant, that he might have the benefit of cross-examining the witness.”).

\footnote{241} See supra note 19, at 76-77, 93-95.

\footnote{242} See supra note 84, at 89 (noting that magistrates faced with felony accusations would sometimes summarily convict for minor offenses such as vagrancy rather than commit for trial).

\footnote{244} See Cox v. Coleridge, 1 B. & C. 37, 50, 107 Eng. Rep. 15, 20 (K.B. 1822) (Bayley, J.) (making the same distinction as to the right to counsel); COPY OF CASE AND OPINIONS, supra note 215, at 10-14 (Shepherd) (same).

\footnote{245} See supra notes 17-18; see also Davies, supra note 5, at 142 (acknowledging that “later treatise writers seem to have read Paine to also prohibit the use of a deposition of an unavailable witness in a felony trial if the deposition were improperly taken outside of Marian procedure”).

\footnote{246} See, e.g., Mattox v. United States, 156 U.S. 237, 244 (1895); United States v. Wood, 28 F. Cas. 754 (C.C.E.D. Pa. 1818) (No. 16,756); Summons v. State, 5 Ohio St. 325, 342-43 (1856); State v. Atkins, 1 Tenn. (1 Overt.) 229 (1807); Finn v. Commonwealth, 26 Va. (5 Rand.) 701, 708 (Gen. Ct. 1827); 2 HAWKINS (1721), supra
depositions. But what about coroners’ depositions? Their admissibility had been settled since Lord Morly’s case in 1666. And, as Professor Davies notes, the coroner’s inquest could occur before anyone was accused or arrested, so there is no obvious reason to assume the eventual defendant would be present.

Nevertheless, there is evidence that those who did attend the inquest could cross-examine witnesses. In a 1742 London trial, the defendant’s attorney testified: “[O]n the 4th of May, I went to Staines to attend the Coroner’s Jury; though, as I had not Time to enquire into the Fact, and prepare for Mr. Annesley’s Defence, I could do him but little Service more, than by cross examining the Witnesses for the Crown, and making Observations on their Evidence . . . .” Furthermore, in 1790, Chief Justice Kenyon in Eriswell explained the admissibility of coroners’ depositions on the ground that “the examination before the coroner is an inquest of office; it is a transaction of notoriety, to which every person has a right of access.”

note 38, at 430. Davies criticizes Crawford’s reliance on Atkins and Finn, see Davies, supra note 5, at 180 & n.235; Davies, supra note 10, at 626, but those cases do support the only proposition for which Crawford cited them—that some courts excluded prior testimony on confrontation grounds even though the defendant had an earlier opportunity to cross-examine. See Crawford v. Washington, 541 U.S. 36, 50 (2004); Atkins, 1 Tenn. (1 Overt.) at 229 (prior trial testimony would “go a great length in overthrowing this wise provision of the Constitution”); id. (counsel’s argument) (relying on “the Constitution, which provided that the witnesses should be confronted with the accused”); Finn, 26 Va. (5 Rand.) at 708 (“In a civil action, if a witness who has been examined in a former trial between the same parties, and on the same issue, is since dead, what he swore to on the former trial, may be given in evidence, for the evidence was given on oath; and the party had an opportunity of cross-examining him. But we cannot find that the rule has ever been allowed in a criminal case; indeed, it is said to be expressly otherwise.” (citations omitted)). I agree the cases are not directly relevant here, because they involved prior trial testimony, not Marian depositions.


249 See supra notes 20-22 and accompanying text.

250 Davies, supra note 5, at 171-72. At most, of course, Davies’ argument suggests only that there was no cross-examination rule for coroners’ depositions. It has no bearing on the cross-examination rule applicable to committal examinations, which derived from the particular statutory text governing committal procedure. See supra notes 125-27 and accompanying text.

251 Trial of James Annesley, Old Bailey Sessions Papers, July 15, 1742, at 1, 25.

252 King v. Eriswell, 3 T.R. 707, 722, 100 Eng. Rep. 815, 824 (K.B. 1790) (Kenyon, C.J.); see also 2 STARKIE, supra note 11, at *492 (“The only plausible ground upon which such a distinction [between coroners’ depositions and committal examinations] could be drawn is that coroners’ depositions are not taken ‘in the name of the King’, whereas committal examinations are.”).
thus appears that coroners’ depositions were admissible on the theory that, since inquests were notorious proceedings of which everyone was presumed to be aware, those who failed to show up to cross-examine had simply neglected their rights.

American cases refused to admit coroners’ depositions, declining to follow English precedents or making only half-hearted attempts to reconcile them. One stated that, whatever the English rule, the use of such *ex parte* depositions had “never been permitted in this country.” The leading case asked of defendants rhetorically: “[S]hall they all be assumed *per leges* [i.e., by operation of law], to have neglected, though absent, the time of cross-examination? Because our Act is general for all inquests, the examination public, and of high respectability? On the contrary, is there not too much of mere formula, if not fiction, in such a notion?” The perceived English rule these cases rejected thus did not condone *ex parte* testimony. Rather, it *presumed* opportunity to cross-examine from the notoriety of the proceeding. That presumption was not very realistic, so the practical effect was to admit *ex parte* depositions. But the very fact that English authorities rationalized that result speaks volumes about the legal landscape.

In a wide variety of contexts, therefore, admissibility depended on presence, and presence was relevant because it afforded an opportunity to cross-examine. Principles of consistency therefore favor a cross-examination requirement for Marian depositions. Furthermore, the fact that opportunity to cross-examine was routinely identified as the reason presence was important—even when the governing statute said nothing about cross-examination—is instructive. Some sources conditioned the admissibility of a Marian examination on the

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254 *Houser*, 26 Mo. at 436.

255 *Campbell*, 30 S.C.L. (1 Rich.) at 129.

256 See, e.g., PEAKE (1808), supra note 47, at 64 n.(m) (“[T]he practice has been to admit [coroners’ depositions] after the death of the witness, without inquiry whether the party was present or not . . . .”); cf. King v. Eriswell, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790) (reporter’s note 1797) (“Nor [are committal depositions admissible] since that statute, unless the party accused be present, though an examination before a coroner is . . . .”).
prisoner’s presence without mentioning cross-examination.\textsuperscript{257} This background suggests that opportunity to cross-examine may nevertheless have been an implicit justification for the presence requirement stated in those sources.\textsuperscript{258}

**B. Subsequent History**

For the most part, the preceding sections have examined only sources roughly contemporaneous with the framing or older, referring to later materials only to shed light on specific earlier ones. As noted at the outset, however, the more general subsequent history is quite one-sided. Between 1795 and 1824, at least eleven English treatises or case reports conditioned admissibility on presence or opportunity for cross-examination; between 1794 and 1858, at least sixteen reported American cases did so.\textsuperscript{259} By contrast, I am not aware of any English source from later than the early 1790s suggesting that a Marian committal examination would be admissible even if taken \textit{ex parte}. And I have not found a single reported case from any American jurisdiction—not one—that has ever made that claim. That subsequent history is relevant to original meaning. Subsequent conduct in conformity with a particular interpretation of a contract is evidence of the parties’ intent; no less is true of the Constitution.

Professor Davies deems later sources irrelevant because “conditions changed rapidly during the early decades of the Republic.”\textsuperscript{260} Clearly, however, that goes to weight rather than admissibility. How committal examinations were conducted in, say, 1821—and what conditions attached to their admissibility—is plainly \textit{some} evidence of practices and legal rules a few decades earlier. Later evidence might reflect new developments instead, but that sort of uncertainty is inherent in any source not precisely contemporaneous with the framing: Post-framing evidence might reflect post-framing

\textsuperscript{257} See various authorities cited \textit{supra} notes 11-13.

\textsuperscript{258} In contexts not involving formal depositions, it may be less likely that presence was relevant in order to afford an opportunity to cross-examine. For example, courts sometimes conditioned admissibility of relatively informal hearsay statements on the prisoner’s presence. \textit{See}, e.g., Trial of John Ilford, Old Bailey Sessions Papers, Dec. 8, 1757, at 10, 10 (accusatory statement to private party); Trial of Thomas Fitzroy, Old Bailey Sessions Papers, Sept. 16, 1801, at 525, 526 (statements to constable). Cross-examination may have been very difficult in those circumstances. I owe these two references to Richard Friedman.

\textsuperscript{259} See sources cited \textit{supra} notes 11-13.

\textsuperscript{260} Davies, \textit{supra} note 5, at 179.
developments, but pre-framing evidence might be obsolete. The historical record should be evaluated as a whole, giving most weight to sources closest to the framing—not by ignoring subsequent authorities entirely because of the mere possibility that they might reflect subsequent developments.\textsuperscript{261}

As to post-framing English sources, little needs to be added to what I have already said with respect to \textit{Radbourne}, \textit{Woodcock}, and \textit{Dingler}.\textsuperscript{262} If an 1821 American source is relevant to American meaning in 1789, then Ayrton’s 1780 civil suit is relevant to English meaning in 1748; Garrow’s 1791 argument is relevant to English meaning in 1759; and the 1801 responses to the Lancaster magistrates’ queries are relevant to English meaning in 1769. More than a hundred American lawyers trained in London over that period, observing English practices and absorbing English conceptions of legal rights.

\textit{Crawford}’s reliance on post-framing authorities is hardly novel. Justices Scalia and Thomas routinely rely on comparable or later American authorities to interpret the Constitution. In \textit{Apprendi v. New Jersey}, for example, Justice Thomas derived the original meaning of the jury-trial right by examining state cases from “the founding to roughly the end of the Civil War, . . . particularly from the 1840’s on,” and continued his review through the end of the nineteenth century.\textsuperscript{263} Other opinions relying heavily on state cases from that era include Justice Thomas’s opinion for the Court in \textit{Wilson v. Arkansas} (knock and announce),\textsuperscript{264} Justice Scalia’s plurality in \textit{Harmelin v. Michigan} (cruel and unusual punishment),\textsuperscript{265} and Justice Scalia’s dissents in \textit{County of Riverside v. McLaughlin} (pretrial detention)\textsuperscript{266} and \textit{Grady v. Corbin} (double jeopardy).\textsuperscript{267} Still further examples abound.\textsuperscript{268}

\textsuperscript{261} Davies also argues that later American decisions might reflect post-framing English developments. \textit{See id.} at 180 n.234. Even if so, American courts chose to follow those developments as consistent with their own understanding of the law.

\textsuperscript{262} \textit{See supra} notes 119-27 and accompanying text.


\textsuperscript{267} 495 U.S. 508, 533-35 (1990) (Scalia, J., dissenting).

Justices Scalia and Thomas also routinely rely on post-framing English authorities. Leach's *Crown Cases* has been cited as constitutional authority throughout the Court's history. *Mattox*, the Court's seminal 1895 Confrontation Clause decision, relied on *Radbourne* itself. While Davies would presumably dismiss every one of these citations as an invalid use of historical evidence, the more reasonable


271 *Mattox*, 156 U.S. at 240.
inference is that his definition of relevant evidence is too narrow.

While the pre-framing evidence is ambiguous in this case, the post-framing evidence is devastating. Every reported American decision to address the issue conditioned the admissibility of a committal examination on presence, and in most cases expressly on opportunity to cross-examine.\footnote{See cases cited supra note 13.} None of those cases contains the slightest hint that it is departing from past practice or creating new law; indeed, with one exception,\footnote{State v. Hill, 20 S.C.L. (2 Hill) 607, 609 (App. L. 1835) (noting a “great diversity of opinion on the question” and citing Eriswell).} none even shows any awareness that the point was ever debatable in England. Furthermore, none of the cases actually excluded a committal examination taken \textit{ex parte}. Rather, they all involved either (1) an attempt by a defendant to exclude a committal examination \textit{even though} he was present and had an opportunity to cross-examine,\footnote{See United States v. Macomb, 26 F. Cas. 1132, 1132 (C.C.D. Ill. 1851) (No. 15,702); Davis v. State, 17 Ala. 354, 356 (1850); Tharp v. State, 15 Ala. 749, 750 (1849); Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836); State v. Houser, 26 Mo. 431, 438 (1858); State v. McO’Blenis, 24 Mo. 402, 402-03 (1857); People v. Restell, 3 Hill 289, 292-93 (N.Y. Sup. Ct. 1842); State v. Moody, 3 N.C. (2 Hayw.) 31, 31-32 (Super. L. 1798); Kendrick v. State, 29 Tenn. (10 Hum.) 479, 484, 487 (1850); Bostick v. State, 22 Tenn. (3 Hum.) 344, 344 (1842); Johnston v. State, 10 Tenn. (2 Yer.) 58, 58 (1821); State v. Hooker, 17 Vt. 658, 662 (1845).} or (2) an attempt by a prosecutor to admit an \textit{ex parte} deposition that was \textit{not} a committal examination.\footnote{See Collier v. State, 13 Ark. 676, 677 (1853) (warrant application); State v. Webb, 2 N.C. (1 Hayw.) 103 (Super. L. 1794) (unclear, but apparently not a committal examination, see Davies, supra note 5, at 181 & n.237); State v. Campbell, 30 S.C.L. (1 Rich.) 124, 124-25 (App. L. 1844) (coroner’s deposition); Hill, 20 S.C.L. (2 Hill) at 608 (warrant application).} If framing-era criminal defendants were routinely sequestered or prohibited to ask questions at their own committal hearings, surely there would be some reported case either excluding a committal deposition or admitting it over the objection that it was taken \textit{ex parte}. That there is neither is compelling evidence that committal examinations were routinely taken in a manner that respected the prisoner’s right to confrontation. Only when a prosecutor sought to invoke a committal statute in a non-committal context, or when a prisoner sought to exclude even a properly taken committal deposition, did it become necessary to confirm the cross-examination rule.
C. Text

Finally, we should not lose sight of what the Sixth Amendment actually says: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”\textsuperscript{276} As Professor Davies observes, the Framers clearly would have understood those who gave sworn testimony against a prisoner at his committal hearing to be “witnesses against him” within the meaning of that clause.\textsuperscript{277} Indeed, the full phrase “accusers and witnesses” that appeared in some state confrontation clauses\textsuperscript{278} and in Madison’s original draft of the federal clause\textsuperscript{279} was the same phrase Hale used to describe Marian deponents.\textsuperscript{280}

Taking a Marian deposition outside the presence of the prisoner and then using that \textit{ex parte} deposition to convict him at trial deprives the defendant of the opportunity “to be confronted with the witnesses against him” under any conceivable literal interpretation of those words. And denying the prisoner the opportunity to question the witness deprives him of the principal benefit that the English confrontational manner of giving testimony was thought to secure. By contrast, if admissibility is subject to the appropriate conditions, “[t]he substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination.”\textsuperscript{281} Those are not irrelevant considerations.

Professor Davies declines to undertake any textual parsing of the Confrontation Clause because it “drew upon settled understandings of legal rights.”\textsuperscript{282} The “right . . . to be

\textsuperscript{276} U.S. CONST. amend. VI.

\textsuperscript{277} Davies, \textit{supra} note 5, at 193.

\textsuperscript{278} See Virginia Declaration of Rights § 8 (1776) (“[I]n all capital or criminal prosecutions a man hath a right . . . . to be confronted with the accusers and witnesses . . . .”), \textit{reprinted in} 1 BERNARD SCHWARTZ, \textit{THE BILL OF RIGHTS: A DOCUMENTARY HISTORY} 234, 235 (1971); Delaware Declaration of Rights § 14 (1776) (“[I]n all prosecutions for capital or criminal offences, every man hath a right . . . . to be confronted with the accusers or witnesses . . . .”), \textit{reprinted in} 1 SCHWARTZ, \textit{supra}, at 276, 278.

\textsuperscript{279} See \textit{SOURCES OF OUR LIBERTIES} 423 (Richard Perry & John Cooper eds., rev. ed. 1978) (“In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with his accusers, and the witnesses against him . . . .”).

\textsuperscript{280} See 2 HALE, \textit{supra} note 23, at 284 (directing magistrates to take “informations of the accusers and witnesses”); \textit{id.} at 52 (similar).

\textsuperscript{281} Mattox v. United States, 156 U.S. 237, 244 (1895).

\textsuperscript{282} Davies, \textit{supra} note 5, at 105 n.1.
confronted with the witnesses against him,” in other words, secures only whatever content that “right” had at common law. That interpretive method is sound so far as it goes, but it presumes the existence of a “settled understanding” on which to operate. If nothing else, this Article has shown that the admissibility of ex parte committal examinations was far from settled.

The Framers were invoking what they understood to be pre-existing legal rights, but they were also using the English language to describe those rights; and when the content of the right invoked is unclear or was disputed, we should not ignore their description of it. It is one thing to read a common-law exception into the text where that exception was noncontroversial in England and consistently followed in America after the framing (as, for example, with dying declarations). But it is quite another where the exception was disputed in England and consistently rejected here.

V. CONCLUSION

Throughout the eighteenth century, it was settled law that a Marian deposition was admissible at trial if the witness was dead, too sick to travel, or kept away by the accused. Nevertheless, Marian procedure was evolving. The development was not that courts began excluding depositions where they once admitted them, but that Marian procedure came to be (or be seen as) consistent with the cross-examination rule. It would have been strange, at the outset of the century, to say that “[t]he substance of the constitutional protection is preserved to the prisoner” in the advantages he enjoyed at Marian pretrial. Not so at the end.

The presence of the prisoner was clearly a routine feature of Marian committal practice. Presence was a natural consequence of the procedure the statutes contemplated—indeed, of any committal procedure. That routine feature hardened into a procedural right, so that an examination conducted in the prisoner’s absence was deemed outside the statutes and so not admissible. How long before the framing that occurred is hard to say, since there was little occasion to consider the matter until prosecutors tried to invoke the

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284 Mattox, 156 U.S. at 244.
statutes to admit depositions unrelated to magistrates’ statutory committal function.

Whether a prisoner could cross-examine witnesses at his committal hearing was probably an almost entirely theoretical question until the second half of the eighteenth century. It was put into relief once magistrates began exercising an extra-statutory power of discharge (increasing the incentive to test the prosecutor’s case) and lawyers began participating (increasing the likelihood that any opportunity to cross-examine would be exploited). The idea that a prisoner had the right to cross-examine witnesses at his committal hearing gained currency before the framing, but some magistrates resisted, and the point was still disputed when the Confrontation Clause was framed.\(^{285}\)

That said, there are compelling reasons to think the framing generation’s views on this point coincided more with Garrow’s than with Buller’s.\(^{286}\) The cross-examination rule was followed in a wide range of other contexts. Courts across the United States uniformly endorsed it after the framing. And the rule is more consistent with the text of the Confrontation Clause itself.

*Crawford*’s cross-examination rule is therefore on solid ground.\(^{287}\) If the opinion is to be faulted for anything, it is only for underestimating the importance of physical presence, not for overstating the importance of cross-examination.\(^{288}\) At the

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285 I therefore disagree with Landsman’s claim that “[b]efore the early nineteenth century, the most that was ever called for was physical confrontation between witness and accused.” Landsman, supra note 76, at 599. The cross-examination rule may have been settled in the nineteenth century, but it originated in the eighteenth.

286 Compare supra notes 165-78 and accompanying text with supra notes 128-44 and accompanying text.

287 Professor Davies thinks I advocate a position much weaker than Justice Scalia’s in *Crawford*. See Davies, supra note 10, at 573-77. But even Justice Scalia acknowledged “doubts” over whether the Marian statutes prescribed an exception to the common-law cross-examination rule, citing among other authorities Lofft’s 1791 edition of Gilbert and Grose and Kenyon’s 1790 opinions in *Eriswell*. See *Crawford*, 541 U.S. at 46. Admittedly, near the end of a lengthy footnote responding to Chief Justice Rehnquist, the opinion also states that three particular sources (Hale, Westbeer, and *Eriswell*) did not show that the law in 1791 was “unsettled.” Id. at 55 n.5. To the extent that sentence implies that the question was settled beyond all dispute, I agree it takes a position stronger than the one I take here. I also concede that, whatever its demerits, Buller’s opinion in *Eriswell* does show that the issue was still debated. But I do not think those differences are as substantial as Davies makes them out to be. A framing-era legal rule need not be settled beyond dispute to be relevant to original meaning, so long as there are adequate reasons to believe the Framers would have resolved the dispute a particular way.

framing, the right “to be confronted with the witnesses against him” was the right to be testified against in one’s presence; opportunity for cross-examination was not so much the confrontation right itself as the reason that right was secured (at least the principal one). That formulation changed over time so that, by 1824, Starkie could write simply that “the depositions of witnesses before magistrates, under the statutes of Philip and Mary, are not evidence, unless the prisoner had an opportunity to cross-examine those witnesses,” without even mentioning presence. The change, however, was more of emphasis than of substance.

Professor Davies’ article is objectionable, not because of the contrary conclusion he reaches, but because of his repeated dismissals of the opposing view as historical “fiction”—at one point going so far as to compare Justice Scalia’s opinion to “junk science.” Davies’ conclusion, however, rests critically on his premise that all English sources published after 1789 and all American sources published more than a few years after 1789 are irrelevant to original meaning; relax either of those two constraints and his argument unravels. Even if those novel constraints were defensible (which I doubt), the fact that Justice Scalia took a somewhat broader view of the post-framing evidence relevant to original meaning hardly makes his opinion “fictional.”

One suspects Davies chose the rhetorical style he did to justify his more general critique of originalism. It was not enough for him to show that Crawford resolved a debatable point over which reasonable legal historians could disagree; he had to show that Crawford’s history was so flawed that it was not even worth undertaking the inquiry. With respect, I do not believe he made that case; but I will let readers judge for themselves.

289 1 STARKIE, supra note 11, at *96. Later formulations of the confrontation right likewise emphasized cross-examination over presence. See, e.g., 3 WIGMORE, supra note 49, § 1397, at 100 (“There never was at common law any recognized right to an indispensable thing called Confrontation as distinguished from Cross-examination.” (emphasis omitted)); FED. R. EVID. 804(b)(1).

290 Davies, supra note 5, at 216.

291 I have focused this Article on the core issue of the cross-examination rule’s applicability to Marian examinations, rather than attempting to respond comprehensively to all of Davies’ other alleged “errors.” That limitation should not be taken as acquiescence. In particular, I have not addressed the validity of Crawford’s testimonial/nontestimonial distinction, because that topic has already been well addressed by other authors. See, e.g., Richard Friedman, Confrontation: The Search for Basic Principles, 86 GEO. L.J. 1011 (1998).
Revisiting the Fictional Originalism in *Crawford’s “Cross-Examination Rule”*

A REPLY TO MR. KRY

*Thomas Y. Davies*†

[The] process by which old principles and old phrases are charged with a new content, is from the lawyer’s point of view an evolution of the true intent and meaning of the old law; from the historian’s point of view it is almost of necessity a process of perversion and misunderstanding.

—Frederic Maitland††

I. INTRODUCTION

Originalists attribute heightened normative importance to the original meaning of a constitutional provision. Given that position, should they be expected to exercise discipline in making claims about the historical content of the original meaning? Should they refrain from making originalist claims in the absence of clear historical evidence of the Framers’ understanding? If so, what are the criteria for identifying valid historical evidence of the Framers’ design?

These issues are at the root of a controversy regarding one of the two originalist claims that appeared in Justice Scalia’s 2004 opinion for the Court in *Crawford v. Washington*. In a 2005 article in this *Law Review*, I criticized the historical claims in *Crawford* as yet another example of fictional originalism in Supreme Court opinions. Mr. Robert Kry, who clerked for Justice Scalia during the term in which *Crawford*

† E.E. Overton Distinguished Professor of Law and Alumni Distinguished Service Professor of Law, University of Tennessee College of Law.


Quotations of historical sources are presented in this article with the original spelling, capitalization, and punctuation, but in modern typeface.


was decided, now responds that my criticisms of one of Crawford’s originalist claims were unfounded.³ I reply to Mr. Kry in this article.

A. Justice Scalia’s Originalist Claims in Crawford

The subject in dispute is a facet of the original meaning of the Sixth Amendment Confrontation Clause in the Bill of Rights. There is no doubt that the Framers intended for that Clause to require that evidence in criminal trials usually be presented by live witnesses, in the presence of the defendant, and subject to cross-examination by the defendant in the view of the jury. However, the scope and content of the confrontation right has seemed problematic with regard to the admission of hearsay evidence—a witness’s repetition at trial of an out-of-court statement made by a declarant who does not testify at the trial.

Because admitting out-of-court statements made by a person who does not testify at trial contravenes the face-to-face and cross-examination aspects of the defendant’s confrontation right, it seems apparent that such statements should not be admissible if the out-of-court declarant is available to be produced as a prosecution witness at trial. In fact, the use of out-of-court statements of persons who could have testified in person is the specific abuse associated with the creation of the confrontation right.⁴ However, the admissibility of out-of-court

³ Robert Kry, Confrontation Under the Marian Statutes: A Response to Professor Davies, 72 BROOK. L. REV. 493, 494 (2007). Kry notes that his focus on this aspect should not be viewed as “acquiescence” in other aspects of my criticism of Crawford. Id. at 556 n.291.

⁴ For example, the admission of out-of-court statements by a person who was available to be called as a witness was one of the notorious defects in Sir Walter Raleigh’s 1603 trial. See Raleigh’s Case, 2 How. St. Tr. 1 (1603). That defect was noted in legal authorities widely used by the Framers, such as Sergeant William Hawkins’s leading treatise on criminal law and procedure, which also stated that it was subsequently adjudged that out-of-court depositions of persons who might have been produced as witnesses at trial could not be admitted into evidence. See, e.g., 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 430 (5th ed. 1771).

Volume one of Hawkins’s treatise was initially published in 1716; volume 2 in 1721. Several subsequent editions that were virtually identical to the first edition were published in 1724-1726, 1739, and 1771. For simplicity, I cite to the 1771 edition. For bibliographic information, see 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 362-63 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter MAXWELL].

Thomas Leach edited two further editions of Hawkins’s treatise in which he made substantial additions. He published an edition in 1787 in which he added substantial notes and sometimes textual material to Hawkins’s original work. Most of the surviving copies of that edition in American libraries are of a 1788 Dublin
statements made by a genuinely unavailable declarant (for example, a declarant who has died prior to the trial) poses a more difficult issue, because such statements may involve important evidence, or even the most pertinent evidence, that could not be presented in any other way. How should the confrontation right now be understood with regard to the admissibility of out-of-court statements?

In *Crawford*, Justice Scalia asserted that originalism could answer that question and made two related claims about “the Framers’ design” for the application of the Confrontation Clause to such hearsay statements. First, he asserted that the Framers’ concern was “focused” on “testimonial” out-of-court statements—that is, statements comparable to formal witness examinations taken by justices of the peace during the eighteenth century. On that basis, he strongly suggested that the confrontation right should apply only to “testimonial” out-of-court statements, but not to more casual or “nontestimonial” sorts of hearsay statements. In other words, the Confrontation Clause would not bar the admission of “nontestimonial” out-of-court statements even when the declarant was readily available to be produced by the prosecution as a trial witness, and even when the out-of-court statements provided crucial evidence for the defendant’s conviction. *(Crawford) left defining the boundary between the “testimonial” and “nontestimonial” categories “for another day,” but the distinction it suggested has since become law in the 2006 decision *Davis v. Washington.*

reprinting, so that edition was only becoming available in America in 1789. Additionally, Leach also published a four-volume enlarged edition in 1795 in which he added considerable new material. To differentiate Leach’s work from Hawkins’s original work, I cite Leach’s 1787 and 1795 editions as LEACH’S HAWKINS.

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5 541 U.S. at 68.
6 *Id.* at 50-53.
7 *Id.* at 60-61.
8 *Id.* at 68.
9 547 U.S. ___, 126 S. Ct. 2266 (2006). *Davis* and the companion decision in *Hammon v. Indiana* provided some indications of the testimonial/nontestimonial boundary, but still stopped short of offering a broad definition of the boundary. See Materials distributed at Brooklyn Law School Symposium, *Crawford* and Beyond Revisited in Dialogue (Sept. 29, 2006) [hereinafter Symposium]. In *Hammon*, the Court concluded that statements made to police officers by a victim of a domestic assault after the assault ended were testimonial and subject to the confrontation right because the statements were primarily for the purpose of preparing for a prosecution. *Davis*, 547 U.S. at ___, 126 S. Ct. at 2278. Conversely, in *Davis*, the Court found that statements made to a 911 operator during a domestic assault were nontestimonial and not subject to the confrontation right because they were not made primarily for the purpose of preparing a prosecution. *Id.* at ___, 126 S. Ct. at 2276-78.
Second, with regard to “testimonial” out-of-court statements, to which the confrontation right would apply, Justice Scalia asserted that the Framers understood that the confrontation right would be violated by the admission of such a statement in a criminal trial unless (1) the declarant was genuinely unavailable to testify, and (2) the defendant had a previous opportunity to cross-examine the declarant. Justice Scalia dubbed this latter requirement the “cross-examination rule,” and asserted that this rule was part of the original understanding of the Confrontation Clause. Specifically, Justice Scalia asserted that the cross-examination rule regulated the admissibility in criminal trials of witness examinations taken pursuant to the Marian post-arrest procedure that applied in all felony prosecutions in eighteenth-century England and America.

10 Crawford, 541 U.S. at 53-54.
11 Id. at 46.
12 Id. at 53-56.
13 The Marian statutes, enacted in the mid-sixteenth century, provided the procedure for initiating felony prosecutions. See 1 & 2 Phil. & Mar. 1554, c. 13, § IV; 2 & 3 Phil. & Mar. 1555, c. 10, § II. The provisions of the statutes applied when a person was arrested for a felony or manslaughter. They required the justice of the peace to whom the “prisoner” (that is, the arrestee) was taken to take the sworn “information” of the witnesses who made the arrest and brought the prisoner, as well as the unworn “examination” of the arrestee himself, to reduce those statements to writing, and to certify those written records to the next session of the felony trial court (either the court of “gaol-delivery” or “sessions of the peace,” depending on the specific felony). The Marian statutes also required coroners to take the sworn information of homicide witnesses and certify it to the trial court. For a more detailed discussion, see Davies, supra note 2, at 126-30.

I realize that the reader, who will almost certainly be aware that we no longer use Marian examination procedure—and who will possibly never have heard of any such procedure prior to encountering Crawford—may think that an argument about Marian committal procedure is a rather arcane basis on which to construe the Confrontation Clause today. I think that, too. See Davies, supra note 2, at 189. However, this is the kind of historical inquiry to which originalism leads. More accurately, this is the kind of inquiry that originalism may pose. Often there is a preliminary question of exactly what aspects of framing-era law are deemed pertinent. In Crawford, Justice Scalia directed attention to what he termed a common-law “cross-examination rule” and to the “statutory derogation” posed by the use of Marian witness examinations. See supra text accompanying note 11. However, as I pointed out in my previous article, the Framers would have had no difficulty deciding the outcome of the actual issue in Crawford on a much narrower ground. The statement at issue in Crawford was a wife’s statement that tended to incriminate her husband; however, framing-era sources stated a clear rule that a wife’s examination could not be used against her husband as evidence. See Davies, supra note 2, at 110 n.18. Hence, Crawford purported to provide an originalist construction of the Confrontation Clause by disregarding the fact that the Framers would have decided the question on an entirely different ground.
B. My Criticisms of Crawford

In a 2005 article in this Law Review, I argued that the two originalist claims that Justice Scalia made in Crawford both rested on misconceptions of the evidence regime that shaped the Framers’ expectations about the confrontation right in 1789. Specifically, I argued that he interpreted the original scope of the right too narrowly, but also overstated one aspect of the substance of the right.

With regard to the original scope of the confrontation right, I argued that there was no historical basis for the restriction of the confrontation right to only “testimonial” hearsay, but not “nontestimonial” hearsay. Because an oath was still a necessary requisite for admissible evidence in a criminal trial under framing-era law,14 and “hearsay” was then defined as any out-of-court statement not made under oath, the rule was still that “[h]earsay is no evidence.”15 Thus, because

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14 In Crawford, Justice Scalia asserted that unsworn statements obtained by police interrogations would be “testimonial” because police interrogations bore a “striking resemblance” to Marian witness examinations taken by justices of the peace. Crawford, 541 U.S. at 52. He dismissed the significance of the fact that Marian examinations were taken under oath, but that the modern police interrogation at issue in Crawford did not involve an oath. See id. at 52-53. However, that departed from the framing-era understanding of valid evidence. See Davies, supra note 2, at 202-03 (noting that the police testimony regarding an out-of-court statement in Crawford would have been inadmissible in 1789 for lack of an oath).

Justice Scalia’s dismissal of the historical oath requirement was especially noteworthy because the importance of the oath as a condition for admissible evidence was emphatically stated in two English cases cited in Crawford. In King v. Woodcock, Leach (1st ed. 1789) 437, 440 (Old Bailey 1789), the 1789 case that Justice Scalia cited as evidence of a “cross-examination rule,” Crawford, 541 U.S. at 46, 54 n.5, the trial judge ruled that the out-of-court statement at issue “cannot be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken.” In addition, in King v. Brasier, 1 Leach (4th ed. 1814) 199, 168 Eng. Rep. 202 (Twelve Judges 1779), cited in Crawford, 541 U.S. at 69-70 (Rehnquist, C.J., concurring), the Twelve Judges stated that “no testimony whatsoever can be legally received [in a felony trial] except upon oath.” Id. at 200, 168 Eng. Rep. at 202. The description of the evidence admitted in the trial in the report of Brasier cited in Crawford differed significantly from that which appeared in the initial version published in 1789, but there was no change in the statement of the Twelve Judges. See Brasier, Leach (1st ed. 1789), at 346.

Indeed, peace officers were not permitted to conduct interrogations of arrestees during the framing-era. Police interrogation arose during the nineteenth century after the standard for warrantless arrests was reduced to “probable cause.” See Thomas Y. Davies, Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial” Right in Chavez v. Martinez, 70 TENN. L. REV. 987, 1030-33 (2003) [hereinafter Davies, Self-Incrimination].

15 See, e.g., GEOFFREY GILBERT, THE LAW OF EVIDENCE 107 (1st ed. 1754) (“a mere Hearsay is no evidence”); id. at 149-50 (4th ed. 1777) (same). For bibliographic information, see Davies, supra note 2, at 143 n.123. Under modern evidence doctrine,
there was no distinction of hearsay into categories, I argued that Justice Scalia’s claim that the original confrontation right was limited to only “testimonial” out-of-court statements was merely a political choice posing as history.16 Crawford’s categorization of some out-of-court statements as “nontestimonial” permits the admission of unsworn hearsay statements that would have been inadmissible under framing-era law.

I criticize the originalist claims made in Crawford and Davis about the “testimonial” scope of the confrontation right in more detail in a forthcoming article.17 However, because Mr. Kry does not address this aspect of my 2005 article,18 I do not discuss Crawford’s restriction of the scope of the confrontation right in this article, even though it seems likely that the limitation of the confrontation right to only “testimonial” hearsay will prove to be the more significant dimension of Crawford’s originalist scheme.19

of course, an out-of-court statement is not hearsay unless the statement is offered in evidence for the truth of the content of the statement. However, that reflects a post-framing alteration of the definition of hearsay that does not appear in framing-era sources. Rather, framing-era evidence law treated all unsworn out-of-court statements as “hearsay” and, thus, as “no evidence.” See Gilbert, supra, at 107-08 (1754 ed.); id. at 149-50 (1777 ed.).

16 Davies, supra note 2, at 189-206. The potential implications of limiting the confrontation right to “testimonial” hearsay statements is discussed infra note 46.

17 I further develop my criticisms of this aspect of Crawford in a follow-up article, Not “the Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Original Confrontation Clause, 15 J.L. & Pol’y (forthcoming 2007) [hereinafter Davies, Not the Framers’ Design]. This article further develops my presentation in Symposium, supra note 9, at 85-109, titled Originalist Alchemy: Applying the Crawford-Davis Testimonial/Nontestimonial Distinction Despite the Framing-Era General Ban Against Hearsay Evidence.

18 Kry states that he does not acquiesce in my criticisms of Crawford’s testimonial/nontestimonial distinction but does not address it because it has been well addressed by other authors, and cites Richard Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011 (1998). See Kry, supra note 3, at 556 n.291. However, Friedman’s article merely mentions some of the very early history of the confrontation right, but makes no attempt to address either the right or the conception of hearsay at the time of the framing of the Confrontation Clause. See Friedman, supra, at 1022-25 (discussing the confrontation right to the middle of the seventeenth century).

19 The significance of the cross-examination rule announced in Crawford will depend upon how broadly or narrowly the justices define the concept of “testimonial” out-of-court statements. The 2006 decision in Davis leaves open the possibility that only statements made to government agents can be “testimonial,” but that not all such statements will be “testimonial.” Indeed, Justice Scalia stated in Davis that whether a statement is “testimonial” will depend upon its “primary” purpose and that “initial inquiries” made by police will “often” be nontestimonial and thus not subject to the confrontation right. See Davis, 547 U.S. at ___, 126 S. Ct. at 2279. Hence, although the Crawford opinion itself may convey the impression of a robust confrontation right,
In my 2005 article, I also criticized Justice Scalia’s originalist claim regarding a Marian cross-examination rule. Based on my prior research regarding the Framers’ understanding of the criminal procedure provisions of the Bill of Rights, it was apparent to me when I read Crawford that Justice Scalia’s opinion did not reflect sufficient discipline regarding the historical materials that he offered as evidence that a cross-examination rule was part of the original Confrontation Clause. Justice Scalia had cited reports of two 1696 English proceedings and three English cases decided in 1787, 1789, and 1791. On the basis of those sources, Justice Scalia claimed that at the time the Sixth Amendment Confrontation Clause was ratified in 1791, it was settled law that the written record of a Marian examination of a witness who had become genuinely unavailable to testify prior to the trial could not be admitted as evidence in a felony trial unless the defendant had had an opportunity to cross-examine the witness when the examination was taken. Additionally, Justice Scalia asserted that post-framing English commentaries and cases and post-framing American state cases also demonstrated that the cross-examination rule announced in Crawford had been part of the original meaning of the Confrontation Clause.

However, I was aware that the 1787, 1789, and 1791 English cases that Justice Scalia had cited as evidence of a...
settled cross-examination rule had all been published in London too late to have come to the Framers’ attention when the Confrontation Clause was framed in mid-1789.23 (As I explain below, further research has uncovered additional objections to the 1787 and 1791 cases: the initial version of the 1787 case differed significantly from the later version cited in Crawford;24 and the 1791 case was not published until 1800.25)

My previous research also led me to doubt that the Framers were familiar with the details of the seventeenth-century English treason trials that Justice Scalia discussed. Additionally, that research convinced me that post-framing sources could not be assumed to be trustworthy guides to the original meaning. With regard to the latter, the reality is that judges, abetted by commentators, have altered legal doctrine more drastically over the two centuries since the framing of the Bill of Rights than is commonly recognized. Put bluntly, during that time, judges and commentators have repeatedly revised major legal doctrines while pretending to simply apply existing doctrine, and the cumulative effect of their misdescriptions has often produced mythical descriptions of framing-era doctrine.26 Hence, descriptions of original meaning that depend upon post-framing sources are rarely accurate.

23 In a 2003 article, I had previously noted that all of the English cases first reported in Thomas Leach’s Cases in Crown Law were published too late to have come to the Framers’ attention prior to the framing of the Bill of Rights because that volume was not published until 1789. See Davies, Self-Incrimination, supra note 14, at 1026-28. In my 2005 article criticizing Crawford, I was able to document more precisely that Leach’s volume could not have been published any earlier than May 1789—although it could have been later—because that volume reported a case from late April 1789. See Davies, supra note 2, at 160-62 n.182.

Additional information now suggests that the first edition was probably published late in 1789. Mr. Kry has informed me that the 1792 second edition of Leach’s reports presented cases only through July 1791. See Kry, supra note 3, at 520 n.107. Thus, there was a publication delay in the 1792 second edition of at least six months after the last reported case. If there were a similar delay in the first edition, it would not have been published in London earlier than October 1789.

Moreover, it is increasingly apparent that Americans did not immediately consult Leach’s reports of Old Bailey cases when they were published. See infra notes 289, 296, 301.

24 See infra notes 175-92 and accompanying text.

25 See infra text accompanying notes 206-10.

26 For example, modern Supreme Court opinions have stated that “probable cause” was the pre-framing—or even the ancient—arrest standard, but that is only a myth. If one consults historical statements of arrest standards it is patent that nineteenth-century English and American courts had relaxed the framing-era “felony in fact” arrest standard to the modern “probable cause” standard, and had conferred more arrest authority on peace officers than private persons, all without acknowledging those changes. See, e.g., Davies, Fourth Amendment, supra note 20, at 634-40, 639 n.252.
Thus, in my 2005 article, I argued that Justice Scalia’s “cross-examination rule” was itself a misstatement of the original content of the Confrontation Clause that would exclude some out-of-court statements that framing-era law would have treated as admissible evidence. I argued that the significant date for assessing the original meaning of the Confrontation Clause was the Clause’s 1789 framing date, rather than the 1791 ratification date that Justice Scalia used in Crawford.27 I also pointed out that no statement that could constitute a “cross-examination rule” had appeared in the discussions of the admissibility of Marian witness examinations in any of the legal authorities that the American Framers actually could have consulted prior to the 1789 framing.28

In particular, no statements imposing a cross-examination requirement on Marian witness examinations appeared in any of the leading eighteenth-century English treatises on criminal procedure and evidence, or in any of the excerpts of those treatises that appeared in the justice of the peace manuals that were published in America and widely used by the framing-era American officials who took Marian witness examinations. Rather, the framing-era authorities simply indicated that the written record of a sworn Marian examination was admissible if the witness had become there is also an even larger dimension of the judicial revision of the Framers’ understanding of constitutional criminal procedure protections; namely, the state supreme courts and the Federal Supreme Court relocated the standard for lawful arrest from its initial locus in the state “law of the land” constitutional clauses and in the Fifth Amendment requirement of “due process of law” to the state provisions banning general warrants and to the Fourth Amendment, which was initially only a ban against legislative approval of general warrants—again without any acknowledgement by the judges who brought about that massive alteration of doctrine and constitutional content. See Davies, Arrest, supra note 20, at 216 n.344.

27 Although the Bill of Rights was not ratified until December 1791, the text of the Confrontation Clause took its final form on July 11, 1789, and the Bill of Rights was adopted by the First Congress on September 25, 1789. See Davies, supra note 2, at 157-60. I argued that the original meaning has to be that which informed the First Congress, not merely the later ratifiers. Id. I further argued that, as a general matter, statements appearing in English sources after 1775 probably do not constitute valid evidence of the American original understanding of provisions of the Bill of Rights. Id. at 153-56. The use of the inappropriate 1791 date mattered for Justice Scalia’s analysis in Crawford because it seemed to allow the use of a 1791 English decision (so long as one did not consider when the case report was published) and also because it allowed Justice Scalia to deflect statements by English judges in the 1790 English decision in King v. Eriswell, 3 T.R. 707, 100 Eng. Rep. 815 (K.B.). See Crawford, 541 U.S. at 54-55 n.5. I explain the difficulty Eriswell posed infra notes 218-40 and accompanying text.

genuinely unavailable prior to trial. 29 Hence, Justice Scalia misstated the authentic history when he claimed that the American Framers would have understood that there was a settled rule that the admissibility of a Marian examination of an unavailable witness depended on the defendant having had an opportunity to cross-examine the witness at the time the examination was taken. There is no evidence that framing-era Americans were aware of any such rule.

I agreed that endorsements of a cross-examination rule began to appear in English authorities that reached America in the decades after the framing of the Confrontation Clause, and that such a rule also became evident in nineteenth-century American state cases. 30 However, I concluded that Justice Scalia had made a prochronistic error when he asserted that the original Confrontation Clause included an existing cross-examination rule. 31 Thus, I identified both Justice Scalia’s cross-examination rule claim and his unhistorical testimonial/nontestimonial hearsay distinction as further examples of historical fiction in Supreme Court originalist claims regarding criminal procedure. 32

C. Mr. Kry’s Response to One of My Criticisms

Mr. Kry now responds to my criticism of Crawford’s originalist claim of a cross-examination rule by asserting an expansive view of what can constitute valid evidence of original meaning. Indeed, he ups the ante by invoking substantial additional materials that pertain to English Marian practices that were not mentioned in Crawford.

In particular, Kry agrees that Marian procedure was a standard feature of felony prosecutions in England and America during the eighteenth century, but complains that I overlooked how Marian committal hearings were actually conducted in eighteenth-century England, or at least in

29 Id. at 143-52, 182-87.
30 Id. at 173-78, 187.
31 Id. at 119, 161. See also id. at 116 n.34 (defining “prochronism” as the specific form of anachronism in which later conceptions are imposed on earlier understandings).
32 Id. at 188-89 (describing the claim of a framing-era cross-examination rule as “historical fiction”). I have used the phrase before in discussing historical errors in Supreme Court opinions. See, e.g., Davies, Arrest, supra note 20, at 239 (titled “The Fictional Character of Law-and-Order Originalism”).
London.\textsuperscript{33} He asserts that the arrestee was “routinely,” or even “almost invariably,” present when a Marian witness examination was taken,\textsuperscript{34} and that this in-the-presence-of-the-prisoner practice evolved into an in-the-presence rule, which then further evolved “at some point” into a rule that a Marian witness examination was inadmissible unless the arrestee had had an opportunity to cross-examine.\textsuperscript{35} Additionally, Kry insists it is appropriate to project statements in nineteenth-century English cases and commentaries and nineteenth-century American state cases backward in time and treat them as valid evidence of an earlier, framing-era American understanding of the confrontation right. Thus, he treats post-framing sources as evidence of the original meaning of the Confrontation Clause.\textsuperscript{36} Like Justice Scalia in\textit{Crawford}, however, Kry pays little attention to what the American Framers could have known, or when they could have known it.

**D. Overview of My Reply**

I welcome this exchange with Mr. Kry because I think it provides a useful opportunity to reiterate the requisites of a valid claim of original meaning. In Part II, I argue that, precisely because originalists assert that original meaning should be accorded a heightened normative status in constitutional discourse, it is appropriate to insist that they exercise historical discipline and make a claim of original meaning only when there is clear historical evidence of the Framers’ understanding when the provision at issue was framed.

In Part III, I call attention to an important point that should not be lost amid the specific disagreements between Kry and me: although Kry attacks my article, he makes a significantly different and significantly weaker historical claim than that asserted in\textit{Crawford} itself. Although Kry’s general remarks sometimes conflate an in-the-presence practice with a cross-examination rule, his pre-framing evidence indicates, at most, only a London framing-era practice in which Marian examinations were taken in the presence of “the prisoner” (that

\textsuperscript{33} See infra notes 241-42 and accompanying text.
\textsuperscript{34} See Kry, supra note 3, at 495, 512-16.
\textsuperscript{35} See id. at 495.
\textsuperscript{36} Id. at 545-48.
is, the arrestee\textsuperscript{37}), but not the supposedly settled rule requiring an opportunity for cross-examination that Justice Scalia asserted in \textit{Crawford}.

In particular, although Justice Scalia invoked the 1791 date of the ratification of the Bill of Rights as the relevant date for original meaning in \textit{Crawford},\textsuperscript{38} Kry does not actively dispute my conclusion that the important date for assessing original meaning is the date of the framing in 1789.\textsuperscript{39} Additionally, Kry concedes at several points that, even in London, as of 1789 there still was only a controversy but not a settled rule regarding an arrestee’s opportunity to cross-examine during a Marian witness examination.\textsuperscript{40} Hence, even compared to Kry’s historical account of London practice, Justice Scalia’s originalist claim in \textit{Crawford} regarding a settled “cross-examination rule” was fictional.

In Part IV, I respond to the specific pre-framing evidence that Kry offers for his conclusion that an in-the-presence-of-the-prisoner standard had become part of English Marian practice by the time of the framing, and argue that his conclusions outrun his evidence. I begin by challenging his suggestion that the mere requirement that Marian witness examinations be taken before an arrestee was committed to jail to await trial or was released on bail supports an inference that the defendant necessarily would have been present.

I next reiterate the profound silence in the framing-era legal authorities as to even an in-the-presence rule. In my prior article, I noted the absence of any reference to cross-examination in the statements regarding the admissibility of Marian examinations of unavailable witnesses in criminal

\textsuperscript{37} Framing-era usage deemed an arrest to be “the beginning of imprisonment.” See Davies, \textit{Arrest, supra} note 20, at 392 n.518. Hence, the arrestee was commonly referred to as the “prisoner” and that term was also commonly used to identify the defendant in a criminal trial.

\textsuperscript{38} \textit{Crawford}, 541 U.S. at 46, 54 n.5.

\textsuperscript{39} Davies, \textit{supra} note 2, at 157-60. Kry writes that he “take[s] no position on whether 1789 or 1791 is the more relevant date for assessing original meaning because [he does] not view that two-year difference as having much practical significance.” Kry, \textit{supra} note 3, at 522 n.119. However, he effectively concedes that 1789 is the significant date when he repeatedly refers to the date “of the framing” throughout his article. Of course, the date “of the framing” is 1789. See \textit{supra} note 27.

\textsuperscript{40} See infra text accompanying notes 65-67. Additionally, in \textit{Crawford}, Justice Scalia downplayed Marian procedure as merely a departure from “common law.” See Davies, \textit{supra} note 2, at 132-35. In contrast, Kry acknowledges that “[b]ecause those Marian examinations were a routine feature of felony prosecutions at the time the Sixth Amendment was framed, their admissibility is relevant to any general theory of the Confrontation Clause.” Kry, \textit{supra} note 3, at 493-94.
trials. In this article, I point out that the same silence also appears in the framing-era descriptions of Marian procedure itself. I also call more attention to a point I only touched on before—that a number of the framing-era authorities, including the leading English justice of the peace manual, actually contrasted Marian witness examinations to the cross-examination standard that applied to depositions taken in civil lawsuits. Hence, the legal authorities that framing-era Americans could have consulted regarding the arrestee’s presence or opportunity to cross-examine during a Marian witness examination did not indicate any such legal requirements.

I then turn to the pre-framing English evidence Kry offers regarding the practice of taking Marian witness examinations in the presence of the arrestee. I initially consider the two seventeenth-century sources Kry invokes. Kry insists that the 1696 ruling in King v. Paine and the 1696 attainder proceeding in Parliament in Fenwick’s Case provide significant evidence. I persist in the view that Paine, as a ruling in a misdemeanor case, carried no implications for the Marian procedure that applied specifically to all felony prosecutions. I likewise persist in the opinion that it is highly unlikely that Americans were aware of any discussion of a witness deposition in Fenwick. Additionally, I note that Kry’s conclusion that there was only a controversy about cross-examination in Marian examinations in London in 1789 demonstrates rather clearly that these two cases could not have been understood to have mandated a cross-examination rule during the eighteenth century.

Moving on to Kry’s description of eighteenth-century Marian practice in England, I argue that, regardless of the historical validity of his description of the evolution of English Marian practice (which strikes me as plausible), the practice he describes still does not constitute significant evidence of the American understanding of the confrontation right at the time of the framing in 1789. For one thing, common practices are not equivalent to legal rules or rights. Although Kry sometimes concludes that there was an in-the-presence rule by the time of the framing, the evidence he presents falls short of

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41 As I discuss below, Kry does correctly point out that I overlooked the potential implication of a margin citation to a page in the report of Fenwick that appeared in a prominent treatise; however, I do not think that alters the larger picture. See infra text accompanying notes 152-60.
a rule, and far short of the settled cross-examination rule that Justice Scalia asserted in *Crawford*. Moreover, it is unclear that the London practices that Kry describes were even typical of the rest of England; there is no reason to assume they shed light on American Marian practices. Of course, it is also unclear how framing-era Americans would have learned of the English practices Kry describes in the absence of any published accounts.

The salient feature of Kry’s evidence about Marian procedure is what is missing—he does not identify a single legal authority that states a Marian in-the-presence rule that Americans could have consulted prior to the 1789 framing of the Confrontation Clause. Hence, I do not think Kry has identified evidence that framing-era Americans would have thought that Marian witness examinations were subject to even a legal in-the-presence requirement, let alone the settled cross-examination rule that Justice Scalia asserted in *Crawford*.

In Part V, I discuss Kry’s heavy reliance on post-framing materials, including nineteenth-century English cases and commentaries and nineteenth-century American state cases. Although Kry sometimes discusses these sources in terms of relevance, he relies on them so heavily that he effectively projects nineteenth-century English statements backward in time as though they provide direct evidence of the framing-era American understanding of the confrontation right. However, I think that Kry’s reliance upon post-framing statements collides with the story Kry himself tells about evolution and change in English Marian practice. How can later sources provide evidence of earlier understandings if legal practices and doctrine were undergoing change? Legal history refutes any assumption of necessary doctrinal consistency over time because it provides innumerable examples of judges and commentators who reshaped earlier cases and authorities to comport with the preferred conceptions of their own times. Post-framing sources reveal only post-framing understandings; they cannot be taken as accurate guides to earlier, framing-era understandings.

Finally, in Part VI, I briefly conclude by calling attention to one of the most serious drawbacks of originalist

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justifications for constitutional rulings—the absence of any procedure for vetting the historical validity of originalist claims constructed in a single justice’s chambers before those claims become enshrined in an opinion of the Court.

II. WHAT BURDEN OF PROOF SHOULD ORIGINALISTS MEET?

Much of the difference between Kry’s historical account and mine, and between Crawford’s account and mine, arises from a difference of opinion regarding the burden of proof that originalists should meet. Precisely because originalists attribute a privileged normative position to claims about the original understanding of a constitutional provision, I think it is appropriate to insist that originalists practice originalism with historical discipline.

Of course, judges often justify decisions by claiming continuity with the past—stare decisis is simply a claim that “we have done it that way before.” If the claim is also that “we have done it that way for a long time,” that adds a traditionalist gloss. However, traditionalism is obviously vulnerable to arguments that conditions have changed or that the evolution of legal conceptions and standards has made prior conceptions obsolete. If recent developments have broken from an earlier traditional position, traditionalism itself does not provide a justification for returning to the earlier position. For example, Justice Scalia could hardly have justified the adoption of the cross-examination rule simply by noting that mid-nineteenth century American cases adopted such a rule even if recent decisions have not.

Originalism is different. Originalism rests on the premise that a constitutional provision’s original meaning—the public meaning when it was framed—is the content to which the Framers agreed. Thus, originalists accord original meaning the normative stature of the political contract itself. Moreover, originalists attribute a fixed content to the original meaning. Because they characterize the original meaning as unchanging, originalists present claims about the original

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43 See Davies, supra note 2, at 105 n.1.
44 For example, Justice Scalia has recently declared, “There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. . . . This reference to changeable law poses no problem for the originalist.” Georgia v. Randolph, 547 U.S. ___, ___, 126 S. Ct. 1515, 1540 (2006).
meaning as though they carry considerably more normative
punch than a simple traditionalist claim.

In particular, because originalism posits a fixed original
meaning, originalism uniquely can seem to justify wiping out
recent legal developments in order to return to the purportedly
fixed original meaning. For example, Crawford itself wiped out
several decades of prior confrontation rulings.45 The unique
platform that originalism provides for undoing precedents is
probably the primary attraction that originalism now holds for
justices toward the right end of the Court’s ideological
spectrum. Originalism provides a justification for breaching
the norm of stare decisis that otherwise protects recent “liberal”
doctrinal developments, and thus provides a justification for
wiping out those developments.46 Hence, originalism today is
often a platform for “activist” rulings.47

If originalists are going to claim this added normative
punch, it seems appropriate that they should invoke claims of
original meaning with historical discipline—that is, claims

U.S. 56 (1980), a precedent that was just shy of lasting for a quarter of a century.
46 For a discussion of the recent emphasis on originalism in constitutional
criminal procedure cases, see David A. Sklansky, The Fourth Amendment and Common
Law, 100 COLUM. L. REV. 1739, 1745-70 (2000). See also Davies, supra note 2, at 207;
Davies, Arrest, supra note 20, at 252-66.

The cross-examination rule adopted in Crawford may appear somewhat
“liberal” in the sense that it provides a more substantial content to a criminal
defendant’s confrontation right than prior law. However, that is only one prong of
Crawford; the other prong, the limitation of the confrontation right to “testimonial”
hearsay, has a different ideological content, and—depending on how the boundary
between testimonial and nontestimonial hearsay is ultimately defined—may yet mean
that the strong protection afforded by the cross-examination rule applicable to
“testimonial” hearsay will rarely apply, in which case the confrontation right will have
little practical substance.

To date, Crawford and Davis have treated only statements obtained during
police interrogation as “testimonial” statements subject to the cross-examination rule.
Moreover, Davis has indicated that only statements made during police interrogations
that were conducted “primarily” to obtain evidence will be deemed “testimonial,” and
has suggested that statements obtained during interrogations will “often” be
“nontestimonial” and not subject to the confrontation right or its cross-examination

Davis has also limited the scope of the confrontation right, and its cross-
examination rule, by indicating that even “testimonial” hearsay statements may be
admitted in hearings to determine whether a defendant has “forfeited” his
confrontation right by preventing a potential witness from appearing at trial. Id. at
___, 126 S. Ct. at 2279-80. Hence, it may yet turn out that Crawford’s cross-
examination rule will bar hearsay evidence only infrequently. See also supra note 21.

47 It may not be coincidental that a recent study has concluded that Justices
Scalia and Thomas are somewhat more prone to overturn prior precedents than the
other justices. See Lori A. Ringhand, Judicial Activism: An Empirical Examination of
Voting Behavior on the Rehnquist Natural Court, 24 CONST. COMMENT. (forthcoming
2007).
about the Framers’ design should be made only in instances when valid and relevant historical sources provide strong evidence of the Framers’ understanding of a constitutional provision at the time the provision was framed. After all, original meaning is hardly a necessary ground of decision. Most of the Supreme Court’s constitutional decisions do not rest on originalist justifications. Indeed, even those justices who purport to be originalists resort to originalism rather selectively.\textsuperscript{48} Hence, there is no excuse for fictional originalist claims that are based only on weak, marginal, or nonexistent evidence, rather than on the most direct historical evidence of what the Framers actually knew and thought at the time of the framing.\textsuperscript{49}

Mr. Kry apparently has a more relaxed view of the criteria for valid originalist claims. Indeed, he defends Crawford’s originalist cross-examination rule claim even though he offers a markedly different historical account of Marian procedure than that which appeared in Crawford itself and arrives at a significantly weaker conclusion.

III. THE DIFFERENCES BETWEEN KRY’S HISTORY AND JUSTICE SCALIA’S

As I indicated in my previous article, I had difficulty deciphering precisely what historical claim Justice Scalia made in Crawford when he cryptically referred to the admission of Marian witness examinations as a “derogation” of a common-law cross-examination rule.\textsuperscript{50} Because I thought Justice Scalia was most likely arguing that Marian examinations of witnesses who had died or had otherwise become unavailable had once been admitted in criminal trials without consideration of cross-examination, but that framing-era English law had come to impose a cross-examination requirement as a condition for admitting a Marian examination as evidence in a criminal trial, I focused on that admissibility claim. I found no evidence

\textsuperscript{48} See, e.g., Davies, Arrest, supra note 20, at 260-62.

\textsuperscript{49} As is probably clear to the reader by this point, I am not an originalist. I do not research original meaning to formulate a program for returning to framing-era conceptions of rights or to promote an alternative originalist program to that endorsed by the self-described originalists on the Supreme Court. Rather, I think that an authentic reconstruction of the Framers’ conception of criminal procedure can provide a useful perspective on the larger trajectory of constitutional criminal procedure and may also provide an antidote, to some degree, to the mythical conceptions that too often appear in United States Reports.

\textsuperscript{50} See, e.g., Crawford, 541 U.S. at 46.
in the framing-era authorities that an opportunity for cross-examination had been made a criterion for admitting a Marian witness examination of an unavailable witness in a felony trial.\footnote{See Davies, supra note 2, at 143-52, 182-86.}

Kry now asserts that I focused on the wrong argument. Instead, he contends that \textit{Crawford} should be read to make what I termed a more “nuanced” claim—that cross-examination emerged within Marian procedure itself, and had become a settled part of that procedure by the time of the framing.\footnote{Id. at 169-78.} Thus, Kry argues that when the framing-era authorities that I quoted stated that Marian examinations of unavailable witnesses were admissible as evidence in criminal trials, those statements implicitly incorporated an in-the-presence or cross-examination rule as an aspect of Marian procedure itself.\footnote{Kry, supra note 3, at 499-501.}

Whether Kry’s historical analysis is actually the same as that which Justice Scalia advanced in \textit{Crawford} is far from clear, however, because many of Justice Scalia’s statements appear to refer to admissibility rather than to any internal standard for Marian procedure. Justice Scalia stated the historical issue as whether “the admissibility of an unavailable witness’s pretrial examination depended on whether the defendant had had an opportunity to cross-examine him.”\footnote{\textit{Crawford}, 541 U.S. at 45 (emphasis added).} Then, when discussing seventeenth and eighteenth-century law, Justice Scalia stated that “[t]he [Marian] statutes did not identify the circumstances under which [Marian] examinations were admissible,” and observed that those who claimed during that period that “no prior opportunity for cross-examination was required” for admitting Marian examinations had acknowledged that “the statutes were in derogation of the common law.”\footnote{Id. at 46 (emphasis added).} For example, Justice Scalia noted that a leading authority on evidence had stated that Marian examinations were “admissible only ‘by Force “of the [Marian] Statute.”’”\footnote{Id. (emphasis altered) (quoting 1 GILBERT, EVIDENCE 215).} The implication in that statement is that Marian examinations were admissible even though they did not provide the opportunity for cross-examination that was usually a requisite for admissibility. Likewise, Justice Scalia later wrote that “to the extent Marian examinations were \textit{admissible}, it
was only because the statutes *derogated* from the common law” but that “the statutory-derogation view” was “rejected” by 1791. That statement also implies that Marian examinations had been admitted despite the absence of cross-examination in Marian procedure (that is, despite the way in which the statutes “derogated” common law), but that the English courts later rejected that special allowance for Marian examinations by making an opportunity for cross-examination a requisite for admitting even Marian examinations into evidence in a felony trial.

At least for purposes of assessing the validity of originalism as an approach to constitutional justification, it matters whether Mr. Kry is articulating the same analysis as that in *Crawford* or not. Justice Scalia’s originalist claims are not salvaged by demonstrating that Justice Scalia could have arrived at a historical conclusion by a route he did not take. Likewise, even if Kry’s analysis does parallel that in *Crawford*, it is unclear how Kry’s presentation of evidence that was never mentioned in *Crawford* can rehabilitate the absence of valid historical evidence in the *Crawford* opinion itself.

Most importantly, Kry’s historical conclusion is decidedly weaker than Justice Scalia’s. In *Crawford*, Justice Scalia repeatedly invoked “the Framers,” “the founding,” and “1791,” and specifically asserted that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” In other words, Justice Scalia asserted

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57 *Id.* at 54 n.5 (first emphasis added). Justice Scalia also based his claim regarding the “reject[ion]” of the “statutory derogation” on the three English cases decided in 1787, 1789, and 1791 that I discuss *infra* notes 175-217 and accompanying text. However, the issue in each of those cases was the *admissibility* of a witness’s examination.

Likewise, Justice Scalia described the issue in a key 1790 English decision in terms of whether the admissibility of Marian examinations was “a statutory exception to the common-law rule.” *Crawford*, 541 U.S. at 54-55 n.5.

58 *Id.* (passim).

59 *Id.* at 53-54. See also *id.* at 54 n.5 (asserting that Chief Justice Rehnquist was incorrect when he claimed that “English law’s treatment of testimonial statements was inconsistent at the time of the framing,” and that “by 1791 even the statutory-derogation view had been rejected with respect to [Marian] examinations”).

Kry suggests that I have overstated the originalist claim actually made in *Crawford*, because Justice Scalia’s opinion recognized “doubts” regarding the cross-examination rule; and Kry also claims that I have overstated the differences between his account and that in *Crawford*. See Kry, *supra* note 3, at 494 n.10, 555 n.287. However, I think Kry understates what *Crawford* actually claimed. Moreover, if
that a settled rule that Marian examinations were admissible only if there had been an opportunity for cross-examination was part of the original understanding of the Confrontation Clause. Although Kry may seem to endorse Justice Scalia’s claim in rhetorical flourishes at the beginning and end of his article, he does not actually defend that claim when he addresses the pre-framing evidence itself.

Rather, Kry describes the English historical evidence regarding cross-examination as “conflicting.” Indeed, when Kry sums up the pre-framing English historical evidence, he asserts only “that prisoners would have been routinely present when witnesses were deposed at Marian committal hearings,” “that presence was widely viewed as a procedural right by the time of the framing,” or “that, by the framing, there was also an emerging consensus that presence was a procedural right,” and “that many believed a prisoner had a right to cross-examine witnesses at his committal hearing, but that the point was still disputed at the time of the framing.” Likewise, although Kry asserts that a cross-examination rule emerged in England “at some point” (without stating a date), the strongest summation he musters of the English pre-framing evidence is that it “suggests that, at the time of the framing, the right to cross-examine at a committal hearing was not firmly established, but nor was the absence of such a right firmly established. Rather, there was disagreement . . . .” Kry does not show that a cross-examination rule had even emerged in England as of 1789, let alone show that such a rule was part of the original Sixth Amendment.

Kry’s conclusions decidedly do not amount to the settled cross-examination rule that Justice Scalia claimed in

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Crawford had made only the weaker historical claims Kry now makes, it would hardly have presented a claim of original meaning.

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60 Kry, supra note 3, at 494 (“Crawford is well supported by the historical evidence.”).
61 Id. at 555 (“Crawford’s cross-examination rule is therefore on solid ground. If the opinion is to be faulted for anything, it is only for understating the importance of physical presence, not for overstating the importance of cross-examination.”).
62 Id. at 542.
63 Id. at 495 (emphasis added).
64 Id. at 512 (emphasis added). See also id. at 553 (“[T]he admissibility of ex parte committal examinations was far from settled.”).
65 Id. at 495 (emphasis added). See also id. at 525.
66 Kry, supra note 3, at 495.
67 Id. at 541 (emphasis added).
68 See supra notes 39-40 and accompanying text.
Crawford. Whatever one concludes about Kry’s attacks on my article, they do not constitute a defense of the originalist cross-examination rule Crawford actually claimed. With that observation, let me nevertheless address Kry’s own claim of an English framing-era in-the-presence practice or rule.

IV. THE SHORTCOMINGS OF KRY’S CLAIMS REGARDING PRE-FRAMING EVIDENCE

A claim of original meaning is, by definition, a claim in which the date of the framing is of the essence. Hence, although Kry tends to mix together pre-framing and post-framing materials, I think it is essential to keep them separate. I discuss his pre-framing claims in this Part, and reserve his post-framing claims for the next. I think the important issue is whether Kry has identified valid evidence of the American Framers’ understanding of the Confrontation Clause when it was framed—and I think the fair conclusion is that he has not.

Kry does not contest my basic point—that the framing-era treatises and justice of the peace manuals that were widely used in framing-era America do not mention any in-the-presence or cross-examination standards for Marian witness examinations. Rather, he dismisses that consistent silence as a mere “negative inference.” Instead, he offers two broad inferences of the must-have variety, and also offers a variety of evidence regarding English Marian practice to lend credence to those inferences. I begin by identifying the fallacies in Kry’s inferences, and then reiterate the profound silence of the framing-era legal authorities before moving on to the specific evidence of English practice that Kry offers.

A. The Invalidity of Kry’s Must-Have Inferences

Kry offers two inferences of the must-have variety to support his historical claims. One is that because testimony in the presence of the defendant and subject to cross-examination was a requirement in other procedural contexts, especially criminal trials, “consistency” would require that Marian procedure include similar features. The simple answer is that one cannot assume that Marian procedure, created by statutory authority, was subject to common-law norms. Rather, because

69 Kry, supra note 3, at 500.
statutes trumped common law, Marian procedure was *sui generis*.

Moreover, sworn Marian examinations of unavailable witnesses were not the only form of admissible evidence that departed from the usual principles that evidence in a criminal trial had to be presented in the defendant’s presence and subject to cross-examination. That was equally true of a murder victim’s dying declaration. Dying declarations were admissible because the victim’s awareness of imminent death was thought to be the functional equivalent of an oath, and because such declarations often amounted to the “best evidence” available of the crime. The same was true of Marian witness examinations of unavailable witnesses; they were made under oath, and they too could provide important evidence, or even the best evidence, of the crime—evidence that would otherwise be unavailable. Hence, there was no reason why Marian procedure should comport with trial procedure.

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70 There is no dispute that dying declarations were admissible under framing-era law. See, e.g., *Crawford*, 541 U.S. at 56 n.6 (existence of dying declaration exception “as general rule of hearsay law cannot be disputed”); Kry, *supra* note 3, at 546. See also *infra* note 73 (quoting statement by English judge in 1789 confirming admissibility of murder victim’s dying declaration).

71 See 2 LEACH’S HAWKINS, *supra* note 4, at 619 n.10 (1787 ed.) (textual note added by editor).

72 See id. Thomas Leach added the section and note discussing the admissibility of a murder victim’s dying declaration immediately after the section he added discussing the “best evidence” rule. See id.

73 As Chief Baron Eyre stated in the 1789 ruling in *King v. Woodcock*, one of the cases cited in *Crawford*:

> The most common and ordinary species of legal evidence consists in the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give. But beyond this kind of evidence there are also two species which are admitted by law: The one is the dying declaration of a person who has received a fatal blow: the other is the examination of a prisoner, and the depositions of the witnesses who may be produced against him, taken officially before a Justice of the Peace, by virtue of [the Marian statutes], which authorizes Magistrates to take such examinations, and directs that they shall be returned to the Court of Gaol Delivery. This last species of deposition, if the deponent should die between the time of examination and the trial of the prisoner, may be substituted in the room of that *viva voce* testimony which the deponent, if living, could alone have given, and is admitted of necessity as evidence of the fact.


74 Of course, although the grand jury was an important phase of the framing-era right to jury trial in felony cases, the defendant played no role, and was not permitted to cross-examine during that phase of the criminal trial. Hence, it is hardly the case that cross-examination was a feature of all phases of a criminal prosecution; rather, it was expected to be a component of the trial before the petit jury.
This is also true of Kry’s second must-have inference. He notes that, although the Marian statutes did not say anything about the presence of the arrestee or about the arrestee having an opportunity for cross-examination during the taking of a witness’s information about a felony, the statutes did indicate that witness examinations were to be taken before the justice of the peace either committed the arrestee to jail to await trial or bailed the arrestee. Likewise, Kry infers that the statutory authority for examinations of the witnesses who brought the prisoner to the justice of the peace means that the prisoner “necessarily” would have been present when the witnesses were examined.

However, there is an obvious reason why the statute required the witness examination to be completed before committal or bail that does not depend upon the arrestee’s presence when a witness examination was taken. A justice of the peace’s decision to commit or bail an arrestee effectively marked the beginning of a formal prosecution. The warrant of committal that authorized jailing the arrestee to await trial ordered that the defendant not be released except “by due course of law”—that is, by court proceedings, usually trial. Hence, it made sense that the Marian statutes would require a justice of the peace to confirm, prior to taking that serious step, that (1) there actually was proof that a felony had been committed, and (2) there were witnesses who were prepared to connect the defendant to the felony. Indeed, the treatises and manuals indicated that a justice should release an arrestee if these minimal thresholds for prosecution were not met, but also stated that a justice had no discretion to release a felony arrestee if these minimal thresholds were met.

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75 Kry, supra note 3, at 512.
76 Id. at 523.
77 See Davies, Arrest, supra note 20, at 395 n.521.
78 See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 293 (1st ed. 1769). (“If upon this enquiry [the Marian post-arrest procedure] it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail . . . .”). See also infra note 246 (citing framing-era American justice of the peace manuals for the same point).

As I have previously noted, the common Bluebook rule for citing the “starred” edition of Blackstone’s Commentaries is inappropriate for historical commentary because that is the 1783 ninth London edition, the last that contains Blackstone's own changes. See Davies, Arrest, supra note 20, at 278 n.119. However, because Blackstone sometimes changed the contents, that edition may be different from the earlier editions, including the 1771-1772 American printing that was widely...
However, a justice of the peace could ascertain whether these minimum committal standards were met simply by listening to the witnesses. Indeed, because a justice of the peace had no authority to try a felony charge, he was not supposed to assess the credibility of the witnesses, but simply to determine whether the proffered evidence supported the arrest.79 Hence, the justice could perform the required task even if the constable had escorted the arrestee out of the justice’s parlor to another place of temporary detention pending the justice’s disposition—and surely some arrestees were ill-behaved enough to merit removal from the justice’s parlor. The cryptic language of the Marian statutes and the absence of specific directions for taking witness examinations imply that the details of how the examinations were to be taken were simply left to the discretion of the justice of the peace.

In addition, it is important to recognize that a Marian witness examination was taken for a different purpose than that for which depositions were taken in civil lawsuits.80 Depositions in civil lawsuits and equity proceedings were taken with the expectation that they would be admitted into evidence as a substitute for live trial testimony. That is, they were taken when it was anticipated that it would be too inconvenient, too
expensive, or otherwise impossible for a witness to attend the civil lawsuit trial. Because depositions in civil proceedings were taken to be used as trial evidence, they were subject to a cross-examination rule comparable to that which applied in trials: depositions could be readily admitted as a substitute for live testimony in civil lawsuits if, but only if, the opposing party had an opportunity to attend and cross-examine when the deposition was taken.

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81 In the eighteenth century, depositions could be taken to be used as evidence in civil lawsuits and equity proceedings. See, e.g., 3 BLACKSTONE, supra note 78, at 383 (1st ed. 1768) (use of depositions in lawsuits); id. at 449 (use of depositions in equity proceedings). Depositions do not seem to have been taken for discovery as they are today, because modern discovery procedures had not yet been developed.

The expectation that depositions would be used as a substitute for live testimony in trials in civil lawsuits was the actual subject of a 1787 Letter of a Federal Farmer that was incorrectly quoted in Crawford as though it were a direct antecedent of the Confrontation Clause applicable to criminal trials. However, the letter was so heavily edited that the concern with the use of depositions as evidence in civil trials was obscured. Justice Scalia portrayed the Letter in Crawford as follows:

[A] prominent Antifederalist writing under the pseudonym Federal Farmer criticized the use of "written evidence" while objecting to the omission of a vicinage right: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of the facts in question. . . . Written evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." The First Congress responded by including the Confrontation Clause in the proposal that became the Sixth Amendment.

Crawford, 541 U.S. at 49 (alterations in original) (citation omitted).

However, the quoted passage actually appeared in a passage that discussed the vicinage (that is, venue) aspect of "[t]he trials by jury in civil causes." Letter from the Federal Farmer, No. 4 (Oct. 12, 1787), reprinted in CONTEXTS OF THE CONSTITUTION: A DOCUMENTARY COLLECTION ON PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW 706, 710 (Neil H. Cogan ed., 1999) (emphasis added). The Federal Farmer stated that he did not place much weight on the need to be tried by one’s neighbors, but then wrote that it was important for trials in civil causes (that is, lawsuits) to be held in the vicinity for the convenience of obtaining oral testimony from witnesses so that it would not be necessary to resort to the use of depositions:

[T]he trial of facts in the neighbourhood is of great importance in other respects. Nothing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question. The common people can establish facts with much more ease with oral than written evidence; when trials of facts are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence, which to the common people is expensive and almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth.

Id. Although this passage reflects the general importance attached to oral testimony and cross-examination, it did so while expressing concern about the expected use of depositions in civil cases, rather than in criminal trials.

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82 See GILBERT, supra note 15, at 46-47, 48 (1754 ed.); id. at 61-62, 63-64 (1777 ed.).
In contrast, Marian witness examinations were not taken with an expectation that they would be offered as evidence of the defendant’s guilt at trial. Because a Marian witness examination was admissible only if the witness had become genuinely unavailable—strictly defined as death, serious illness, or interference by the defendant—there was little likelihood that any particular Marian examination would be admitted as evidence at trial. That was especially so because the pace of framing-era criminal prosecutions was considerably speedier than modern proceedings, so there was little likelihood that a witness would die or become seriously ill during the short period between the date of the Marian examination and the subsequent trial.

In the usual course of events, the witnesses who brought the arrestee to the justice of the peace and were examined under Marian procedure would also appear and testify in person at the subsequent trial. Indeed, the justice was supposed to assure that they would appear for trial by binding them to do so with a recognizance. Hence, the expectation was that a felony defendant would have the opportunity to cross-examine the witnesses who had given Marian examinations during the course of the felony trial itself. A Marian examination was not supposed to be a mini-trial.

The probable purpose of the requirement that the record of Marian witness examinations be forwarded to the trial court was simply to provide a means by which the trial judge could determine whether the witness had changed his or her story in

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83 As Kry notes, Marian examinations were not created to be a substitute for live testimony at criminal trials. See Kry, supra note 3, at 498 n.19 (citing JOHN H. LANGEVIN, PROSECUTING CRIME IN THE RENAISSANCE 24-34 (1974) (“contending that ‘the Marian draftsman did not intend to institute a system of written evidence’”).

84 See 2 HAWKINS, supra note 4, at 429 (1771 ed.); 2 LEACH’S HAWKINS, supra note 4, at 605 (1787 ed.) (stating that a Marian witness examination was admissible as evidence if the witness (called an “Informer”) “is dead, or unable to travel, or kept away by the Means or Procurement of the Prisoner,” and also noting that “it is not sufficient to authorize the Reading such an Examination, to make Oath that the Prosecutors have used all their Endeavours to find the Witness, but cannot find him”), quoted in Davies, supra note 2, at 147, nn.137-38.

85 For example, less than two months passed between the crime and the trial of the defendant in King v. Radbourne, one of the cases that Justice Scalia cited in Crawford. The attack that was prosecuted as a murder occurred on May 31, 1787 (the “27th year” of the reign of George III), and the trial was held “[a]t the Old Bailey in July Session 1787.” King v. Radbourne, 1 Leach (4th ed. 1815) 457, 168 Eng. Rep. 330 (Old Bailey 1787), cited in Crawford, 541 U.S. at 46-47. Although the victim of the attack did die in the interval in Radbourne, the dates in that case still illustrate the speed of late eighteenth-century prosecutions.
response to a bribe or threat. To meet that purpose, as well as to test the validity of the charge on which the arrest had been made, the Marian witness examination was taken under oath and the witness was required to sign the written summary of his or her examination that was then prepared by the justice. However, there is no apparent reason why the arrestee’s presence would have been necessary for that purpose.

In addition, it is not clear what purpose cross-examination would ordinarily have served. As Kry observes, the written records of Marian witness examinations took the form of short summaries of what the witness swore to, but did not resemble a modern transcript. As a result, it is not apparent how cross-examination would have been recorded. The bottom line is that Kry’s must-have inferences simply do not hold up to close inspection.

The sui generis character of Marian procedure is also evident in what the framing-era legal authorities had to say about Marian procedure. In fact, there is more to say on that score than I previously presented.

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86 See Davies, supra note 2, at 129.
87 Kry suggests that cross-examination became relevant when English magistrates began to exercise an extra-legal discretion as to whether felony charges should be dismissed. See Kry, supra note 3, at 523, 554-55 (noting that cross-examination in Marian witness examinations served no purpose until this development). He offers no evidence of whether American justices of the peace exercised similar discretion.
88 See id. at 535-37 nn.189-92 and accompanying text.
89 There are a number of features of arrest and committal procedures that seem to undercut an in-the-presence-of-the-arrestee rule. For one thing, many if not most felony arrests were made by warrant. See, e.g., Davies, Fourth Amendment, supra note 20, at 641. A sworn, signed record of the factual allegations made by the complainant usually was made when an arrest warrant was issued. See, e.g., 1 Matthew Hale, The History of the Pleas of the Crown 582 (Sollom Emlyn ed., 1736). Is it really likely that the justice retook the complainant’s information as a witness after the arrest? Or is it more likely that the complainant’s sworn pre-arrest statement became his Marian examination? If so, there was no apparent opportunity for the arrestee to cross-examine. As I note below, in 1807, the Attorney General of the United States stated that an affidavit for an arrest warrant could serve as a Marian witness examination. See infra note 302 and accompanying text.
Likewise, as I discuss below, the Marian procedure entries in framing-era justice of the peace manuals sometimes included material witness warrants, which would seem to pose some logistical problems for the examination being taken in the presence of the arrestee. See infra notes 103, 108-09 and accompanying text.
B. The Evidence Against an In-the-Presence or Cross-Examination Rule in the Framing-Era Authorities

In my previous article, because I perceived the originalist claim in Crawford as a claim regarding the admissibility of Marian witness examinations,\(^{90}\) I noted that the framing-era legal authorities did not mention cross-examination in the passages discussing the admissibility of a Marian examination of an unavailable witness. In view of the argument that Kry now makes regarding Marian procedure itself, I should add that the silence also extends to the discussions of Marian procedure itself. The framing-era authorities do not mention either an in-the-presence or cross-examination rule in the passages in which they set out the requirements of a Marian witness examination. In fact, some of the framing-era authorities actually contrasted Marian procedure to depositions in civil lawsuits which were subject to a cross-examination procedure.

1. Framing-Era Descriptions of Marian Procedure

Let me begin with the descriptions of Marian procedure that appeared in the prominent framing-era treatises and then address the somewhat more detailed statements in the justice of the peace manuals.\(^{91}\) Like the absence of detail in the Marian statutes themselves, the absence of detail regarding the taking of Marian examinations in the treatises and manuals suggests that those details were simply left to the justice of the peace’s discretion.

a. Hale’s Treatise

Sir Matthew Hale had been one of the judges who ruled in 1666 that a coroner’s Marian examination of an unavailable witness would be admissible in a criminal trial.\(^{92}\) In my previous article, I noted that Hale’s later treatise, The History of the Pleas of the Crown, which was written in the late

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\(^{90}\) See supra notes 50-51 and accompanying text.

\(^{91}\) It does not appear that Sir Edward Coke discussed Marian committal procedure; neither Crawford nor Kry cites any statement by Coke, and I have not found any.

\(^{92}\) Kry, supra note 3, at 497.
seventeenth century but not published until 1736, did not make cross-examination a condition of admissibility for a Marian examination of an unavailable witness. Hale’s treatise also said nothing about either the presence of the prisoner or an opportunity for cross-examination in its discussion of Marian procedure itself.

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93 See HALE, supra note 89. For bibliographic information, see Davies, supra note 2, at 130.
94 Davies, supra note 2, at 129-32.
95 The significance of how little Hale had to say about Marian witness examinations comes through only if one reads his entire description of Marian procedure. This is the most complete passage on that subject, with witness examinations being discussed in paragraphs numbered 2 and 3:

Previous to the commitment of felons, or such as are charged therewith, there are required three things, 1. The examination of the person accused, but without oath. 2. The farther information [beyond the complaint for the arrest warrant] of accusers and witnesses upon oath. 3. The binding over of the prosecutor and witnesses unto the next assizes or sessions of the peace [that is, the criminal trial courts], as the case requires.

1. The examination of the person accused, which ought not to be upon oath, and these examinations ought to be put in writing, and returned or certified to the next gaol-delivery or sessions of the peace, as the case shall require by [the Marian statutes] and being sworn by the justice or his clerk to be truly taken may be given in evidence against the offender.

And in order thereunto, if by some reasonable occasion the justice cannot at the return of the [arrest] warrant take the examination, he may by word of mouth command the constable or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination; and this detainer is justifiable by the constable, or any other person, without shewing the particular cause, for which he was to be examined, or any warrant in scriptis.

But the time of the detainer must be reasonable, therefore a justice cannot justify the detainer of such person sixteen or twenty days in order to such examination.

2. He must take information of the prosecutor or witnesses in writing upon oath, and return or certify them at the next sessions or gaol-delivery, and these being upon the trial sworn to be truly taken by the justice or his clerk, &c. may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.

3. Before he commit the prisoner he is to take surety [that is, bond] of the prosecutor to prefer his bill of indictment at the next gaol-delivery or sessions, and likewise to give evidence; but if he be not the accuser, but an unconcerned party, that can testify, the justice may bind him over to give evidence, and upon refusal in either case may commit the refuser to gaol.

1 HALE, supra note 89, at 585-86 (citations omitted). I submit there is no hint in this passage of any concern that the prisoner be present or have an opportunity to cross-examine when the witness examinations were taken. See also 1 id. at 372 (also discussing Marian procedure); 2 id. at 46, 51-52 (also discussing Marian procedure).
b. Hawkins’s Treatise

Although Kry, like Justice Scalia in *Crawford*, tends to describe the rule of admissibility as “Hale’s,” the most influential eighteenth-century treatise on criminal law and procedure was almost certainly Sergeant William Hawkins’s *Pleas of the Crown*, first published in the early eighteenth century and republished into the nineteenth. In my previous article, I noted that when Hawkins discussed the admissibility of a Marian examination of an unavailable witness in his chapter on evidence, he stated that “it seems settled” that Marian examinations of unavailable witnesses were admissible in felony trials, but—like Hale—he made no mention of any in-the-presence requirement. The only conditions that Hawkins noted regarding admissibility were the genuine unavailability of the witness and the requirement that the justice who took the examination or his clerk attest that the record of the examination was accurate.

I should add here that Hawkins also never mentioned any in-the-presence or cross-examination rule when he discussed Marian committal and bail procedure itself in earlier entries in his treatise. Rather, Hawkins simply quoted the relevant portions of the Marian statutes and noted that a justice of the peace should not detain a prisoner for more than three days before examining him. If Hawkins had actually understood that a Marian witness examination was invalid unless it was taken in the presence of the prisoner, would he not have advised justices of the peace of that requirement?

96 Kry, like Justice Scalia in *Crawford*, tends to place more emphasis on Hale’s statements than on those by Hawkins and in later treatises. That treatment may create the appearance that the 1696 rulings in *Paine* and *Fenwick* altered “Hale’s” earlier rule of admissibility. However, the more significant point is that straightforward statements of the admissibility of Marian examinations of unavailable witnesses appeared in the eighteenth-century treatises by Hawkins, Chief Baron Geoffrey Gilbert, Francis Buller, and others, as well as in the eighteenth-century justice of the peace manuals, and those statements tend to show that *Paine* and *Fenwick* did not influence the understanding of Marian procedure. See Davies, supra note 2, at 143-52.

97 See supra note 4.

98 2 HAWKINS, supra note 4, at 429 (1771 ed.); 2 LEACH’S HAWKINS, supra note 4, at 605 (1787 ed.), discussed in Davies, supra note 2, at 146-50.

99 2 HAWKINS, supra note 4, at 118-19 (1771 ed.); 2 LEACH’S HAWKINS, supra note 4, at 184-85 (1787 ed.) (discussing Marian committal procedure). See also 2 HAWKINS, supra note 4, at 49 (1771 ed.); 2 LEACH’S HAWKINS, supra note 4, at 79-80 (1787 ed.) (discussing coroners’ examinations). See also 2 HAWKINS, supra note 4, at 104-05 (1771 ed.); 2 LEACH’S HAWKINS, supra note 4, at 162-63 (1787 ed.) (discussing bailing arrestees).
c. **Dalton’s Justice of the Peace Manual**

In addition to the treatises on criminal procedure, there was also a second category of framing-era legal authorities that were written or compiled to inform and guide the officials who were charged with committal and bail in felony arrests under the Marian statutes—what are now usually called justice of the peace manuals. The term “manual” is somewhat misleading because these works were often quite substantial.

One of the earlier justice of the peace manuals that was probably still in circulation to some degree in framing-era America was Michael Dalton’s *The Country Justice*, initially published in 1618, with subsequent editions to 1742 (though the latest edition I have located is 1727). As was often the case in later manuals, this work discussed Marian witness examinations in two entries, one dealing with Marian procedure itself, and one dealing with the admissibility of Marian witness examinations as evidence in felony trials. The first entry, titled “Felonies,” noted that the Marian statutes required justices of the peace to take the information of witnesses regarding a felony arrestee, reduce the material contents of that information to writing, and bind the witnesses to appear at trial, prior to either committing or bailing the arrestee. However, this entry does not mention any requirement that the arrestee be present for the witness examinations.

The second of Dalton’s entries, titled “Evidence against Felons,” contains similar statements about Marian procedure, but also makes two statements that seem to cut against any in-the-presence-of-the-prisoner requirement. One states that a justice of the peace can take and certify to the trial court the sworn “Accusation or Information by one that is decrepit or unable to travel”—that is, the justice can go to the witness. However, this statement does not mention arranging to take the arrestee along.

The other passage indicates that the justice of the peace can issue a warrant to a constable to bring in other persons

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100 Michael Dalton, *The Country Justice* (1727 ed.). For bibliographic information, see 1 Maxwell, supra note 4, at 227.

101 See id. at 541. The entire passage reads: “Accusation or Information by one that is decrepit or unable to travel, is good, and may be taken by the Justice of the Peace on Oath, and certified at the next general Gaol-delivery, or Sessions of the Peace, as the Cause shall require.” Id.
who have been identified as having material information about a felony—that is, material witnesses. This passage also does not mention making arrangements for the arrestee to be present when these witnesses are found and brought in and when their examinations are taken.\textsuperscript{103} Hence, it is fairly clear that there was no in-the-presence rule for Marian procedure in English law during the early eighteenth century.\textsuperscript{104} Moreover, there is similar evidence in a later, and more important, English justice of the peace manual.

d. Burn’s Justice of the Peace Manual

The leading eighteenth-century English justice of the peace manual, which Blackstone recommended to law students for the details of the role of that office in criminal procedure, was Richard Burn’s \textit{The Justice of the Peace, and Parish Officer}, first published in London in 1755 and republished in fourteen additional editions edited by Burn to 1785, and another fifteen thereafter to 1869.\textsuperscript{105} Like Dalton, Burn discussed Marian witness examinations in two entries, one for “Examination” and one for “Evidence.” The entry for “Examination” addressed Marian procedure itself and also provided relevant forms. Like Hawkins, Burn mostly just quoted or paraphrased the statutes; he said nothing about

\textsuperscript{103} \textit{See id.} at 542. The full passage begins by discussing the examinations of the persons “who bring” the arrestee, and then continues:

And if afterwards the said Justice shall hear of any other Persons that can inform any material Thing against the Prisoner to prove the Felony, whereof he is suspected; he may grant his Warrant for such Persons to come before him, and may also take their Information, &c. and may bind them to give Evidence against the Prisoner, for every one shall be admitted to give Evidence for the King.

\textit{Id.} at 542.

\textsuperscript{104} Note that these entries are inconsistent with, and thus cast doubt on, the implications that Kry and Crawford draw from the 1696 sources discussed \textit{infra} notes 125-51 and accompanying text.

\textsuperscript{105} \textit{Richard Burn, The Justice of the Peace, and Parish Officer} (1st ed. 1755) (two volumes). For bibliographic information, see \textit{Richard Whalley Bridgman, A Short View of Legal Bibliography} 42-43 (photo. reprint n.d.) (1807); 1 Maxwell, \textit{supra} note 4, at 225-26. To show continuity, I also cite the 1764, 1776, 1785, and 1797 editions.

Blackstone recommended that students interested in criminal procedure consult “Dr Burn’s \textit{justice of the peace}; wherein [the student] will find every thing relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.” 1 \textit{Blackstone, supra} note 78, at 343 (1st ed. 1765).
taking the witness examinations in the presence of the prisoner
or about cross-examination.106

The forms that accompanied the “Examination” entry
are also significant. Although a form was provided for
“Information of a witness,” it simply tracked the prefatory
format of the form for “Examination of a felon”—it did not
include any statement that the prisoner was present when the
examination was taken.107 That silence is significant. If there
had been an in-the-presence requirement, one would expect
that a statement that the witness’s information was taken in
the presence of the prisoner would have been made a
boilerplate aspect of the form, but there was no such statement.

The “Examination” entry also contained a form for a
warrant for a “material witness”—that is, for a warrant
comparable to the one discussed by Dalton for a constable to go
out and bring in a person who was thought to possess relevant
information about the felony, so that the justice could examine
that person and record his information under oath.108 Because
this warrant pertained to a person who was not among “those
who brought” the prisoner to the justice at the time of arrest,
its inclusion also undercuts any in-the-presence legal
requirement for Marian witness examinations. If there had
been such a rule, one would expect that Burn would have said
something about the need to retrieve the defendant and bring
him in at the same time as the material witness, but Burn did
not say that. The material witness form still appears at least
as late as the 1797 edition of Burn’s manual.109

Burn’s manual is especially relevant because the justice
of the peace manuals published in America prior to the framing
borrowed heavily from it. The principal manuals reprinted his
passages on Marian procedure as well as the accompanying
forms for witness examinations and material witnesses.110

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106 1 BURN, supra note 105, at 295-97 (1755 ed.) (discussing Marian
procedure); 1 id. at 536-38 (1785 ed.) (same); 1 id. at 671-73 (1797 ed.) (same).

107 1 BURN, supra note 105, at 297 (1755 ed.) (setting out forms for
examination of prisoner and information of witnesses); 1 id. at 538 (1785 ed.) (same); 1
id. at 673-74 (1797 ed.) (same).

108 1 BURN, supra note 105, at 298-99 (1755 ed.) (setting out form for material
witness warrant); 1 id. at 539-40 (1785 ed.) (same).

109 1 BURN, supra note 105, at 675 (1797 ed.) (setting out same form for
material witness warrant as in previous editions).

110 Several American manuals closely tracked Burn’s manual. See JOSEPH
GREENLEAF, AN ABRIDGMENT OF BURN’S JUSTICE OF THE PEACE AND PARISH OFFICER
118 (Boston 1773) (reprinting Burn’s discussion of Marian procedure and forms); JOHN
FAUCHERAUD GRIMKE, THE SOUTH-CAROLINA JUSTICE OF PEACE 199-202 (Phila. 1788)
The consistent silences in the framing-era authorities are powerful evidence of the “dog-that-did-not-bark-in-the-night" sort that there was no in-the-presence rule for Marian examinations. However, there is more evidence than silence. Several framing-era authorities juxtaposed Marian witness examinations to depositions in civil lawsuits which were subject to a cross-examination rule.

2. Contrasting Treatments of Marian Procedure and Civil Litigation Deposition Procedure

a. Gilbert’s Treatise

Chief Baron Geoffrey Gilbert authored a leading treatise, The Law of Evidence.111 As I pointed out in my prior article, he contrasted Marian examinations to the cross-examination rule that applied in non-Marian depositions in a passage regarding the implications of the 1696 ruling in King v. Paine112 by writing that the judges in that misdemeanor libel trial “would not allow the Examinations . . . to be given in Evidence, because Paine was not present to cross-examine [when the deposition at issue was taken], and tho’ tis Evidence in Indictments for Felony in such Case, by Force of [the Marian statutes], yet ‘tis not so in Informations for Misdemeanors . . . .”113 In other words, a Marian witness examination was admissible as “Evidence” in a felony trial regardless of cross-examination, but a deposition was...
inadmissible in a misdemeanor trial (to which the Marian statutes did not apply) unless the defendant had had an opportunity to cross-examine the deponent. That statement appeared in later editions, including the 1788 American edition of Gilbert’s treatise, and was still unaltered as late as the expanded and updated 1791 London edition.114

Gilbert also implicitly drew a contrast between civil lawsuit depositions and Marian witness examinations when he explicitly noted that an opportunity for cross-examination was required in the former, but made no comparable statement about the latter.115 Gilbert’s contrasting treatment was also echoed in later works.

b. The Theory of Evidence

Another evidence treatise, The Theory of Evidence, was published anonymously in London in 1761.116 This treatise stated that a deposition could be admitted into evidence in a variety of civil proceedings if, but only if, the other party had been given an opportunity to cross-examine when the deposition was taken. However, when this treatise discussed the admissibility in felony trials of Marian witness examinations taken by coroners or justices of the peace, it simply stated that Marian witness examinations could be admitted in evidence if the witness had become unavailable. The contrasting treatment is especially evident because this treatise connected these two subjects with the disjunctive “yet”:

It is a general Rule, that Depositi ons taken in a Court not of Record shall not be allowed in Evidence elsewhere. So it has been holden in Regard to Depositions in the Ecclesiastical Court, though the Witnesses were dead. So where there cannot be a cross Examination, as Depositions taken before Commissioner of Bankrupts, they shall not be read in Evidence, yet if the Witnesses examined on a Coroner’s Inquest are dead, or beyond Sea, their Depositions may be read; for the Coroner is an Officer appointed on behalf of the Public, to make Inquiry about the Matters within his Jurisdiction; and therefore the Law will presume the Depositions

114 Davies, supra note 2, at 145-46.
115 Compare Gilbert, supra note 15, at 46-47, 48 (1754 ed.) (indicating that an opportunity for cross-examination was a requirement for a deposition in civil lawsuits), with id. at 100 (1754 ed.) (not mentioning cross-examination regarding Marian examinations).
116 Henry Bathurst, The Theory of Evidence (Dublin 1761). There was no later edition of this work, which, though originally published anonymously, is now attributed to Henry Bathurst. See 1 Maxwell, supra note 4, at 378.
before him to be fairly and impartially taken.—And by [the Marian statutes] Justices of the Peace shall examine of Persons brought before them for Felony, and of those who brought them, and certify such Examination to the next Gaol-Delivery; but the Examination of the Prisoner shall be without Oath, and the others upon Oath, and these Examinations shall be read against the Offender upon an Indictment, if the Witnesses be dead.117

The contents of The Theory of Evidence, including the above passage, were subsequently restated in a 1767 treatise, An Introduction to the Law Relative to Trials at Nisi Prius,118 which I quoted in my previous article.119 The quoted passage then appeared in later editions of the Nisi Prius treatise that were published as late as 1793, including a New York edition published in 1788.120

c. Burn’s Justice of the Peace Manual

Burn’s leading English justice of the peace manual similarly contrasted Marian examinations in felony prosecutions with depositions in civil lawsuits. In addition to the description of Marian procedure noted above,121 Burn also discussed the admissibility of depositions in civil proceedings and the admissibility of Marian witness examinations of unavailable witnesses in a subpart of his entry for “Evidence” headed “Of written evidence.” In that discussion, Burn also contrasted the rule that an opportunity for cross-examination was a condition for admitting a deposition in a civil lawsuit to the admissibility of Marian witness examinations of unavailable witnesses.

117 BATHURST, supra note 116, at 33-34 (emphasis added). Kry concedes that the “yet” in the quoted passage “arguably” applies to Marian committal examinations as well as to coroners’ examinations, but suggests that it might apply only to coroners’ examinations. See Kry, supra note 3, at 500 n.28.

118 HENRY BATHURST, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT nisi prius (n.p. 1767). The incorporation of the contents of The Theory of Evidence into the Nisi Prius treatise and other later treatises was well known. See BRIDGMAN, supra note 105, at 230-31 (noting that the contents of The Theory of Evidence were “generally understood to have been engrafted on” the Nisi Prius treatise); 1 MAXWELL, supra note 4, at 378 (entry 1) (The Theory of Evidence incorporated into An Introduction to the Law Relative to Trials at Nisi Prius); 1 MAXWELL, supra note 4, at 335 (attributing the 1767 edition of the Nisi Prius treatise—first published anonymously—to Henry Bathurst and the 1772 edition to Francis Buller).

119 Davies, supra note 2, at 151 n.148 (quoting the passage in the text immediately after the “yet” cited supra text accompanying note 117).

120 Davies, supra note 2, at 151 n.147.

121 See supra text accompanying note 106.
Beginning in the 1764 edition of his manual, Burn apparently combined the statements about the requirement of cross-examination in depositions in civil proceedings that preceded the “yet” in the passage from The Theory of Evidence, with the sections from Hawkins’s criminal procedure treatise that discussed the admissibility of a Marian witness examination of an unavailable witness in a felony trial. Burn joined these two subjects with the disjunctive “but”:

So [in civil matters] where there cannot be a cross-examination, as depositions taken before commissioners of bankrupts, they shall not be read in evidence.

But it seems to be settled, that [a Marian examination of an unavailable witness] may be given in evidence at the [felony] trial . . . .122

Thus, Burn’s passage seems to indicate that cross-examination was a condition for the admission of depositions in the trial of civil lawsuits, “[b]ut” that it was not a requirement for the admission of Marian witness examinations in felony trials.

The contrasting treatment of these subjects in Burn’s manual is especially important because the passage quoted above was reprinted in several framing-era American justice of the peace journals.123 Other American manuals simply discussed the admissibility of a Marian examination of an unavailable witness separately from the admissibility of civil depositions.124 None mentioned either the presence of the prisoner or an opportunity for cross-examination as conditions for admitting a Marian examination of an unavailable witness.

3. Summary

The bottom line is that there were no statements in the framing-era authorities widely used in England and America—including the justice of the peace manuals that were intended

122 1 BURN, supra note 105, at 336 (1764 ed.). Note that the material preceding “but” came from The Theory of Evidence, BATHURST, supra note 116, at 34, while the material following “but” came from Hawkins’s treatise, 2 HAWKINS, supra note 4, at 429 (1771 ed.). The same passage is repeated in subsequent editions of Burn's manual. See, e.g., 1 id. at 516 (1785 ed.); 1 id. at 645 (1797 ed.).

123 See, e.g., GREENLEAF, supra note 110, at 118; GRIMKE, supra note 110, at 184; LADD, supra note 110, at 131-32. See Davies, supra note 2, at 182-86.

124 HODGE'S CONDUCTOR, supra note 110, at 168 (discussing the admissibility of Marian examinations of unavailable witnesses before very briefly touching on the admissibility of civil depositions); GAINES CONDUCTOR, supra note 110, at 137-38 (same).
to inform the very officials who administered Marian examinations—that stated any in-the-presence or cross-examination rule applicable to Marian witness examinations. Rather, the treatises and justice of the peace manuals contrasted the cross-examination standard for civil depositions to the absence of such a rule for Marian witness examinations.

Nevertheless, Kry discounts the published framing-era authorities that almost certainly informed the American Framers’ understanding of Marian procedure. Instead, he discusses English sources and practices that either could not have informed the Framers’ thinking, or were unlikely to have done so. Let me turn to these sources and practices.

C. Kry’s Pre-Framing Evidence for an In-the-Presence Practice

Like Crawford, Kry relies heavily on reports of two 1696 cases. He also goes beyond Crawford by describing Marian practices in eighteenth-century London, and then invokes the same three English cases from 1787, 1789, and 1791 that Crawford heavily relied upon—that is, the three cases that were published too late to have come to the Framers’ attention. I continue to doubt that any of this sheds much light on the original American understanding of the Confrontation Clause.

1. The 1696 Sources

Both Crawford and Kry rely heavily upon statements in two 1696 proceedings, the misdemeanor libel trial in King v. Paine, and a single colloquy in the attainder proceeding for treason in Parliament in Fenwick’s Case. The first said nothing material, while the second was too obscure to have mattered.

a. Paine

Kry says that the 1696 ruling in Paine is “Professor Davies’ other line of authority.” That is an odd way to put it. Justice Scalia asserted in Crawford that Paine had created an

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125 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1696), discussed in Crawford, 541 U.S. at 45-46.
126 13 How. St. Tr. 537 (H.C. 1696), discussed in Crawford, 541 U.S. at 45-46.
127 Kry, supra note 3, at 505.
across-the-board common-law cross-examination rule. I only responded, in criticizing that claim, that Justice Scalia had ignored the fundamental point that Marian procedure applied only to felony prosecutions, not to misdemeanor prosecutions. Thus, the ruling in the misdemeanor trial in Paine was not about Marian witness examinations. Instead, because all five of the reports of Paine explicitly indicated that the ruling in that case did not affect the admissibility of a Marian witness examination, and seemed to affirm the admissibility of Marian examinations of absent witnesses, I concluded that Paine could not have stated a general cross-examination rule. I also noted that the discussions of Paine that appeared in the framing-era treatises drew the same distinction between the deposition in that misdemeanor prosecution and Marian procedure in felonies. Hence, regardless of how one might tease out what Paine meant about the admissibility of non-Marian depositions in misdemeanor cases, there is no reason to think that a framing-era American would have viewed Paine as an authority that had any bearing on the admissibility of a Marian witness examination in a felony trial.

Indeed, as noted above, Gilbert (who was a contemporary of the Paine ruling) actually contrasted the inadmissibility of the deposition in that misdemeanor case with the admissibility of Marian examinations in felony trials when he wrote: “[T]ho’ tis Evidence in Indictments for Felony in such case by Force of [the Marian statutes], yet ‘tis not so in Informations for Misdemeanors.” Kry concedes that the “more natural[]” reading of this passage is that cross-examination was not a condition for admitting Marian depositions in felony trials, and that a similar interpretation

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128 541 U.S. at 45, 46.
129 See Davies, supra note 2, at 135-43. After reading Kry’s article, I wonder if I unnecessarily muddied the waters by speculating what Paine meant regarding the use of depositions in misdemeanor cases. See id. at 137-40. That really was beside the more basic point that Paine did not raise any doubt about the admissibility in a felony trial of a Marian witness examination of an unavailable witness. See id. at 140-42 (noting that all four versions of Paine that appear in the five reports indicated that the ruling against the admissibility of the deposition in the misdemeanor prosecution “had no effect on the rule that Marian [examinations] of unavailable witnesses were admissible in felony trials”).
130 Id. at 140-43. See also supra note 40.
131 Davies, supra note 2, at 143-49.
132 Gilbert died in 1726. BRIDGMAN, supra note 105, at 132.
133 See supra text accompanying note 113.
134 Kry, supra note 3, at 510-11.
of *Paine* is also evident in English decisions announced in 1739 and 1790.\(^\text{135}\) It seems likely that framing-era Americans also understood the “more natural[]” reading of Gilbert’s statement.

Nevertheless, Kry insists that *Paine* may have said something about Marian examinations. Although he concedes that the case is “ambiguous on its face,” Kry places weight on a variety of post-framing constructions of the case in English commentaries published in 1814 and 1816\(^\text{136}\) and on statements about *Paine* in American state cases decided in 1835, 1842, and 1844.\(^\text{137}\) On the basis of these post-framing constructions, he concludes that *Crawford’s* “interpretation [of *Paine*] cannot be dismissed as ‘fictional’ when that same interpretation was *ultimately* adopted as settled law.”\(^\text{138}\) I disagree.

As I discuss below, legal historians have long recognized that commentators and judges frequently shoehorn old cases into new conceptions without admitting as much.\(^\text{139}\) Indeed, Kry effectively concedes that *Paine* could not have been understood to create a cross-examination rule for Marian felony examinations during the eighteenth century when he concludes that there was only an “emerging consensus” regarding an in-the-presence rule “by the time of the framing” while a cross-examination rule was still a matter “of dispute” and emerged only “at some [later] point.”\(^\text{140}\) Hence, *Paine* plainly was not regarded as having created a cross-examination rule for Marian examinations during the eighteenth century. Rather, that gloss was applied only after the 1789 framing.

The fact that later nineteenth-century English commentators and American judges subsequently “widely read” *Paine* so that it fit then-prevailing conceptions\(^\text{141}\) simply does not constitute evidence that *Paine* would have been understood that way in framing-era America. Nineteenth-century judicial interpretations of earlier cases can be every bit as fictional as contemporary judicial interpretations of prior doctrines. The


\(^{136}\) *Id.* at 511.

\(^{137}\) *Id.* at 509.

\(^{138}\) *Id.* at 511 (emphasis added).

\(^{139}\) See supra text accompanying notes 309-10. See also *supra* note 26 (discussing unacknowledged judicial relaxation of arrest standard); *infra* notes 317-19 and accompanying text (discussing unacknowledged judicial invention of hearsay exceptions).

\(^{140}\) See infra text accompanying notes 66-67.

\(^{141}\) Kry, *supra* note 3, at 511.
important fact is that framing-era authorities consistently described Painé as simply indicating that Marian witness examinations constituted a distinct form of evidence subject to distinct rules.

b. Fenwick

Like Justice Scalia in Crawford, Kry also asserts that a colloquy that occurred during the 1696 attainder proceeding for treason in Fenwick indicated that Marian depositions had to be taken in the presence of the party.\textsuperscript{142} However, the mere fact that a statement was made sometime prior to the framing does not mean that framing-era Americans would have been familiar with the statement. One can safely assume that framing-era American lawyers and judges consulted the leading legal treatises and manuals. Conversely, it seems doubtful that they would have been conversant with the details of English treason trials or attainder proceedings that were reported at length in the State Trials case reports. Thus, I dismissed the Fenwick colloquy because it seemed improbable that the Framers would have been conversant with it.\textsuperscript{143}

Kry insists that I dismissed the Fenwick colloquy too quickly. He asserts that “[s]everal colonial libraries had copies of the State Trials,” that modern “scholars have assumed the Framers were familiar with their contents,” and that both Blackstone and Hawkins “discussed and cited” Fenwick.\textsuperscript{144}

Really?

Access to the State Trials set of reports, as well as to other specific sets of English case reports, was problematic in framing-era America. Law libraries were still privately owned, not public. Moreover, the State Trials set of reports was a multi-volume collection that grew from four volumes in 1719 to eleven in the fourth edition published over the period 1776-

\textsuperscript{142} Crawford, 541 U.S. at 45-46; Kry, supra note 3, at 501.
\textsuperscript{143} Cf. Kenneth Graham, Confrontation Stories: Raleigh on the Mayflower, 3 OHIO ST. J. CRIM. L. 209 (2005) (questioning the relevance of English treason trials to the American confrontation right). The ready availability of Howell’s 1816 edition of State Trials, complete with a comprehensive subject index, in modern law libraries may lead contemporary academics, lawyers, and judges to place undue emphasis on the State Trials as evidence of original meaning. For an early example of a false originalist claim based on Howell’s edition, see Davies, Fourth Amendment, supra note 20, at 726-27 (discussing Justice Bradley’s mistaken reliance on a report in State Trials for a novel claim in Boyd v. United States, 116 U.S. 616 (1886)).
\textsuperscript{144} Kry, supra note 3, at 502 (emphasis added).
It was also an expensive set of reports. Hence, because it is unclear that reports of treason trials or attainder proceedings in Parliament would have been of much practical value for American lawyers or judges, especially after 1775, it seems doubtful that many Americans obtained these reports prior to the framing.

Moreover, even if one had access to the set, finding material regarding a particular procedural point in the multiple volumes of the State Trials reports was no small feat because the indexes in the pre-framing editions were very limited. Reading these accounts was also no small undertaking; Fenwick’s attainder proceeding ran to ninety-six double-columned pages in the 1719 folio (large page) edition.

What about the references to Fenwick in Blackstone’s and Hawkins’s treatises that Kry refers to? They did mention Fenwick by name—but not for the point that was germane to the claim made by Kry or in Crawford. Because the English treason statutes required evidence of two witnesses for overt acts of treason, but the prosecutors could produce only one

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145 See 1 Maxwell, supra note 4, at 369 (indicating that State Trials consisted of four volumes in the 1719 first edition, six in 1730, eight in 1735, ten in 1766, and eleven in Hargrave’s edition published over the period 1776-1781). No further edition was published until Howell’s edition, published 1809-1826. Id. at 370.

146 See Bridgman, supra note 105, at 312-13 (commenting that Hargrave undertook to republish the set in eleven volumes in 1776 because “this work had become very scarce, and sold at a high price”). It may also be significant that Hargrave’s later edition was published during the years 1776-1781, the years of the Revolutionary War. See supra note 145.

147 There were four eighteenth-century editions of State Trials (or Tryals); the first folio edition in 1719, a second edition in 1730, a third in 1742, and Francis Hargrave’s fourth edition in 1776-1781. See 1 Maxwell, supra note 4, at 369. Each edition had an alphabetical topical index at the end of the final volume (none of the indexes had numbered pages). However, the indexes were quite superficial. In all of the editions, the entries for “Depositions” and “Examination” refer the reader to the entry for “Evidence.” In the “Evidence” entry, each of the indexes had a subentry for “Depositions of a Person absent read in Evidence in a capital Case” and each also had a subentry for the specific point in Fenwick that “No Evidence to be given in capital Cases but in the Prisoner’s Presence,” identifying the page discussing the presentation of evidence at trial, as discussed infra note 154 and accompanying text (discussing Hawkins’s citation to page “277”). However, none of the “Evidence” entries in the alphabetical tables had a subentry that led to the colloquy regarding the deposition of a witness having been taken in the absence of the defendant that Mr. Kry and Justice Scalia rely upon. Thus, a framing-era reader would not have identified Fenwick as a case discussing that point by using the indexes.

It is easy to overlook these deficiencies when doing research today, because Howell’s nineteenth-century edition of State Trials that is now commonly found on law library shelves does have a useful comprehensive subject index in which the colloquy in Fenwick can be identified—but that is only a post-framing development.

148 See The Tryal of Sir John Fenwick, 4 St. Tr. (1719 ed.) 232, 232-328 (H.C. 1696).
living witness against Fenwick, they could not prosecute him for treason in the law courts. Instead, he was prosecuted in an attainder proceeding in Parliament, where the admission of evidence was decided by vote. Fenwick was convicted on the basis of one live witness and one deposition of another person. Thus, Blackstone and Hawkins both discussed Fenwick simply as a departure from the two-witness treason standard—but neither discussed the point that the deposition in question was taken in Fenwick’s absence.

Blackstone did not mention a deposition at all. He wrote only that “in Sir John Fenwick’s case, in king William’s time, where there was but one witness, an act of parliament was made on purpose to attain him of treason, and he was executed.”\(^\text{149}\) Hawkins also discussed Fenwick simply as a departure from the two-witness rule. He mentioned that a deposition of a witness taken by a justice of the peace had been used as a substitute for a second live witness, but said nothing about whether the deposition was taken in the presence or absence of the prisoner.\(^\text{150}\) Thus, neither Blackstone’s nor Hawkins’s passage would have alerted a framing-era American that the requisites of valid Marian examinations were discussed in Fenwick.\(^\text{151}\) That said, however, I concede that Kry

\(^\text{149}\) 4 BLACKSTONE, supra note 78, at 351 (1st ed. 1769).

\(^\text{150}\) Hawkins wrote:

[I]t was agreed in Sir John Fenwick’s Case, that the Information of a Witness taken upon Oath before a Justice of Peace, being joined with the Evidence of one other Witness only viva voce, could not in the ordinary Course of Justice, amount to sufficient Evidence within the [treason statute] which requires two Witnesses in High Treason; and therefore it was thought necessary to proceed in that Case by Bill of Attainder in Parliament, whose Power can be restrained by no Rules but those of natural Justice.

2 HAWKINS, supra note 4, at 430 (1771 ed.) (citation omitted) (emphasis added); 2 LEACH’S HAWKINS, supra note 4, at 606 (1787 ed.) (citation omitted) (emphasis added).

\(^\text{151}\) Like Blackstone and Hawkins, Capel Lofft also did not mention that Fenwick was absent when the deposition was taken when Lofft added a discussion of Fenwick to Gilbert’s evidence treatise in 1791. 2 GILBERT, supra note 15, at 895-97 (Capel Lofft ed., 1791) (discussing evidence in attainder proceedings in Parliament). Lofft commented that the admission of a deposition of an “absent Witness” as evidence during Fenwick’s attainder trial in Parliament deprived Fenwick of meeting the witness “face to face” and of “cross-examining” the witness. However, he did not mention Fenwick’s absence when the deposition was taken. Id. at 897.

Thus, the important point about Dean Wigmore’s claim, which Justice Scalia quoted in Crawford, that Fenwick “must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination,” Crawford, 541 U.S. at 46 (quoting 3 JOHN H. WIGMORE, EVIDENCE § 1364 (2d ed. 1923)), is that the salient abuse associated with Fenwick in the accounts by Blackstone, Hawkins, and Lofft was the admission of a deposition of a witness who was merely absent from a trial rather than dead, and the associated loss of Fenwick’s opportunity
does identify a citation to *Fenwick* in Hawkins’s treatise that I overlooked, and it bears closer attention.

c. *Hawkins’s Margin Citation to “4 State Trials . . . 310”*

At the outset of Hawkins’s chapter on evidence in criminal cases, he wrote: “As to the nature of evidence, so far as it more particularly concerns criminal cases, having premised that it is a settled rule, That in cases of life no evidence is to be given against a prisoner but in his presence . . . .” When I read this passage, I assumed it referred simply to the “evidence” admitted at a felony trial. I assumed this because framing-era sources typically used the term “evidence” to refer to the proof offered at trial; hence, Marian witness examinations were not usually denoted as “evidence” unless they were admitted at trial. I did not notice that a citation in the margin next to the quoted passage (the eighteenth-century equivalent of a footnote) to “State Trials vol. 4 f. 277. 310” was a citation to *Fenwick*.

The statements on page 277 do relate to presenting evidence in the prisoner’s presence at trial. However, page 310 includes an argument that a witness’s deposition should have been taken in the prisoner’s presence. Specifically, there is an argument against the validity of “a Deposition of a Person that was absent [from trial], taken before a Justice of the Peace, when the Person accused, had no opportunity to interrogate him.” This argument was not successful; the

to cross-examine the witnesses against him during Fenwick’s attainder trial itself. In contrast, none of those accounts mentioned Fenwick’s absence when the deposition at issue was taken.

152 2 HAWKINS, supra note 4, at 428 (1771 ed.); 2 LEACH’S HAWKINS, supra note 4, at 602 (1787 ed.) (citation omitted). Of course, this passage presents serious problems for Justice Scalia’s other originalist claim in *Crawford* to the effect that the Framers would not have objected to the admission in criminal trials of unsworn out-of-court statements involving “nontestimonial hearsay.” See Davies, *Not the Framers’ Design*, supra note 17.

153 2 HAWKINS, supra note 4, at 428 n.(a) (1721 ed.), cited in Kry, supra note 3, at 502 n.38. Hawkins’s margin citation did not refer to *Fenwick* by name.

154 The Tryal of Sir John Fenwick, 4 St. Tr. (1719 ed.) 232, 277 (H.C. 1696) (referring to the “Evidence” that was introduced when a man was “upon Tryal for his Life”).

155 Sir Christopher Musgrave, speaking on Fenwick’s behalf during the attainder proceeding in the House of Commons, argued as follows:

It now will appear upon your Journals that you have caused to be read, a Deposition of a Person that was absent, taken before a Justice of Peace, when the Person accused, had no opportunity to interrogate him; and likewise that
House of Commons voted to admit the deposition, and also voted to condemn Fenwick.\footnote{156}{Fenwick, 4 St. Tr. at 310, 327.}

What is the significance of Hawkins’s margin citation to page 310? The cited passage in \textit{Fenwick} does not refer to Marian authority as such.\footnote{157}{Hawkins discussed the admission of depositions in treason cases in a subsequent section to his discussion of the admissibility of Marian witness examinations. That latter section does not mention the Marian statutes (which did not apply to treason as such). The passage on depositions focused on the inadmissibility of depositions of available witnesses who could have been produced in person. See \textit{2 Hawkins, supra} note 4, at 429-30 (1771 ed.) (Sections 6 and 9); \textit{2 Leach’s Hawkins, supra} note 4, at 605 (1787 ed.) (same).} Moreover, it seems unlikely that Hawkins meant to indicate that it was settled law that Marian witness examinations had to be conducted in the presence of the prisoner, because Hawkins had not mentioned any such requirement in the earlier sections of his treatise that had discussed Marian procedure itself.\footnote{158}{Hawkins’s “premise[ ]” appeared in volume 2, chapter 46, \textit{2 Hawkins, supra} note 4, at 428 (1771 ed.), but his discussions of Marian coroners’ examinations, bail procedure, and committal procedure were in volume 2, chapters 9, 15, and 16, \textit{id.} at 49, 104-05, 118-19. \textit{See also supra} note 99 and accompanying text. Hence, there was no indication in Hawkins’s treatise itself that the in-the-presence premise applied to Marian procedure.} Hence, it seems doubtful that the margin citation to page 310 in the report of \textit{Fenwick} was meant to indicate that Marian witness examinations had to be taken in the presence of the arrestee.

Additionally, whatever Hawkins intended, there are reasons to discount the likelihood that Americans would have noticed the margin citation to \textit{Fenwick}. For one thing, assessing the meaning of the margin citation was problematic insofar as it required access to the 1719 folio edition of State Trials reports—the page cite does not work for the later

\begin{quote}
you have heard a Witness as to what a Man swore in the Tryal of another Man: All this will appear upon your Books.

And truly, I would be glad to know if another Age may not be apt to think that you took these to make good the Defect of another Witness; and then I must appeal to you, if you have not admitted of a Testimony, which according to no Law is admitted.

They say you are not tied to the Rules of Westminster-Hall [the common-law courts], nor their Forms: Is there any Law in Being, that says a Judge may hear a Witness as to what was sworn upon the Tryal of another Person, to condemn him that was not Party to that Tryal. If there be no such Law, then the Rule is founded upon Justice and common Right, that nothing shall be brought against a Man when a Man was not a Party when the Oath was made, and he had no Opportunity to examine him.
\end{quote}

\textit{Id.} at 310. Note that Justice Scalia did not cite this passage in \textit{Crawford}; rather, he cited a colloquy that Hawkins did not cite. 541 U.S. at 45-46.
editions. In fact, unless one has access to the 1719 edition, one cannot even identify the citation as one to *Fenwick* (Hawkins cited only the pages, not the case name). Perhaps because of the limited usefulness of Hawkins's citation, the framing-era justice of the peace manuals did not repeat Hawkins's page cites to *Fenwick*.

Burn's leading English justice of the peace manual repeated Hawkins's "premise[]" that evidence be taken in the presence of the prisoner, but not in either of the entries that discussed Marian examinations. Rather, Burn quoted that passage only in a later part of his entry on "Evidence" under the heading "Of the manner of giving evidence" which related to testimony at trial, and he omitted Hawkins's margin citation to *Fenwick*.

Framing-era American justice of the peace manuals followed Burn's presentation of Hawkins's in-the-presence premise—they also quoted Hawkins's passage in the discussion of trial testimony without the margin citation to *Fenwick*.

Hence, it seems unlikely that Hawkins's margin citation would have alerted American readers to the colloquy in *Fenwick* that was cited in *Crawford*.

In sum, it does not appear that either *Paine* or *Fenwick* would have led framing-era Americans to think that Marian procedure involved either an in-the-presence or cross-examination rule. What about English practice?

2. Eighteenth-Century English Practice

After discussing the 1696 sources, Kry turns to English Marian practice during the eighteenth century. Although the English historian James Fitzjames Stephen previously reported that the prisoner was not present during Marian witness examinations, and Justice Scalia endorsed that

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159 1 BURN, supra note 105, at 293-94 (1755 ed.) (quoting Hawkins's passage but citing only "2 Haw. 248"); 1 id. at 533 (1785 ed.) (same); 1 id. at 668 (1797 ed.) (same).

160 See, e.g., GREENLEAF, supra note 110, at 128 (quoting Hawkins's text but citing only "2 Haw. 428."); GRIMKE, supra note 110, at 197 (same); HODGE'S CONDUCTOR, supra note 110, at 174 (same); GAINES'S CONDUCTOR, supra note 110, at 144 (same); LADD, supra note 110, at 154 (same).

161 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 221 (London, MacMillan 1883) ("The prisoner had no right to be, and probably never was, present [at a Marian witness examination].") I mentioned Stephen's assertion in my 2005 article but pointed out that he had presented no evidence to support it. See Davies, supra note 2, at 170.
account prior to *Crawford*, Kry indicates that Stephen’s account was erroneous. He reports that recent historical research, especially that by Professor John Beattie, has disclosed that during the eighteenth century, prisoners were routinely present for Marian examinations in London. Kry first argues that Marian witness examinations were routinely taken in the presence of the arrestee. He reports that “more than 80%” of a small sample of twenty-seven London Marian witness examinations from 1789 clearly reveal that the arrestee was present, and Kry interprets this to mean that the presence of the arrestee was a “near-universal” feature of London Marian procedure (though Kry concedes that these Marian examinations “provide little evidence of cross-examination”).

I do not intend to quarrel with Kry’s general description of the evolution of English Marian practice, which seems plausible. Rather, I identify three objections to treating Kry’s description of English practice as though it were evidence of the original American understanding of the confrontation right: First, a routine practice is hardly the same as a legal rule, requirement, or right, and Kry does not establish that the routine practice became a legal rule or right even in England prior to the framing of the Confrontation Clause in 1789. Second, there is no basis to assume that English Marian practice—indeed, London practice—provides a window on American Marian practice. And third, Kry does not provide a plausible explanation as to how framing-era Americans would have been aware of English Marian practice in the absence of published accounts of that practice.

The important question regarding original meaning is not what English Marian practice was, but how framing-era Americans understood Marian procedure. The work of contemporary historians of English criminal justice is certainly

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162 See White v. Illinois, 502 U.S. 346, 361 (1992) (Thomas, J., concurring) (“The prisoner had no right to be, and probably never was, present’ [at a Marian witness examination].” (quoting 1 Stephen, supra note 161, at 221)). Justice Scalia joined Justice Thomas’s concurring opinion. Id. at 358. Stephen’s claim is not repeated in *Crawford*. However, neither is there a statement in *Crawford* that earlier reliance on that claim was misplaced.

163 See Kry, supra note 3, at 516.

164 Id. at 516 n.93, 527-28, 531.

165 Id. at 512-16.

166 Id. at 514-16.

167 Id. at 535.
interesting in its own right, but it does not illuminate the original American understanding of the confrontation right.

3. “Routine” Practices Do Not Constitute Legal Rules

Although Kry at one point asserts that the prisoner would “necessarily” be present for Marian witness examinations, he usually describes English practice in terms of what was “routinely” or “almost invariably” done. For example, he states that “Marian examinations [in England] were routinely conducted in the prisoner’s presence[,] . . . [and] by the framing, there was an emerging consensus that presence was also a procedural right.” However, “routinely” and “emerging consensus” do not connote a settled legal rule, requirement, or right. Kry labels the practice he describes as a “procedural right,” but that is merely his own label; he does not identify any authoritative statement of such a “right” even in English law prior to 1789.

It may well be that the arrestee was often present, especially in London, when Marian witness examinations were taken. That practice, in turn, may have spawned an issue as to whether an arrestee should have a right to be present at such examinations. However, the only reference to the prisoner’s presence at Marian examinations that I have located in any English publication that Americans could have been aware of at the time of the framing merely posed a query as to whether a Marian examination should be admissible if the defendant was not present when it was taken. That query would seem to

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168 Id. at 523.
169 See, e.g., Kry, supra note 3, at 495 (defendant “routinely present”); id. at 516 (defendant “almost invariably present” in London Marian procedure).
170 Id. at 512 (emphasis added).
171 Although Kry indicates that the arrestee initially had no right to be present for the Marian examinations of witnesses, id. at 516 n.93, he quotes modern studies of English criminal procedure to the effect that presence and a cross-examination requirement were accepted “in its most general terms” in London “by 1790 or soon thereafter” or by “the end of the eighteenth century.” Id. at 542 n.225. However, the significant point for the present inquiry is that none of those studies assert any legal rules to those effects by 1789.
172 See 4 Thomas Wood, An Institute of the Laws of England 671 (9th ed. 1763) (stating, regarding Marian witness examinations, “that they may be read [if it is proved the witness is dead, or unable to travel, or kept away by the Prisoner]; but Qu. If the Defendant must not be present at the Time they are taken in order to make them good Evidence.” (“Qu.” being an abbreviation of “Quare” or “Query”). The “Advertisement” in the material at the front of this edition indicates that it was revised by “an eminent Barrister.” No query appeared in the previous edition. See 4 id. at 676-77 (8th ed. 1754). The query was repeated without change in the tenth edition
confirm that there was no recognized in-the-presence “rule.” It would also seem to confirm that neither of the 1696 rulings in Paine or Fenwick had created any such “rule.”

Indeed, there is a glaringly large gap in the English legal authorities that Kry construes as evidence of an in-the-presence rule. Kry does not cite any such authority after the two 1696 sources discussed above until the 1787 ruling in King v. Radbourne, the earliest of the three cases that Justice Scalia relied heavily upon in Crawford. That gap strongly suggests that no in-the-presence rule or right was recognized in English Marian procedure during the eighteenth century. Moreover, it is not that clear what Radbourne stands for.

a. The 1787 Ruling in Radbourne

In the 1787 Radbourne case, a justice of the peace's examination of a murder victim prior to her death was admitted in a trial in the Old Bailey, notwithstanding that it did not constitute a dying declaration, and notwithstanding that it was not taken in connection with Radbourne's arrest. The Twelve Judges then upheld that ruling. Radbourne was present for something in connection with the victim’s examination, but exactly what she was present for is uncertain because there are two different versions of the case report.

(described in the “Advertisement” as having been revised by “a Serjeant at Law”). See 4 id. at 642 (10th ed. 1772). However, that was the last edition published. See 1 MAXWELL, supra note 4, at 38.

Some of the relevant editions of Wood’s Institutes were imported by Americans, though apparently not in large numbers. A search of the online catalogs of public libraries in the United States reveals twenty-five copies of the 1763 edition and nineteen of the 1772 edition. I am indebted to my colleague Professor Sibyl Marshall for this information.

173 The description of the evidentiary issue in Radbourne varies depending on which edition of Leach's reports is consulted, as discussed in the text infra Part IV.C.3.a.


175 The victim’s examination in Radbourne was not a dying declaration because, at the time, the victim did not appreciate that she was dying. Additionally, the examination does not appear to have been taken in connection with Radbourne’s arrest or committal. The initial report lends that impression because it mentions that the victim’s examination was taken during the interval of several weeks that she lingered after the attack. Radbourne, Leach (1st ed. 1789) 399, 400 (Old Bailey and Twelve Judges 1787) [the first page is misnumbered “993”]. (According to the later 1800 version, the crime was committed on May 31st, but the examination was taken on June 9th. Radbourne, Leach (4th ed. 1815) at 459, 168 Eng. Rep. at 331.)

176 Like everyone else, when I wrote my 2005 article on Crawford, I erroneously assumed that the reports of Radbourne in the various editions of Leach would be the same. However, Professor Robert Mosteller subsequently called my
A short report of Radbourne was initially published in the first edition of Thomas Leach’s *Cases in Crown Law* in 1789\(^{177}\) (though too late to have come to the American Framers' attention\(^{178}\)). That version was reprinted, with only a small change, in Leach’s 1792 second edition.\(^{179}\) However, the *Radbourne* report was substantially enlarged and altered in Leach’s 1800 third edition.\(^{180}\) This later version was then reprinted in Leach’s 1815 fourth edition, which is now reprinted in the English Reports.\(^{181}\) Thus, the version of *Radbourne* cited in *Crawford* was not actually published until 1800.\(^{182}\)

There are several significant differences between the initial report and the 1800 version. One difference is that the 1789 report never mentioned the Marian statutes, but the 1800 version did.\(^{183}\) Hence, it is not altogether clear that *Radbourne* addressed a Marian witness examination at all, particularly because the examination in *Radbourne* does not seem to have

\(^{177}\) *Radbourne*, Leach (1st ed. 1789) at 399.

\(^{178}\) See supra notes 23-25 and accompanying text.

\(^{179}\) *Radbourne*, Leach (2d ed. 1792) 363 (Old Bailey and Twelve Judges 1787). The report in the second edition is the same as the first, except that the phrase “to [the victim] in the presence and hearing of the prisoner” was italicized in the second edition. *Id.* at 363.

\(^{180}\) *Radbourne*, 2 Leach (3d ed. 1800) 512 (Old Bailey and Twelve Judges 1787).


\(^{182}\) See supra note 13.

\(^{183}\) The 1800 version, reprinted in Leach’s 1815 edition and in the English Reports, does quote the prosecutor William Garrow as saying that the victim’s statement “was admissible as an information taken by a regular magistrate, under the statutes of Philip & Mary; for it had been given in the presence and hearing of the prisoner, upon an oath lawfully administered.” *Radbourne*, 2 Leach (3d ed. 1800) at 518, 168 Eng. Rep. at 332.

In contrast, there is no mention of the Marian statutes in the initial report of the case, which does not quote Garrow at all. See *Radbourne*, Leach (1st ed. 1789) 399 (Old Bailey 1787). Moreover, the absence of any mention of the Marian statutes in the first edition of Leach corresponds to the account of Garrow’s statement about the examination in the Proceedings of the Old Bailey account of *Radbourne*, in which he makes no mention of the Marian statutes, but seems to suggest that the victim’s examination should be admissible because Radbourne’s failure to object to it when she heard it was proof of her guilt. See Trial of Henrietta Radbourne (Old Bailey July 1787), The Proceedings of the Old Bailey, Ref: t17870711-1, http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html.
been taken in the post-arrest window for Marian procedure defined in the 1789 and 1791 cases.\textsuperscript{184} Radbourne’s relevance to Marian procedure is also clouded because the defendant was charged with petty treason as well as murder, and the treason statutes, unlike the Marian statutes, explicitly required that all evidence be taken in the presence of the prisoner.\textsuperscript{185}

A second difference between the reports relates to exactly what happened. The 1800 version that Justice Scalia cited states that two magistrates “in the presence of the prisoner, took down [the victim’s] deposition,” and “[t]he whole of this examination . . . was heard by the prisoner,” and “distinctly read over to her.”\textsuperscript{186} Likewise, Kry cites the 1800 version when he writes that the examination “was taken” in the presence of the prisoner.\textsuperscript{187}

However the initial report published in 1789 indicated only that “[the victim] gave an information upon oath, before a Justice of the Peace, which was read deliberately over to her in the presence and hearing of the prisoner, then signed by her, and authenticated by the magistrate.”\textsuperscript{188} The prosecuting attorney is quoted even in the later version as saying only that the examination was “given” in the prisoner’s presence,\textsuperscript{189} a

\textsuperscript{184} See infra note 197. There is a possibility that Thomas Leach may have purposely added the reference to the Marian statutes in the 1800 version as part of a campaign for a cross-examination rule. See infra note 191.

\textsuperscript{185} The defendant servant was charged with petty treason because the victim was her mistress, and petty treason, as a form of treason, would have been subject to the explicit requirement in the treason statutes, unlike the Marian statutes, that all evidence be taken in the presence of the prisoner. See Davies, supra note 2, at 165.

\textsuperscript{186} Radbourne, 2 Leach (3d ed. 1800) at 516; 1 Leach (4th ed. 1815) at 459, 168 Eng. Rep. at 331-32 (emphasis added).

\textsuperscript{187} Kry, supra note 3, at 517 & n.101.

\textsuperscript{188} Radbourne, Leach (1st ed. 1789) at 400 (emphasis added). The relevant passage in the 1789 version read as follows:

The deceased survived for several weeks the blows and wounds which were the cause of her death. During this interval, and before she was apprehensive of, or, from the evidence of the surgeon who attended her, had any reason to apprehend her approaching dissolution, she gave an information upon oath, before a Justice of the Peace, which was read deliberately over to her in the presence and hearing of the prisoner, then signed by her, and authenticated by the magistrate; and he was the only subscribing witness to it. This information, being regularly proved, was admitted in evidence against the prisoner [at trial] . . . .

\textit{Id.}

\textsuperscript{189} 1 Leach (4th ed. 1815) at 461, 168 Eng. Rep. at 332.
somewhat ambiguous verb that also appears in the account in the Proceedings of the Old Bailey.\(^{190}\)

Although saying that an examination was “taken” in the prisoner’s presence might imply some room for prisoner participation, merely “reading” the already written-out record of a witness examination in the presence of a defendant would not. Whichever version is more accurate (which is not clear\(^{191}\)), the emphasis in both is on the defendant’s having “heard” the examination; neither version indicates that Radbourne, the defendant, was allowed an active role in the victim’s examination.\(^{192}\) Thus, whatever Radbourne stood for, it did not involve cross-examination. There is also more than a little

\(^{190}\) Trial of Henrietta Radbourne (Old Bailey July 1787), The Proceedings of the Old Bailey, Ref: t17870711-1, http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html. The report of Radbourne in the Proceedings of the Old Bailey quotes prosecuting barrister William Garrow as stating that the victim’s examination “was given in the presence of the prisoner; she heard it, she saw it sworn to, she saw the deceased subscribe to it; and she heard her solemnly call God to witness, that it was true,” and further, that the defendant revealed her guilt because she “did not object to it when [she] heard it.” Id. Garrow’s verb “was given” is ambiguous because it could refer either to the taking or reading of the examination. James Crofts, the magistrate who administered the examination of the victim, said “the prisoner was there at the time, and heard the whole of this account, it was afterwards distinctly read over to the prisoner in the presence of [the victim], it was signed by [the victim].” Id.

\(^{191}\) Some of the changes between the initial report of Radbourne and the 1800 version suggest the possibility that Thomas Leach, who was not an official reporter, may have been creatively campaigning for a cross-examination rule. For example, the initial report used the more traditional term “examination” when referring to the victim’s statement, while the 1800 version used the term “deposition,” which carried the baggage that Marian examinations were not really sui generis. See supra note 80. Likewise, it is curious that the change from “read” to “taken down” was not made promptly in the 1792 second edition. Instead, Leach italicized the phrase “in the presence and hearing of the prisoner” in that edition. Radbourne, Leach (2d ed. 1792) at 363. Why did he add that emphasis? (One possibility is that it was a reaction to Justice Buller’s 1790 comments in Eriswell, discussed infra text accompanying notes 223-27.) In addition, as discussed supra note 183, there was no mention of the Marian statutes in the 1789 report of Radbourne, and there is also none in the account in the Proceedings in the Old Bailey.

It may also be significant that Thomas Leach’s 1795 edition of Hawkins’s treatise was the first commentary to assert that a Marian deposition of a deceased witness was inadmissible unless it had been taken in the presence of the prisoner and the prisoner had an opportunity to cross-examine. See 4 LEACH’S HAWKINS, supra note 4, at 423 (1795 ed.) (basing a new section on Woodcock and Dingler, but not mentioning Radbourne). As Kry indicates, no other commentary seems to have mentioned “cross-examination” until 1816. See Kry, supra note 3, at 495 n.11. Leach seems to have been a bit ahead of his time.

\(^{192}\) Justice Buller, who participated in the Twelve Judges’ review of Radbourne, later made comments about Radbourne that seem to comport with the examination only having been read in the prisoner’s presence. See infra text accompanying note 223.
uncertainty as to what the later 1789 case that Kry discusses (and on which Crawford also heavily relied) stood for.

b. The 1789 Ruling in Woodcock

The 1789 Old Bailey ruling in *King v. Woodcock* refused to admit the examination of a murder victim because the examination was not taken in connection with the defendant’s arrest. Unfortunately, the report never says whether the defendant was arrested and committed before or after the examination. The trial judge, Chief Baron Eyre (the chief judge of the Court of Exchequer), stated that the examination was not “of the nature” of a Marian examination because “[i]t was not taken, as the statute directs, in a case where the prisoner was brought before [the justice of the peace] in custody; the prisoner therefore had no opportunity of contradicting the facts it contains.” He went on to state that the examination was not taken in the discharge of a justice of the peace’s duty “by which he is, on hearing the witnesses, to bail or commit the prisoner; but it was a voluntary and extrajudicial act”—that is it was not within Marian authority. Thus, because the victim’s examination was taken in “circumstances where the Justice was not authorized to administer an oath,” Eyre ruled that the examination “cannot

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193 See Crawford, 541 U.S. at 46-47, 54 n.5.

194 Leach (1st ed. 1789) 437; 1 Leach (4th ed. 1815) 500, 168 Eng. Rep. 352 (Old Bailey 1789). Unlike Radbourne, the version of the report of the 1789 ruling in Woodcock that now appears in the English Reports is essentially unchanged from that in Leach’s first and second editions, except for the addition of a final sentence pertaining to the judge’s leaving to the jury the question of whether the deceased victim’s statement constituted a dying declaration. See Woodcock, 1 Leach (4th ed. 1815) at 504, 168 Eng. Rep. at 354.

However, there is other evidence that Leach apparently misunderstood the ruling in Woodcock when he published his first edition of *Cases in Crown Law* in 1789. The initial report of Radbourne in that volume contained a marginal note to Woodcock that erroneously indicated that the statement had been admitted in evidence even though it was not a dying declaration. Radbourne, Leach (1st ed. 1789) 399, 400 n.(a) (Old Bailey and Twelve Judges 1787). Actually, the jury’s conviction of the defendant indicates that they must have decided the victim’s statement was a dying declaration, and the text of the Leach’s original note was deleted in the 1792 second edition report of Radbourne. I am indebted to Mr. Kry for a copy of the 1792 report.

195 The justice went to the local poorhouse to take the victim’s examination. The case report does not state when the defendant (her husband) was arrested in relation to the victim’s examination, or whether her allegations were known when the defendant’s own examination was recorded.
be admitted before a Jury as evidence; for no evidence can be legal unless it be given upon oath, judicially taken.\textsuperscript{196}

The thrust of Eyre's statement seems to be that an examination of a deceased witness could be admissible under Marian authority only if it were taken in connection with the defendant's arrest and committal. Indeed, the logic he expressed would seem to indicate that the victim's examination would have been inadmissible as being outside Marian authority even if the prisoner had been present. (However, it is difficult to square Eyre's logic with the admission of the victim examination in \textit{Radbourne}—that is, assuming the latter had involved Marian authority.\textsuperscript{197})

It may also be significant that Eyre referred only to the prisoner's loss of an opportunity to "contradict," rather than to a loss of an opportunity to cross-examine.\textsuperscript{198} Eyre's use of "contradict" suggests that his concern was that the defendant lost the opportunity to have his \textit{response} to the victim's allegation \textit{recorded} for use at trial, rather than any opportunity for the defendant to cross-examine or otherwise participate in the victim's examination.\textsuperscript{199}

Marian procedure did not call only for the justice of the peace to record the witness's sworn information; in addition, the justice of the peace was required to record the "examination" of the prisoner as well. Unlike the witness examinations, the written record of the prisoner's examination


\textsuperscript{197} The victim's examination that was admitted in \textit{Radbourne} does not seem to have been taken in connection with Radbourne's arrest; hence, it does not seem to fit Woodcock's definition of the scope of Marian authority. That calls into question whether \textit{Radbourne} was actually understood to involve admission of a Marian examination. See supra notes 183-84 and accompanying text.

Note, too, that there is also a tension between Woodcock and the "material witness warrants" that were still appearing in the discussion of Marian procedure in Burn's justice of the peace manual, discussed supra notes 108-10 and accompanying text. These warrants seemed to imply a wider window for the exercise of Marian examination authority. These tensions suggest to me that Marian procedure was unsettled and undergoing change in England in 1789, not that it was settled as Kry suggests.

\textsuperscript{198} I previously discussed the judge's use of the term "contradict" rather than "cross-examine." See Davies, supra note 2, at 167 n.196.

\textsuperscript{199} Professor Langbein has described Woodcock as the first "judicial mention" of the loss of cross-examination as a ground for excluding hearsay statements, but he refers to a general statement of the reasons why hearsay statements were excluded from evidence, not to Eyre's specific reference to the defendant's loss of an opportunity to "contradict." JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 238 (2003). I fear I previously misstated his view of Woodcock. See Davies, supra note 2, at 167 n.196.
was always admissible evidence in his trial and was routinely read to the jury. Hence, if the defendant failed to deny factual accusations at the time of his arrest—that is, failed to “contradict” them—the record of his examination could undercut the credibility of any denial he made for the first time later at trial, by which time he had had more time to arrange a story. For example, according to the report of Radbourne in the Proceedings of the Old Bailey, the prosecutor Garrow argued that Radbourne’s guilt was shown by the fact that she did not object when she heard the victim’s accusations, and thus did not behave like an innocent person would have behaved.

Thus, when Eyre referred to the loss of the defendant’s opportunity to “contradict” allegations, he may have meant that the victim’s statement had been taken after the defendant’s post-arrest examination had already been taken and recorded, so the defendant had no opportunity to have his contemporaneous denial of the victim’s allegations recorded for possible use later in his defense at trial. If that is what Eyre meant, his statement would not necessarily imply that the prisoner should have been present for the victim’s examination. Although the prisoner could have learned of the victim’s allegations by hearing the witness examination in person, the justice of the peace could also have informed the prisoner of the allegations when he took the prisoner’s examination separately—provided the victim’s examination had been taken before the prisoner’s.

200 See, e.g., 2 HAWKINS, supra note 4, at 429, 431 (1771 ed.); 2 LEACH’S HAWKINS, supra note 4, at 603-04, 606-07 (1787 ed.).

201 See supra note 190.

202 The importance attached to an arrestee’s immediate denial of a charge is also evident in contemporary English procedure. See, e.g., Police and Criminal Evidence Act, 1984, c. 60 (Eng.) (directing English police to caution suspects at the start of an interrogation that “[i]t may harm your defense if you do not mention when questioned something which you later rely on in court”).

203 The fact that the Dingler ruling was based on Woodcock suggests that the scenario in Woodcock also involved a situation in which the victim’s examination was conducted after the defendant had already been arrested and committed. See infra text accompanying notes 212-13.

204 Kry suggests that the defendant in Woodcock was not literally denied an opportunity to “contradict” the witness; he could have given a contradictory account at trial after the deposition was read. Implicit in the court’s holding is that the defendant was denied an opportunity to contradict the witness at a time when the witness could be required to respond to the contradictions—which is, in substance, an opportunity to cross-examine.
Thus, it is not clear that Eyre was actually referring to any departure from an in-the-presence Marian practice when he referred only to the loss of the defendant’s opportunity to “contradict.”205 As with Radbourne, we can only guess at critical aspects of Woodcock.

c. The 1791 Ruling in Dingler

The 1791 Old Bailey ruling in King v. Dingler,206 which Crawford and Kry both invoke as evidence,207 now turns out to be even more distant from the American framing than I suggested in my 2005 article. Because I could not locate a copy of Leach’s 1792 second edition, in that article I assumed that Dingler would have been included in that edition, and simply noted that it could not have been published prior to even the ratification of the Sixth Amendment in 1791.208 However, Mr. Kry located a copy of the second edition and discovered that Dingler was not included in it.209 Instead, Dingler was never reported until Leach’s third edition in 1800.210

The delay in the publication of Dingler is significant because Dingler is the only one of the three cases cited by Justice Scalia in Crawford that actually mentions “cross-examin[ation].” Even there, that term appeared only in an argument by the defense counsel,211 not in a statement by the court.

Kry, supra note 3, at 532.

The response to his first point is that a denial at trial would not be as credible as a contemporaneous denial. See supra note 190. Kry’s claim as to what is “implicit” in the court’s holding ignores the various ways that a defendant could “contradict” allegations.

205 The interpretation I offer of Eyre’s comments would also explain why Justice Ashhurst, who was also on the bench during Woodcock, did not object to a later statement made by Justice Buller to the effect that there was no in-the-presence requirement for Marian examinations. See infra text accompanying notes 229-30.


207 Crawford, 541 U.S. at 46, 54 n.5; Kry, supra note 3, at 519-23.

208 Davies, supra note 2, at 157 n.164.

209 See Kry, supra note 3, at 519 n.107.

210 Dingler, 2 Leach (3d ed. 1800) 638 (Old Bailey 1791). However, Leach did mention the still-unreported decision in Dingler in a passage he added in his 1795 edition of Hawkins’s treatise. See supra note 191.

211 See Dingler, 2 Leach (4th ed. 1815) at 562, 168 Eng. Rep. at 383-84 (indicating that “cross-examination” was mentioned by “Garrow, for the prisoner”). Kry suggests that the fact that the counsel was William Garrow was significant because he was “the most famous criminal defense lawyer of his time” and if he thought cross-examination was a right, that indicates that others also would have thought that. Kry, supra note 3, at 533-34. However, Garrow could just as easily have been on the cutting edge of the argument. Professor Langbein also describes Garrow
Most of counsel’s arguments dealt with the issue of whether the examination had been taken within the window of Marian post-arrest authority. The only statement attributed to the court was that the victim examination at issue was inadmissible “on the authority of [Woodcock].” Because the report in Dingler does clearly state that the defendant had already been committed to jail to await trial when the victim’s examination was taken, it seems fairly clear that the victim’s statement was inadmissible because it was taken outside of the window for the exercise of Marian authority created by a felony arrest. Moreover, the court’s treatment of Woodcock as the controlling authority in that setting would seem to imply that a similar situation had occurred in Woodcock, as I speculated above.

Radbourne, Woodcock, and Dingler indicate that Marian procedure in England was unsettled around the time of the American framing. Woodcock and Dingler also appear to indicate that English judges were beginning to take a more restrictive view of the post-arrest window for exercising Marian examination authority than had previously been the case. For example, the rulings in Woodcock and Dingler do seem to rule out taking examinations of material witnesses after the committal of the prisoner, even though forms for such warrants were still appearing in the justice of the peace manuals.

However, Kry insists that these cases reflect a settled in-the-presence rule for Marian examinations. He even asserts that the 1789 ruling in Woodcock and the 1791 ruling in Dingler “simply confirm what [Marian] procedure already was.” However, that assertion seems to collide with Kry’s

as a “dominant figure” in that period, but characterizes him as “the trickster.”

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213 The report in Dingler indicates that the victim’s examination was taken the day after the defendant was arrested and “committed . . . to take his trial at the next gaol delivery.” 2 Leach (4th ed. 1815) at 561, 168 Eng. Rep. at 383.

214 See supra notes 108-10 and accompanying text.

215 Kry, supra note 3, at 535 (citing Leach’s claims about Woodcock and Dingler in the passage Leach added to the 1795 edition of Hawkins’s treatise, discussed supra note 191, and noting that “[l]ater treatises and cases that conditioned admissibility on an opportunity for cross-examination often similarly traced that requirement to Woodcock and Dingler”).

216 Id. at 522. He also notes that those rulings “do not purport to change Marian committal procedure in any way.” Id. However, the absence of a statement of novelty would be significant only if one naively expects judges to announce what they are doing whenever they innovate.
own account of the evolution of Marian practice during the eighteenth century. Indeed, if there was already a well-established in-the-presence legal rule for Marian witness examinations in 1789 or 1791, why did the justices of the peace who took the victims’ examinations in Woodcock and Dingler think they were authorized to take witness examinations in the absence of the arrestee? It is one thing to say that Woodcock and Dingler indicate movement toward the creation of an in-the-presence rule; it is quite another to assume they merely announced the continuation of an existing doctrine that somehow had remained unstated.

d. The Statements of the King’s Bench Judges in Eriswell

Kry’s suggestion that the 1789 Old Bailey ruling in Woodcock reflected a settled in-the-presence rule is also undermined by statements that the judges of King’s Bench made in the 1790 ruling in King v. Inhabitants of Eriswell (“Eriswell”). Eriswell was not a criminal case; it was a Crown suit charging a town’s inhabitants with the care of a pauper who had become insane. The issue was the admissibility of a sworn examination of the pauper taken by justices of the peace when the villagers of Eriswell were not represented. The topic of Marian examination procedure came up only indirectly as the judges discussed whether the pauper’s sworn statement of residence constituted admissible evidence, but what the four judges of King’s Bench said is significant because, by virtue of that court’s jurisdiction, they had primacy in matters of

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217 See supra notes 34-35, 164-65 and accompanying text.
218 3 T.R. 707, 100 Eng. Rep. 815 (K.B. 1790). The report of this case in the Term Reports, as reprinted in the English Reports, appears to be the same, with one exception, to the report initially published in 1790 by Charles Durnford and Edward Hyde East under the title, Reports of Cases Argued and Determined in the Court of King’s Bench from Hilary Term, 29th George III. to Trinity Term, 30th George III (London, A. Strahan & W. Woodfall). Durnford and East, the editors, added a footnote in the 1797 edition to the effect that a Marian witness examination was not admissible “unless the accused be present,” even though a coroner’s Marian examination was admissible regardless. Eriswell, 3 T.R. (1797 ed.) at 710 n.(c), 100 Eng. Rep. at 817 n.(c). No such footnote appears in the 1790 edition. See 3 T.R. (1790 ed.) at 710.

However, Kry cites the “case report” in Eriswell as having “expressly conditioned admissibility on either an opportunity to cross-examine or the prisoner’s presence at the examination,” but he refers only to the 1797 footnote that was added by the authors, not to any statement by the judges. See Kry, supra note 3, at 496 n.12 (citing Eriswell, 3 T. R. (1797 ed.) at 710 n.(c), 100 Eng. Rep. at 817 n.(c)).
219 Eriswell, 3 T.R. at 707-08, 100 Eng. Rep. at 815-16.
220 Id. at 708, 100 Eng. Rep. at 816.
criminal law and procedure. Indeed, Americans understood that rulings by the King's Bench were more authoritative than those in the Old Bailey itself.

Two of the justices, Buller and Ashurst, ruled that the deposition was admissible. In the course of the discussion, Justice Buller made the following statement about Marian examinations:

Where an act is judicially done, it is not necessary that the person to be affected by it should be present in order to make it evidence against him, and therefore depositions taken . . . in the absence of the prisoner must be read. So it was determined by all the Judges in Radburn's case, Michaelmas Term 1787.

In Crawford, Justice Scalia dismissed Buller's statement by noting that an 1826 English commentary had criticized Buller as misstating the fact that the deposition in Radbourne was taken in the prisoner's presence. Kry also asserts that Radbourne "squarely refutes [Buller's] position," and cites similar criticisms in 1801, 1802, and 1824 commentaries.

However, Buller's view of Radbourne cannot be so readily dismissed because he had participated when the Twelve Judges reviewed Radbourne's conviction in December Michaelmas Term 1787. Moreover, his statement in Eriswell is not actually inconsistent with Leach's initial report.

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221 There were four central or "superior" courts at Westminster in London: King's Bench, Common Pleas, Exchequer, and Chancery. Although judges from these central courts sometimes sat for trials in the Old Bailey, the felony trial court for London, the King's Bench had exclusive jurisdiction over criminal cases in the allocation of subject matter jurisdiction among the central courts. See 3 Blackstone (1st ed. 1768), supra note 78, at 42.

222 For example, in an 1807 Supreme Court argument, counsel cited statements from the King's Bench ruling in Eriswell but not from the Old Bailey rulings in Woodcock or Dingler. See infra text accompanying note 300.

223 Eriswell, 3 T.R. at 713-14, 100 Eng. Rep. at 819. Buller was also identified as the author of some editions of the treatise An Introduction to the Law Relative to Trials at Nisi Prius, discussed supra note 118.

224 Crawford, 541 U.S. at 54-55 n.5.

225 Kry, supra note 3, at 526. Kry also says that nineteenth-century commentators' negative reception of Buller's view suggests that "even around the time Eriswell was decided, the prevailing view in the legal community was that Buller's dictum had misstated the law." Id. at 527. However, the only evidence he offers for that assessment are statements by commentators that appeared years later in 1797 and 1801. See id. at 526-27. Do commentators have more to do with "the prevailing view" of criminal evidence doctrine than the judges of the King's Bench?

226 Buller was appointed to the Court of King's Bench in 1778. Edward Foss, Judges of England 252-53 (1864; reprinted 1966). The report of Radbourne shows all of the Twelve Judges participated except Mansfield. King v. Radbourne, Leach (1st ed. 1789) 399, 401 (Old Bailey and Twelve Judges 1787).
of Radbourne to the effect that the examination was simply “read” in the defendant’s presence, rather than being “taken” in her presence, which could be how Radbourne was argued to the Twelve Judges. As noted above, the term “taken” did not appear until the 1800 version of Radbourne.227 Thus, the criticism of Buller seems to be based only on the revised 1800 version of Radbourne, which was not published until a decade after Buller made his statement in Eriswell.

Justice Ashhurst said nothing in Eriswell about Marian examinations, but simply expressed a reluctance to alter prior law and concurred with Buller’s remarks in a general way.228 His silence is noteworthy because he had been on the Old Bailey bench with Chief Baron Eyre during the trial in Woodcock a year earlier.229 The fact that Ashhurst did not take issue with Buller’s statement may indicate that Woodcock had not ruled that the prisoner had to be present at the taking of a Marian witness examination, but only had to have a chance to “contradict” witnesses’ allegations in his own examination.230

The other two King’s Bench justices who participated in Eriswell expressed the view that the pauper’s deposition should be inadmissible. The significant point for present purposes is that neither suggested that there was an in-the-presence rule in Marian examinations themselves. Justice Grose stated that

Before the [Marian statute], a deposition taken before the justice of the county where the murder was committed was not evidence, even though the party died or was unable to travel. Why? Because although the justice had jurisdiction to enquire into the fact, the common law did not permit a person accused to be affected by an examination taken in his absence, because he could not cross examine; and therefore that statute was made.231

Note that Grose indicated that the Marian statute had been enacted to permit the admission of ex parte examinations.

227 See supra note 191.
229 Unlike modern American trials, it was common for more than one judge to be on the bench during a criminal trial in the Old Bailey. See King v. Woodcock, 1 Leach (4th ed. 1815) 500, 500, 168 Eng. Rep. 352, 352 (Old Bailey 1789) (stating that “Woodcock was tried before Lord Chief Baron Eyre, present Mr. Justice Ashhurst, and Mr. Sergeant Adair, Recorder”).
230 See supra notes 198-205 and accompanying text.
231 Eriswell, 3 T.R. at 710, 100 Eng. Rep. at 817 (emphasis added) (notes omitted). This was the point to which the authors of Term Reports addressed the footnote described supra note 218.
Additionally, Chief Justice Kenyon appears to have conceded that Marian witness examinations in felony cases constituted “exceptions” to the usual rules for admitting depositions.\textsuperscript{232} Kry concedes that “Grose and Kenyon never clearly dispute[d Buller’s] premise,”\textsuperscript{233} but that is an understatement.

Kry admits that the statements of the King’s Bench judges in the 1790 ruling in \textit{Eriswell} demonstrate that “[t]he [in-the-presence] rule articulated by \textit{Radbourne, Woodcock,} and \textit{Dingler} was not universally accepted.”\textsuperscript{234} However, how was it a “rule” if the judges of King’s Bench did not recognize it? The judges’ statements in \textit{Eriswell} cut against the existence of any in-the-presence rule in Marian procedure as of 1790. In fact, Kry mentions that the judges made comments similar to those in \textit{Eriswell} in another case in 1793.\textsuperscript{235}

Remarkably, Kry nevertheless announces under the heading “Conclusion” that, “[a]t some point before the framing”—that is, 1789—the practice of “routinely conduct[ing] Marian witness examinations] in the prisoner’s presence” had “hardened into a procedural right.”\textsuperscript{236} How can that be when the judges of King’s Bench apparently knew of no such rule in 1790 or 1793? As noted above, no such rule was stated in any of the treatises or justice of the peace manuals that had been published by 1789; the first claim of any such rule appears in Leach’s alterations of Hawkins’s treatise in 1795—six years after the framing—and it was based only on Leach’s own report of the 1789 ruling in \textit{Woodcock} and the still unpublished 1791

\textsuperscript{232} \textit{Id.} at 722, 100 Eng. Rep. at 823. Kenyon said:

It has been said that there are cases where examinations [not taken in the presence of the party] are admitted, namely, before the coroner, and before magistrates in cases of felony. . . . Those exceptions alluded to are founded on the [Marian statutes]; and that they go no further is abundantly proved. . . . But, without stating the cases which occur on this head, I will do little more than to refer to the case of \textit{The King v. Paine} in Salk. 281, & 5 Mod. 163. That was not loosely decided, but was the opinion of this Court assisted by the Court of Common Pleas. In Salkeld’s report of that case it is expressly said that the rule cannot be extended further than the particular case of felony . . . .


\textsuperscript{233} Kry, supra note 3, at 525.

\textsuperscript{234} \textit{Id.} at 524.

\textsuperscript{235} \textit{Id.} at 526 n.137 (citing King v. Ravenstone, 5 T.R. 373, 374, 101 Eng. Rep. 209, 209 (K.B. 1793)).

\textsuperscript{236} \textit{Id.} at 527 (emphasis added). Even more remarkably, Kry writes in the conclusion of his article that it is hard to say “[h]ow long before the framing” the “procedural right” to be present “hardened.” \textit{Id.} at 554.
ruling in Dingler.237 Prior to 1795, the supposed rule is missing from the very authorities that were meant to instruct justices of the peace in taking Marian examinations.

The bottom line is that Kry’s conclusion regarding a “hardened” in-the-presence rule outstrips his evidence.238 Likewise, his pre-framing evidence falls far short of Crawford’s claim of a settled cross-examination rule. As noted above, all Kry claims about a right to cross-examine in Marian examinations is that, at the time of the 1789 framing, the “absence of such a right” was not “firmly established.”239

Kry’s English evidence indicates that the English (or London) bar was agitating for in-the-presence and cross-examination rules in 1789, but that the English bench was still resisting that demand. Indeed, one 1789 evidence commentary says precisely that.240 However, it is not clear whether this agitation had spread beyond London committal proceedings, and there is no evidence that Americans were aware of it.

237 See supra note 191.
238 Kry cites two English cases in addition to the cases discussed in the text. He asserts that the King’s Bench held in 1761 “that testimony must be given in the prisoner’s presence.” Kry, supra note 3, at 545 (citing King v. Vipont, 2 Burr. 1163, 1165, 97 Eng. Rep. 767, 768 (K.B. 1761)). However, that case did not involve Marian practice because it did not involve a felony, and it appears that the justice of the peace who decided the case in a summary proceeding treated a single deposition as conclusive proof of the defendant’s guilt, and in effect denied him a trial.

Kry also discusses Ayrton v. Addington, an unreported 1780 civil lawsuit, as an example of “attempted cross-examination at a committal hearing.” Id. at 538. However, in that instance, the magistrate William Addington had refused to permit an attorney, Thomas Ayrton, to cross-examine a witness at a committal hearing because it was “not a trial but an examination of prisoners,” and, when the attorney persisted, the magistrate had him removed from the hearing room. Id. at 537 (quoting Ayrton v. Addington (Dec. 7, 1780), in 2 James Oldham, The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 1023, 1025-26 (1992)). The attorney then sued the magistrate and the jury gave a verdict for the attorney. Id. at 538. Kry suggests that the jury’s approval of cross-examination is “[i]mplicit in the verdict,” but that is far from clear; it seems likely that the attorney’s removal was the gravamen of the lawsuit. Id.

Similarly, Kry cites London newspaper accounts of incidents in 1774 in which cross-examination was disallowed during a committal hearing, and in 1786 in which cross-examination was allowed. Id. at 538-39.
239 Id. at 541 (emphasis added).
240 See 1 John Morgan, Essays Upon the Law of Evidence, New Trials, Special Verdicts, Trials at Bar, and Repleaders 431 (London 1789) (stating that the admissibility of Marian examinations of unavailable witnesses “shews the propriety and justice of permitting a prisoner by himself, or counsel to cross-examine any witnesses produced against him, before the magistrate, though some justices have strenuously contended against the right”).

A second objection to Kry's descriptions of English Marian practice is that there is no reason to assume that English practice, as opposed to published English doctrine, informed American Marian practice. Indeed, Kry primarily describes practice in London. It makes sense that the high volume of arrests in London and its environs would have led to an unusual degree of institutionalization of felony committal hearings. As a result, “Newgate solicitors” may have found it worthwhile to hang around the London committal courtroom because of the high volume of potential business to be found there, and London magistrates may have accommodated them. However, it seems unlikely that similar circumstances would have existed in rural England or even in smaller cities, where Marian committal hearings would not have been held on such a routinized basis. Hence, it is not clear that the urban Marian practice that Kry describes would even have been typical of the rest of England in 1789, much less America.

Additionally, Kry argues that cross-examination became relevant to English Marian practice only when London justices of the peace began to depart from the doctrinal rule by widely exercising extra-legal discretion to dismiss felony charges at Marian committal hearings if they concluded that evidence of the arrestee's guilt was weak. However, there is no evidence that American justices of the peace widely exercised similar discretion. Rather, the framing-era American justice of the

241 There are references to London throughout Kry's descriptions of pre-framing, eighteenth-century English practice: e.g., Middlesex, Newgate (the prison adjacent to the Old Bailey), Bow Street, the Guildhall magistrates' court, etc.

242 Kry notes that “Newgate solicitors” appeared in committal hearings in London, and suggests that shows there is “no substance” to my prior statement that arrestees would not have been represented by counsel at the time of a Marian committal proceeding. See Kry, supra note 3, at 530 n.154 (criticizing Davies, supra note 2, at 170). However, there is no apparent reason to assume that lawyers would have been as active in committal hearings outside of London or other large cities, and there is no apparent basis for assuming that lawyers would have been widely involved in American Marian committal practice.

243 For example, the Old Bailey had eight trial sessions a year, but outlying cities had only two assizes a year. See LANGBEIN, supra note 199, at 17.

244 Kry, supra note 3, at 528-29, 554-55 (noting that cross-examination in Marian examinations served no purpose without this development).

245 Kry does not offer any evidence as to how American justices of the peace conducted Marian examinations prior to 1789, other than noting a 1766 controversy in New York in which a magistrate did not permit cross-examination. Id. at 539.
peace manuals followed Burn’s manual by stating the doctrinal rule that a justice of the peace had authority only to commit or bail, but not release, an arrestee at a Marian hearing.\textsuperscript{246} Hence, there is no evidence that there was any reason for cross-examination to emerge in American Marian practice. London practice simply does not amount to evidence of American practice.

5. How Would Americans Learn of London Marian Practice?

A third objection to Kry’s account of English (London) practice is that framing-era Americans generally had no way to learn of English practices unless they were described in published sources.\textsuperscript{247} But no such published descriptions have been identified. Kry ignores this point when, in addition to describing London practice, he cites an unreported English case and London newspaper accounts of other cases.\textsuperscript{248} How could framing-era Americans possibly have learned of those? The crucial fact is that Kry does not identify any description of in-the-presence Marian practice in any pre-framing publication that would have been likely to come to the attention of Americans. Rather, as discussed above, the published descriptions of Marian procedure in framing-era authorities were either silent on such aspects or implied that they were not part of Marian procedure. How were framing-era Americans

\textsuperscript{246} Burn recited,

\begin{quote}
If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty; yet the justice shall not discharge him, but he must either be bailed or committed: for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man’s discretion, without farther trial. Dalt. c. 164.
\end{quote}

1 BURN, supra note 105, at 295 (1755 ed.); 1 id. at 536 (1785 ed.). American manuals repeated this statement. See GREENLEAF, supra note 110, at 131; GRIMKE, supra note 110, at 199; HODGE’S CONDUCTOR, supra note 110, at 178; GAINES’S CONDUCTOR, supra note 110, at 145; LADD, supra note 110, at 156. Starke’s description of Virginia practice in the early 1770s suggests that justices of the peace did not exercise discretion to dismiss in the Marian hearing itself when witness examinations were taken; rather, Virginia created a unique “Court of Examination” that met five to ten days after the arrest and that court was given a “Power of Acquittal” if it deemed the evidence too weak to justify the prosecution. See STARKE, supra note 110, at 114-15.

\textsuperscript{247} This concern is not hypothetical. For example, the 1761 Writs of Assistance Case in Boston was adjourned for several months because no one could locate any published information as to how a writ of assistance was used for customs searches in England. See generally M. H. SMITH, THE WRITS OF ASSISTANCE CASE (1978).

\textsuperscript{248} See supra note 238.
supposed to have learned of the London Marian practice that Kry now describes?

The only answer Kry offers is that nine of the American Framers, primarily from the southern states, had studied at the Inns of Court in London along with a hundred or so other Americans.\(^{249}\) However, that is a bit too facile. One problem is timing: the data Kry cites refers to American lawyers who studied in London “between 1760 and 1775.”\(^{250}\) It makes sense that they studied prior to the outbreak of the Revolutionary War in 1775 and American independence in 1776, but 1760 to 1775 would be considerably too early even for the “emerging consensus” that by Kry’s account was only “hardening” into an in-the-presence rule “by the time of the framing” in 1789.\(^{251}\)

Moreover, it is hardly obvious that Americans who crossed the Atlantic for an expensive course of legal study would have devoted much of their attention to Marian committal proceedings, the lowest rung of English felony justice. In the stratified English legal community, the Inns of Court trained barristers, not lowly “Newgate solicitors.”\(^{252}\) It seems likely that the Americans who traveled to London for legal studies and “personal contact with some of England’s leading lawyers and judges”\(^{253}\) would have directed their attention primarily to higher-status subjects like property, equity, legal actions, and civil procedure. Indeed, Blackstone’s *Commentaries* provide some indirect evidence—they were written for the student of English law but barely mentioned Marian procedure.\(^{254}\)

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249 Kry, *supra* note 3, at 522.

250 *Id.*

251 See *supra* text accompanying note 236.

252 Newgate was the infamous prison in London adjacent to the Old Bailey; “Newgate solicitors” would have been fairly low in the hierarchy of the English legal community.

253 Kry, *supra* note 3, at 522 (quoting 1 A NTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 33 (1965)).

254 Blackstone’s *Commentaries* were meant to provide such a study. He mentioned Marian witness examinations only once in the four volumes of the commentaries, at the beginning of chapter 22 on “Commitment and Bail” in criminal proceedings, but did not mention any requisites of such examinations—not even that they had to be under oath:

The justice, before whom such [arrested] prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute of 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him: which Mr. Lambard observes, was the first warrant given for the examination of a felon in English law. For, at the common law, *nemo*
The mere fact that some Americans attended the Inns of Court prior to 1775 is too frail a hook on which to hang American knowledge of unpublished English committal practices as of 1789. That hook is especially frail because, as I note below, post-framing American sources from 1794, and even 1807, do not reflect any awareness of Radbourne, Woodcock, or Dingler. The bottom line is that, even if Kry’s description of English practice were accurate, he has not shown the relevance of that description to the Framers’ design—and that is crucial for a claim of original meaning.

6. Coroners’ Marian Examinations

In addition, there is one aspect of English Marian practice that plainly did not involve an in-the-presence or cross-examination rule in 1789—coroners’ Marian witness examinations. The Marian statutes also provided for coroners to take sworn witness examinations in the course of investigating a suspicious death. Coroners conducted inquests on view of the body to determine whether a crime had been committed and, if so, who was the likely killer. Because no defendant was identified until the conclusion of the proceeding, it is patent that there could not have been either an in-the-presence or cross-examination rule for coroners’ witness examinations. Yet, framing-era treatises and manuals affirmed the admissibility of coroners’ examinations of unavailable witnesses in felony trials.

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tenebatur prodere seipsum; and his fault was not to be wrung out of himself, but rather discovered by other means, and other men. If upon this inquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise, he must either be committed to prison, or give bail . . . .

4 BLACKSTONE, supra note 78, at 293 (1st ed. 1769) (footnote omitted). Note that the focus of this passage is on the examination of the arrestee, but little is said of witness examinations themselves; note also that Blackstone stated such a low threshold for proceeding to commit or bail the arrestee that cross-examination would rarely have made any difference.

The 1791 lectures in law given by James Wilson (one of the Framers of the Constitution and one of the earliest justices of the Supreme Court) in Philadelphia do not seem to mention Marian witness examinations at all. See THE WORKS OF JAMES WILSON (Robert G. McCloskey ed., 1967).

255 See infra text following note 287 (no mention of the cases in 1794 North Carolina case), 293 (no mention of the cases in 1794 Virginia justice of the peace manual), 297 (no mention of the cases in 1807 Supreme Court argument).

256 See Davies, supra note 2, at 128.

257 Id. at 171-72.
In *Crawford*, Justice Scalia breezed past this inconvenient fact in one evasive footnote. Kry at least addresses the difficulty. Although he concedes that coroners’ Marian examinations were admissible, and also concedes that the defendant need not even have been identified or present when such examinations occurred, he takes refuge in a palpable fiction—because coroners’ inquests were open to the public, a potential defendant could have chosen to attend and could even have chosen to cross-examine the witnesses. Thus, the requirement of an “opportunity” for such was met and “those who failed to show up to cross-examine had simply neglected their rights.” In addition to offering this notion of constructive presence, Kry notes that American state cases in 1835, 1842, and 1844 began refusing to admit coroners’ examinations in criminal trials.

However, the significant fact for assessing the original understanding of the Confrontation Clause is that the framing-era treatises and justice of the peace manuals never suggested that either an in-the-presence rule or cross-examination rule applied to Marian coroners’ examinations of witnesses, and they did not condition the admissibility of coroners’ examinations of unavailable witnesses on the examination having been taken in the prisoner’s presence or having been subject to cross-examination rules. Indeed, Kry cites English statements that indicate that no such conditions were placed on the admissibility of coroners’ Marian examinations well after the 1789 framing.

7. Summary of Kry’s Pre-Framing Evidence

In sum, I do not think Mr. Kry has presented historical evidence that sheds much light on the original American understanding of the Confrontation Clause. Rather, like

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258 *Crawford*, 541 U.S. at 47 n.2 (suggesting “[t]here [was] some question whether the requirement of a prior opportunity for cross-examination applied as well to statements taken by a coroner, which were also authorized by the Marian statutes” but citing only post-framing sources as grounds for that “question”).

259 Kry, *supra* note 3, at 547.

260 *Id.* at 547 & n.253 (citing cases from 1835, 1842, 1844, and 1858).

261 For example, Kry several times cites a 1797 footnote added to the *Eriswell* case report by the reporters of that volume to the effect that “Nor [are committal depositions admissible] since [the Marian statutes], unless the party accused be present, though an examination before a coroner is.” *Id.* at 496 n.12, 523 n.126, 527 n.143, 547 n.256 (citing King v. *Eriswell*, 3 T.R. 707, 710 n.(c), 100 Eng. Rep. 815, 817 n.(c) (K.B. 1790)). *See supra* note 218.
Crawford, he has focused on matters that are, at best, marginally relevant and often ambiguous, while he has downplayed or dismissed the treatises and manuals that provide the best evidence we have of the Framers’ understanding of Marian procedure. Although Kry offers a description of the evolution of English Marian practice itself, he has paid little heed to the essential question of what Americans would have known about that practice, and when they would have known it. Indeed, he has not even shown that there was a settled English in-the-presence rule that Americans could have discovered in 1789, let alone the settled cross-examination rule asserted in Crawford.

V. KRY’S POST-FRAMING EVIDENCE

Kry suggests that because the pre-framing evidence is “conflicting,” it is appropriate “to consider a broader range of historical evidence,” including post-framing evidence. He asserts that post-framing evidence is relevant and effectively assumes that later statements reveal earlier doctrine. Indeed, he asserts that “[w]hile the pre-framing evidence is ambiguous, the post-framing evidence is devastating.”

It certainly is true that post-framing sources are crucial to Kry’s arguments. I invite the reader to perform an experiment: make a copy of Kry’s article, black out all statements that are based on post-1789 sources as well as on Radbourne, Woodcock, and Dingler, the three cases that were published too late to have informed the American framing, and see what is left. Kry characterizes our disagreement over relevant evidence as “a question of timing.” I think “time travel” would be more apt.

I do not deny that there might be instances in which post-framing statements could carry sufficient indicia of continuity with earlier doctrine to make it appropriate to treat them as evidence of original meaning. However, none of the post-framing sources that Kry offers fall into that category.

262 Kry, supra note 3, at 542.
263 Id. at 551.
264 Id. at 495.
265 An American case or statement from the immediate aftermath of the framing might constitute valid evidence of the original understanding if the case or statement exhibits some indicia of continuity. For example, if an American state case from the decade after the framing had said something like “As we have construed our
Rather, I think his post-framing evidence is essentially irrelevant for reconstructing the original American understanding of the Confrontation Clause. Let me briefly review the post-framing sources he relies upon, and then address the real issue—Kry's assumption of judicial consistency over time.

A. Kry's Post-Framing English Evidence

Kry argues that in English law, “admissibility [of Marian examinations] clearly became conditioned, at some point, on whether the defendant had an opportunity to cross-examine,” and cites as evidence seven post-framing English treatises, three post-framing English cases, and a post-framing footnote added to a case report by the reporters rather than the court.266 However, “at some point” does not amount to a claim about “the Framers’ design.”267 The critical fact is that these post-framing English sources that endorsed an in-the-presence or cross-examination rule cited no precedents or authorities between the 1696 rulings in Paine and Fenwick and the 1787, 1789, and 1791 decisions in Radbourne, Woodcock, and Dingler (the three cases that were published too late to have informed the framing of the Confrontation Clause). Moreover, it is noteworthy that a number of the commentaries that Kry cites were written by members of the London bar who probably were partisans in the campaign for recognition of in-the-presence and cross-examination rules in Marian procedure.268 Kry does not identify any English court ruling that endorsed those rules until 1814—twenty-five years after the 1789 framing of the Confrontation Clause.269 Thus, the post-framing statements Kry cites do not provide evidence that an in-the-presence or cross-examination rule was recognized in England prior to the American framing.270

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266 Kry, supra note 3, at 495 & nn.11-12.
267 Crawford, 541 U.S. at 68.
268 For example, Leonard MacNally authored one of the English treatises that Kry cites. See Kry, supra note 3, at 496 n.11 (citing LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN (Dublin 1802)). MacNally also appears as defense counsel in Kry’s account. See id. at 539 (referring to a cross-examination by “Mr. MacNally”). See also supra note 204.
269 See Kry, supra note 3, at 496 n.12.
270 I invite the reader to peruse the authorities set out in Kry, supra note 3, at 495 nn.11-12.
My 2005 article did not dispute or downplay the fact that a cross-examination rule was adopted in England in the decades after the American framing.\textsuperscript{271} In fact, my 2005 article actually introduced some of the post-framing treatises and cases Kry now cites.\textsuperscript{272} I simply noted the basic point that what was said in England after the framing does not constitute evidence of what the American Framers thought at the time of the framing.

B. Kry's Post-Framing American Evidence

Kry also cites several post-framing American statements in cases and commentaries. However, none of these statements constitute significant evidence that Americans understood in 1789 that a cross-examination rule was part of Marian procedure.

1. “Early” State Cases

Like Justice Scalia in \textit{Crawford}, Kry also stresses post-framing American state cases. Although Justice Scalia invoked the authority of “numerous early state cases,” two were plainly inapposite,\textsuperscript{273} and of the nine remaining, only one was decided prior to 1821.\textsuperscript{274} Kry omits the inapposite cases (unlike Justice Scalia who continues to include them\textsuperscript{275}), but Kry has added further cases, reaching sixteen decided “between 1794 and

\textsuperscript{271} Davies, \textit{supra} note 2, at 173-78.

\textsuperscript{272} For example, I initially identified the passage that Thomas Leach added to the 1795 edition of Hawkins’s treatise. See \textit{id}. at 173. That is the earliest English commentary that endorsed a cross-examination rule. See Kry, \textit{supra} note 3, at 495 n.11. Likewise, I initially identified \textit{King v. Smith}, Holt 614, 171 Eng. Rep. 357 (1817). See Davies, \textit{supra} note 2, at 174 n.224; Kry, \textit{supra} note 3, at 496 n.12. Justice Scalia did not cite either of these authorities in \textit{Crawford}.

\textsuperscript{273} See \textit{Crawford}, 541 U.S. at 49-50 (citing, \textit{inter alia}, Finn v. Commonwealth, 26 Va. 701, 708 (1827); State v. Atkins, 1 Tenn. 229 (Super. Ct. 1807) (\textit{per curiam}). These two cases are inapposite because they excluded oral testimony regarding testimony a deceased witness had given at a prior trial, rather than a written record of a Marian examination. As I previously explained, there was no transcript of the prior court testimony, so an oral account of it was deemed less reliable than a written record of a witness examination; hence, there was a settled rule against admitting oral accounts of prior testimony that had nothing to do with cross-examination. See Davies, \textit{supra} note 2, at 180 n.235. Kry contends that these cases were offered for only a narrow point in \textit{Crawford}. See Kry, \textit{supra} note 3, at 546 n.246. However, they appear in \textit{Crawford} as “cases to the same effect” as those that deal with cross-examination. See \textit{Crawford}, 541 U.S. at 50.

\textsuperscript{274} See \textit{Crawford}, 541 U.S. at 49-50 (citing two cases from the 1820s, two from the 1830s, two from the 1840s, and three from the 1850s).

\textsuperscript{275} Davis v. Washington, 547 U.S. ___, 126 S. Ct. 2266, 2275 n.3 (2006).
However, Kry still identifies only three cases prior to the 1830s, and they constitute only limited evidence: the earliest is a 1794 case that did not actually involve the pertinent issue, and the other two are merely offspring of the 1794 case.

The earliest American case Kry cites is the 1794 North Carolina case, *State v. Webb*. I am chagrined that when I wrote my prior article, I did not notice that *Webb* did not actually deal with the pertinent issue. Although the cryptic one-paragraph statement by the court did refer to an in-the-presence standard and right to cross-examine for admitting a witness “deposition” as a matter of “natural justice,” Mr. Kry errs when he describes the case as involving a Marian examination of an “unavailable” witness. As noted above, the settled understanding, which was stated explicitly in the English treatises that the prosecutor offered as authority for admitting the witness deposition, was that a Marian deposition was admissible only if the witness was genuinely unavailable—that is, he could not attend the trial because he was dead, too ill to travel, or was kept away by the defendant. However, it appears that the witness in *Webb* did not meet any of those criteria—he was merely in South Carolina.

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276 Kry, *supra* note 3, at 496 n.13. Kry also includes a “cf.” cite to an 1808 Kentucky bastardy case overruling a decision by a lower court to admit the complaint for an arrest “warrant” as evidence. *Id.*

277 2 N.C. (1 Hayw.) 139 (Super. Ct. 1794), *discussed in Crawford*, 541 U.S. at 49; *cited in Kry, supra note 3, at 496 n.13. See also Kry, *supra* note 3, at 548 (citing American cases “between 1794 and 1858”).

278 See Davies, *supra* note 2, at 181 (incorrectly stating that *Webb* offered support for Justice Scalia’s position).

279 *Webb*, 2 N.C. at 139 (“[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross-examine . . . .”).

280 Kry, *supra* note 3, at 502 (emphasis added) (stating that the prosecutor in *Webb* sought “to admit an unavailable witness’s deposition taken *ex parte*”). Justice Scalia said nothing about the availability of the witness in *Crawford*. See 541 U.S. at 49.

281 The prosecutor cited passages in the treatises by Hale, Hawkins, and Buller. *Webb*, 2 N.C. at 139. Hale referred to witnesses who had died or were too ill to travel. See 2 HALE, *supra* note 89, at 52. Hawkins referred to witnesses who were dead, too ill to travel, or kept away by the defendant. See *supra* note 84. Buller referred to witnesses who were “dead.” See *supra* text accompanying note 117. Cf. Kry, *supra* note 3, at 553 (“Throughout the eighteenth century, it was settled law that a Marian deposition was admissible at trial if the witness was dead, too sick to travel, or kept away by the accused.”).

282 See *Webb*, 2 N.C. at 139 (reporting the only description of the witness and deposition offered by the prosecutor: “the deposition of one Young, to whom [Webb] had sold the horse in South Carolina.”).
Given that the witness who had been deposed did not meet any of the unavailability criteria, it is hardly surprising that the North Carolina judges found that the admissibility rule set out in the English treatises cited by the prosecutor was inapplicable. Instead, it appears that the North Carolina judges construed the state Marian statute as though it incorporated the common-law cross-examination standard that pertained to admitting depositions in civil cases. Indeed, the “natural justice” language that they used appears in a number of passages in pre-framing English authorities that pertain to the admissibility of “depositions” in civil lawsuits. It may also be significant that the North Carolina judges referred to the witness statement at issue as a “deposition,” rather than as an “examination,” the term that actually appears in the North Carolina Marian statute. Hence, the statements in Webb were not actually made in the context of resolving the admissibility of a Marian examination of a genuinely unavailable witness; rather, the context resembles that of a civil lawsuit deposition taken when it would merely be inconvenient for a witness to attend a trial.

Nevertheless, Webb was later invoked as the relevant authority in the 1798 and 1821 cases that Kry cites, both of which involved the admissibility of a victim’s Marian examination that had been taken in the presence of the arrestee. The 1798 North Carolina case that Kry identifies, State v. Moody, was decided by the same court (and largely the same judges) that had decided Webb only four years earlier. Although the court ruled that the victim’s statement could not be admitted because it had not been properly sworn, one judge

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283 See Kry, supra note 3, at 502-03 (noting that the prosecutor cited passages on the admissibility of Marian depositions of unavailable witnesses from “Hale, Hawkins, and Buller on which Davies relies”). Kry suggests that my interpretation of the issue is “implausible” because it would mean that the prosecutor made a “nonsensical” argument to the North Carolina court. Id. at 503 n.42. I suggest that inapt citations are not an uncommon feature of arguments made in the course of litigation.

284 See, e.g., GILBERT, supra note 15, at 62 (1756 ed.) (“tis against natural Justice to admit a “Deposition” if the party “had not Liberty to cross-examine the Witnesses”).

285 See supra note 81. The language of the North Carolina Marian Statute is set out in Davies, supra note 2, at 181 n.239.

286 See supra notes 81-82.

287 3 N.C. (2. Hayw.) 50 (1798).
did make a statement that appears to have reiterated the in-the-presence standard previously announced in *Webb*.  

It should also be noted that the North Carolina cases appear to have announced a homegrown doctrine. Although Kry writes that *Webb* “essentially replicated the reasoning of *Woodcock* and *Dingler,*” the important fact is that *Webb* did not refer to the English reports of *Radbourne* or *Woodcock* (and *Dingler* had not yet been published). Thus, *Webb* suggests that Americans either did not immediately become familiar with Leach’s reports of Old Bailey cases when they were published sometime in late 1789, or did not regard them as authoritative.

The next case chronologically that *Crawford* cited, and that Kry cites, is the 1821 Tennessee ruling in *Johnston v. State*, which admitted a witness examination taken in the defendant’s presence. However, *Johnston* is also an offspring of *Webb*. The Tennessee judges regarded the 1715 North Carolina Marian statute as having been absorbed into Tennessee law (presumably because Tennessee was created from North Carolina territory), and thus treated *Webb* as a pertinent construction of that statute. As a result, the three pre-1830 cases Kry cites all really boil down to one decision, the 1794 decision in *Webb*.

Kry then also cites two state cases from the 1830s, five from the 1840s, and five from the 1850s. However, those cases are hardly proximate to the framing in 1789. Even by the

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288 *Moody* involved the admissibility of a statement a murder victim had made on the day after the attack; however, because he died six or seven weeks later, the court concluded that the statement was not admissible as a dying declaration. *Id.* at 50-51. Judge John Haywood then raised the possibility that the statement would be admissible as a Marian examination of an unavailable witness:

> [T]it may be a question whether [the victim's statement] may not be received as an examination taken on oath before a justice of the peace, pursuant to the act of Assembly prescribed for such depositions in cases of felony [that is, the North Carolina Marian statute]; when regularly taken pursuant to the act, and the witness afterwards dies, it may be read in evidence; more especially if the party to be affected by that testimony were present at the examination, as the prisoner was in the present case.

*Id.* The deposition was not admitted, however, because there was a question as to whether it was properly sworn. *See id.* at 51. It is unclear if Haywood was on the bench of North Carolina Superior Court (that is, the state supreme court) when *Webb* was decided in the “September Term, 1794” because he was elected to the court in 1794. I agree with Kry that Judge Haywood’s “more especially” phrasing probably meant “more specifically” in 1798. *See Kry, supra note 3, at 496 n.13.

289 *See Kry, supra note 3, at 534.*

290 10 Tenn. (2 Yer.) 51, 52-53 (1821), *cited in Crawford*, 541 U.S. at 50. *See also Kry, supra note 3, at 496 n.12.*
1820s, American courts could have begun inventing new understandings of the confrontation right, or—because the nineteenth-century English treatises that Kry cites were circulating in America by the 1820s—the nineteenth-century American cases he cites may have simply imported the new English understanding of Marian procedure.291

2. Other Post-Framing American Sources

Kry discusses three additional American statements. One involved a 1766 complaint about the denial of cross-examination in a committal proceeding in colonial New York.292 Although it is true that there was a complaint, the fact that the court refused to allow cross-examination would appear to indicate the absence of a legally recognized right.293 The other two statements are from 1794 and 1807.

In 1794, William Waller Hening criticized the admissibility of Marian witness examinations of unavailable witnesses when he wrote his justice of the peace manual, The New Virginia Justice. Specifically, Hening objected that “[t]he doctrine laid down in the books” regarding the admissibility of Marian examinations of deceased or otherwise unavailable witnesses was liable to the objection that “the accused party has not the same advantage of cross examination, which he would possess before a court, with the assistance of counsel.”294 Kry stresses Hening’s use of the word “same” and reads this to mean that the accused was entitled to cross-examine the witness on his own during a Marian examination.295 Even by that literal reading, however, Hening would have referred only

291 See Davies, supra note 2, at 180 n.234. See also Kry, supra note 3, at 495 n.11 (citing several American printings of English commentaries). The 1821 Tennessee decision in Johnston cited the evidence treatise by Phillips that Kry cites. See Johnston v. State, 10 Tenn. (2 Yer.) 58 (1821); Kry, supra note 3, at 495 n.11 (citing S.M. PHILLIPS, A TREATISE ON THE LAW OF EVIDENCE (1814)). For example, in 1824, Nathaniel Dane cited “M’Nally” (that is, MacNally’s evidence treatise; see Kry, supra note 3, at 495 n.11), Radbourne, Woodcock, and Dingler when discussing the admissibility of Marian witness examinations. See 3 NATHANIEL DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 372-73 (1824). Interestingly, Dane attributed an in-the-presence rule to Radbourne, but did not actually mention an opportunity for cross-examination.

292 Kry, supra note 3, at 539.

293 See Davies, supra note 2, at 188 n.269.

294 WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 147 (entered for publication 1794, printed in Richmond 1795). The passage is quoted in Davies, supra note 2, at 187.

295 Kry, supra note 3, at 535.
to a minimal opportunity for cross-examination. Moreover, I do not think it is clear that Kry’s reading is correct. Hening’s statement could also be read idiomatically as a complaint that the accused lacked both the opportunity to cross-examine and the assistance of counsel that he would have enjoyed during a trial.

It is also worth noting that Hening made no mention in 1794 of Radbourne or Woodcock, five years after the reports of those cases were initially published in Leach’s reports of Old Bailey cases (Dingler still had not been published). In fact, although Hening did cite some English case reports published in London contemporaneously with the framing, he did not cite Leach’s reports at all.296 Thus, Hening’s reference to the rule of admissibility “laid down in the books” seems to confirm that he was not aware of any alteration of earlier doctrine regarding the admissibility of Marian examinations of unavailable witnesses.

The other post-framing American statement that Kry invokes is a question posed by Chief Justice John Marshall during the 1807 arguments in Ex Parte Bollman, a proceeding related to the Burr conspiracy.297 Bollman had been arrested as a conspirator and sought a writ of habeas corpus in the Supreme Court. An issue arose as to whether an affidavit by General Wilkerson, made after Bollman’s arrest for treason, could be admitted as evidence to determine whether there was probable cause to support the arrest warrant issued for Bollman.298 The Court requested that the attorneys present authorities on the issue.299

At the next Court session, Bollman’s attorney, Francis Scott Key, cited statements from the King’s Bench ruling in Eriswell as authority that an “extrajudicial” affidavit is

296 At least one of the 1795 printings of Hening’s manual includes a list of the legal authorities cited in the manual among the opening, unnumbered pages. Hening did not include Leach’s Cases in Crown Law but he did include the “Term Reports” of King’s Bench rulings. There are several citations to the third volume of those reports that was published in 1790 (the volume in which Eriswell was reported; see supra note 232). See, e.g., HENING, supra note 294, at 176, 178 (citing “3 Term Rep. 590,” “3 Term Rep. 27”). The fact that Hening cited recent reports of King’s Bench cases but not Old Bailey cases suggests that Americans in 1794 still accorded significance to decisions in the King’s Bench itself but may have been less interested in trial rulings in the Old Bailey.

297 Ex Parte Bollman, 8 U.S. (4 Cranch) 75 (1807).
298 Id. at 110-11, 123-24.
299 Id. at 123.
inadmissible.\textsuperscript{300} (Notably, he did not cite the Old Bailey rulings in \textit{Woodcock} or \textit{Dingler}—again suggesting that Americans were not consulting Leach’s reports.) As Kry notes, Chief Justice Marshall then asked:

If a person makes an affidavit before a magistrate to obtain a warrant of arrest, such affidavit must necessarily be \textit{ex parte}. But how is it on a motion to commit, after the person is taken? Must not the commitment be upon testimony given in the presence of the prisoner?\textsuperscript{301}

However, Attorney General Caesar Rodney responded that the \textit{ex parte} affidavit for the arrest warrant would suffice to commit the arrestee unless the prisoner demonstrated his innocence in his own examination.\textsuperscript{302} Thus, the Attorney General apparently believed an \textit{ex parte} warrant affidavit could serve as a Marian witness examination for purposes of committing an arrestee—\textsuperscript{303}—which suggests that was sometimes the practice. There was no further discussion of the point, and Marshall subsequently ruled that Wilkerson’s affidavit was admissible in the habeas corpus proceeding, stating that “[s]uch an affidavit seems admissible on the principle that before the accused is put upon his trial all the proceedings are \textit{ex parte}”\textsuperscript{304}—a statement that would seem to leave room for \textit{ex parte} witness examinations.

Kry correctly notes that Attorney General Rodney conceded that General Wilkerson’s affidavit would be inadmissible at trial, but that simply reflects the point that Wilkerson (like the deponent in \textit{Webb}) did not meet any of the unavailability criteria. Wilkerson was not dead; he just was not in Washington.\textsuperscript{305} Thus, neither Hening’s statement nor the

\textsuperscript{300} \textit{Id.} at 124.
\textsuperscript{301} \textit{Id.}, quoted in Kry, supra note 3, at 513.
\textsuperscript{302} \textit{Id.} (“The first affidavit [for the arrest warrant] would be sufficient, unless disproved or explained by the prisoner on his examination.”).
\textsuperscript{303} I suggested that possibility, supra text accompanying note 89.
\textsuperscript{304} \textit{Bollman}, 8 U.S. (4 Cranch) at 129.
\textsuperscript{305} Kry correctly notes that it was understood that General Wilkerson’s affidavit would not have been admissible evidence at trial. Kry, supra note 3, at 513 n.81. However, he ignores the point that Wilkerson did not qualify as an unavailable witness, which explains why his affidavit could not be admissible in a trial. I call attention to the hypothetical discussion between Marshall and Attorney General Rodney regarding committal proceedings in which Rodney asserted that an \textit{ex parte} arrest warrant affidavit could suffice to commit a prisoner—that is, could serve as a Marian examination. There is no indication in \textit{Bollman} that Rodney’s general statement to that effect was challenged by anyone.
colloquy in *Bollman* provide evidence of a cross-examination rule in America in the aftermath of the framing.

The bottom line is that Kry has not identified any post-framing American sources that reveal a *framing-era* in-the-presence rule, let alone a cross-examination rule. Rather, the sources he identifies tend to show that there was a significant lag between the publication of *Radbourne*, *Woodcock*, and *Dingler* in London, and American awareness of those English developments.

C. Kry’s Assumption of Continuity

Mr. Kry, however, insists that it is valid to treat post-framing statements as evidence of pre-framing understandings, apparently because one can assume a high degree of consistency in judicial rulings over time. He bases this apparent assumption not on historical methodology, but on a misplaced application of contract law doctrine.\(^{306}\) Additionally, he notes that “*Crawford*’s reliance on post-framing authorities is hardly novel,” that “Justices Scalia and Thomas also routinely rely on post-framing English authorities” in construing constitutional provisions,\(^{307}\) and that justices have been citing cases from Leach’s *Crown Cases* since the late nineteenth century.\(^{308}\) However, errors do not cease to be errors simply because they are repeated.

Kry’s assumption of continuity simply conflates two very different things: one is an interpretive posture that judges assume when they purport to look to history to justify a preferred result; the other is authentic legal history derived

\(^{306}\) Kry argues “[t]hat subsequent history is relevant to original meaning [because s]ubsequent conduct in conformity with a particular interpretation of a contract is evidence of the parties’ intent; no less is true of the Constitution.” Kry, *supra* note 3, at 548-49. There is a significant difference between a contract ruling and constitutional law. Contract law resorts to such fictions when there is no better way to construe a contract and it is necessary to do so because the contract has to be construed to settle a dispute. However, as I noted above, it is not necessary to base a constitutional interpretation on original meaning because it is only one of a variety of approaches to constitutional justification. Hence, when there is no direct evidence of original meaning, originalism should not be resorted to. See *supra* text accompanying note 48.

\(^{307}\) Kry, *supra* note 3, at 549-50.

\(^{308}\) *Id.* at 550-51. Kry notes that the Court cited *Radbourne* in *Mattox v. United States*, 156 U.S. 237, 240 (1894). *Id.* at 551. However, that opinion cited *Radbourne* only regarding the content of English law, not the original meaning of the Confrontation Clause. Likewise, other Supreme Court opinions cited cases in *Leach* when discussing criminal law doctrine in criminal cases, rather than constitutional interpretation.
from valid evidence. What legal history actually teaches is that judges have been fudging older precedents since the beginning of judging.\textsuperscript{309} The English legal historian Frederic Maitland put it this way:

\begin{quote}
[The] process by which old principles and old phrases are charged with a new content is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding.\textsuperscript{310}
\end{quote}

The reality of “perversion[s] and misunderstanding[s]” in later interpretations of earlier doctrines cautions that authentic legal history depends upon enforcing a strong distinction between historical evidence and judicial revisionism. One cannot take judicial interpretations of cases offered several decades or more after a case was decided as evidence of the original meaning of the earlier case; neither can one take subsequent interpretations of a constitutional provision as valid evidence of the original understanding of the provision. There is too much likelihood that the post-framing treatments will involve either deliberate or unintentional adjustments or distortions.

Indeed, a large contradiction lurks in Kry’s account. On the one hand, the story he tells of English Marian practices is a story of legal “evol[ution],”\textsuperscript{311} an in-the-presence practice “hardened into a procedural right” to be present,\textsuperscript{312} and “at some point,” that led to a cross-examination rule.\textsuperscript{313} However, he then tells us that we can treat nineteenth-century commentaries and cases as evidence of eighteenth-century understandings, apparently because we can assume constancy of doctrinal content over time. Legal history endorses only the evolutionary claim.

The unfounded assumption of continuity that Kry ultimately relies upon in claiming that post-framing statements prove framing-era understandings is a common defect in originalist claims. Practitioners of originalism, including Justices Scalia and Thomas, tend to describe our

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{309} See \textit{supra} note 26 (discussing judicial alteration of arrest law and the transference of the law of arrest from “due process of law” in the Fifth Amendment to the Fourth Amendment).
\item\textsuperscript{310} Maitland, \textit{supra} note 42.
\item\textsuperscript{311} Kry, \textit{supra} note 3, at 553 (stating that Marian practice was “evolving”).
\item\textsuperscript{312} \textit{Id.} at 554.
\item\textsuperscript{313} \textit{Id.} at 495.
\end{enumerate}
\end{footnotesize}
constitutional history as though it has been continuous and stable, at least until recently. That is a profoundly false picture. As I have discussed on other occasions, the past really is a foreign country—far more foreign than originalists are either able to see, or willing to admit.\(^{314}\) Indeed, once the overall foreignness of framing-era doctrine is recognized, it is fairly obvious that any attempt to apply a specific historical rule to a modern issue will always involve selective originalism at best; that is, originalists always choose to ignore far more framing-era law than they invoke.\(^{315}\)

For present purposes, one example of doctrinal discontinuity is particularly pertinent. As noted above, the other prong of \textit{Crawford}'s originalist scheme limits the scope of the confrontation right and allows the admission of unsworn “nontestimonial” hearsay in criminal trials.\(^{316}\) In the course of proposing that limitation, Justices Thomas and Scalia, as well as commentators, have assumed that the hearsay exceptions that now give rise to much of the current controversy over the application of the confrontation right were commonplace at the time of the framing.\(^{317}\) However, the historical sources present a very different picture. The framing-era treatises, which defined “hearsay” as unsworn, out-of-court statements, indicate

\(^{314}\) See Davies, \textit{Arrest}, supra note 20, at 419-35; Davies, \textit{Fourth Amendment}, supra note 20, at 744-50; Davies, \textit{supra} note 2, at 210-17.

\(^{315}\) As I previously noted, the issue in \textit{Crawford}, the admission of a wife’s statement against her husband, would not have arisen in framing-era law because there was a settled rule that a spouse’s statement could not be admitted against the other spouse. See Davies, \textit{supra} note 2, at 110 n.18. Indeed, James Wilson, one of the early justices of the Supreme Court who was also active in the debates that preceded the adoption of the Bill of Rights, observed in his 1790-1791 law lectures in Philadelphia that a married couple were considered to be “but one person in the law” and that “if they were permitted to give testimony against one another, another maxim of the law would be violated—No one is obliged to accuse himself.” 2 \textit{THE WORKS OF JAMES WILSON} 602 (Robert G. McCloskey ed., 1967) (reprinting Wilson’s 1790-1791 lectures). Thus, Wilson appears to have understood that the admission of the wife’s statement at issue in \textit{Crawford} would have violated the couple’s Fifth Amendment right against self-incrimination. However, Justice Scalia’s \textit{Crawford} opinion ignored these aspects of framing-era law when he characterized the issue in \textit{Crawford} in terms of the Confrontation Clause of the Sixth Amendment.

\(^{316}\) See also Davies, \textit{Fourth Amendment}, supra note 20, at 742-48. See also \textit{supra} notes 13, 26.

\(^{317}\) See \textit{supra} text accompanying notes 5-9.

\(^{317}\) See, \textit{e.g.}, White \textit{v. Illinois}, 502 U.S. 346, 362 (1992) (Thomas, J., concurring) (“[T]here appears to be little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation.”); \textit{AKHIL R. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES} 94 (1997) (“At common law, the traditional hearsay ‘rule’ was notoriously unruly, recognizing countless exceptions to its basic preference for live testimony.”).
that there was a virtually complete ban against the admission of hearsay statements as evidence of a defendant’s guilt (the only exception being the dying declaration of a murder victim). Thus, for example, the hearsay evidence involving statements a crime victim made to a 911 operator which the justices found to be admissible in *Davis* would have been inadmissible in 1789.

The rigorous ban against hearsay evidence regarding the defendant’s guilt that was part of framing-era law is obscure today because the nineteenth-century judges and commentators who invented the variety of modern hearsay “exceptions” that now permit admission of hearsay statements as evidence did not call attention to the novelty of their creations. Those judges and commentators also do not seem to have paid much heed to the confrontation right when they made those innovations. So much for judicial consistency over time.

The core of Kry’s complaint against my article is that my criticisms of *Crawford’s* originalist claims “rest[] critically on [Davies’] premise that all English sources published after 1789 and all American sources published more than a few years after 1789 are irrelevant to original meaning; relax either of those two constraints and [Davies’] argument unravels.” I do not object to that as a general summary—if one relaxes either of those two constraints, it is unlikely one is addressing the historical original meaning. However, I prefer to state the

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318 As I document in a forthcoming article, the only two forms of out-of-court statements that were admissible as evidence of the defendant’s guilt were dying declarations of murder victims and the written records of Marian examinations of witnesses who had become unavailable prior to trial. Both of these involved genuinely unavailable witnesses and either an oath, in the instance of Marian examinations of witnesses, or conditions that were thought to provide assurances of truthfulness comparable to an oath, in the instance of dying declarations of murder victims. *Davies, Not the Framers’ Design, supra* note 17. Compare the statement of Chief Baron Eyre in the 1789 Woodcock case, *supra* note 73.

At the time of the framing, hearsay statements—that is, all unsworn out-of-court statements—were not admissible as direct evidence of a defendant’s guilt but could be admitted only for the limited purposes of either corroborating that a witness who testified at trial had previously given the same account in out-of-court statements (or of impeaching the trial testimony) or generally establishing the existence of a conspiracy, but not the defendant’s personal involvement in it. See *Davies, Not the Framers’ Design, supra* note 17. There were some additional exceptions that permitted hearsay statements to be admitted with regard to certain specific issues that might arise in civil lawsuits, but those exceptions were not recognized in criminal evidence doctrine and also were not pertinent to criminal matters. See *id.*

319 See *Davies, Not the Framers’ Design, supra* note 17.

320 Kry, *supra* note 3, at 555. See also *id.* at 494.
criterion directly: claims of original meaning should be based on the legal authorities that were actually widely used by framing-era Americans. If those sources do not clearly reveal a settled understanding, originalist claims should not be made. The fact that Kry has not identified significant evidence that meets that criterion confirms that no claim regarding an originalist Marian cross-examination rule should have been made in *Crawford*.

VI. THE UNTESTED CHARACTER OF JUDICIAL-CHAMBERS ORIGINALISM

Although Kry has addressed only one of my two criticisms of *Crawford*’s originalist claims, he complains that my “fictional originalism” label is “objectionable” and also complains about my use of *Crawford* as a vehicle for a broader criticism of originalism. I do not shirk from the “fictional originalism” label (which I have used before to criticize similarly ungrounded claims of original meaning), or from the broader aim of my article. Claims that purport to reflect the Framers’ design but are not grounded in valid historical evidence should be regarded as fiction. Mr. Kry, like Justices Scalia and Thomas, treats evidence that amounts to mere traditionalism (that was the rule during the nineteenth century) as though that suffices to support a normatively privileged claim regarding “original meaning.” These two sorts of claims should not be interchangeable.

A final general defect in originalism should be noted in closing—the absence of any procedure for testing originalist

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321 As noted above, Kry has not undertaken to defend the other major “originalist” claim in *Crawford*, which I also criticized—the fictional claim that the Framers would have limited the confrontation right to “testimonial” out-of-court statements, but would not have applied it to “nontestimonial hearsay.” See supra notes 16-19 and accompanying text.

322 Kry, supra note 3, at 555.

323 See, e.g., Davies, *Arrest*, supra note 20 (characterizing as “fictional originalism” Justice Souter’s claims about framing-era arrest law in *Atwater v. Lago Vista*, 532 U.S. 318 (2001)).

324 My purpose was not to oppose the cross-examination rule as a feature of current procedure, which I view positively, but rather to point out the fictional character of the originalist rationale that Justice Scalia presented for it. See Davies, supra note 2, at 106-07 (stating that the claims of original meaning in *Crawford* “provide the latest installment of fictional originalism”); id. at 206-15 (“*Crawford* offers a paradigmatic illustration of the defects of an originalist approach to criminal procedure.”). For additional examples of fictional originalist claims in recent Supreme Court criminal procedure opinions, see, for example, Davies, *Arrest*, supra note 20, at 262-66.
historical claims before they become enshrined in United States Reports. The usual processes of briefing and oral argument in the Supreme Court are not adequate. Few attorneys are familiar enough with the historical materials to deal with them effectively. Moreover, the page limitations on briefs are too confined to set out historical sources, and oral argument is far too awkward a forum.325

The typical result is judicial-chambers originalism: after the outcome of the case has been decided in the justices’ conference, the assigned justice (assuming he or she has originalist inclinations) and his or her law clerks root out historical materials and create an originalist account to justify the already-made decision, based largely on historical sources never even mentioned in the briefs.326 The accounts produced in this way are invariably superficial and too often simply wrong.

The most significant feature of the controversy over the historical evidence between Kry and me may be its timing—we are debating the historical evidence only after Justice Scalia announced his originalist rationale. No one had any prior opportunity to cross-examine Crawford’s fictional originalism.

325 I have previously argued that a similar procedural deficit exists with regard to the Supreme Court’s use of empirical research materials. See Thomas Y. Davies, A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests, 1983 AM. B. FOUND. RES. J. 611, 687-88 (1983).

326 See Davies, Arrest, supra note 20, at 270-74, 418-19.
I want to begin by clarifying something which is going to become stunningly clear whether I clarify it now or not. I am not an attorney. I did in fact graduate from law school. I did in fact take and pass the New York Bar Exam. But to give you a sense of how long ago that was, when I finished the exam I celebrated by picking up a six pack of Heineken and going home to watch the Watergate Hearings.

I have never practiced law. But as President of the Dramatists Guild of America for the last eight years I have found myself in the middle of a number of legal collisions, the most important of which I’m going to talk about today, not from a lawyer’s perspective—although I may attempt to dazzle you with a couple of actual citations—but from the perspective of the playwrights, composers, and lyricists whose interests the Guild represents.

First, some background: The Dramatists Guild is the only national organization representing the interests of playwrights, composers, and lyricists writing for the living stage.

Founded almost a hundred years ago, the Guild currently has over 6,000 members nationwide ranging from a kid in a dorm room somewhere struggling to finish his first one act play, to established playwrights working on Broadway, Off-Broadway, and in regional theaters all over the country. Members over the years have included George S. Kaufman,
Eugene O’Neill, Arthur Miller, Lillian Hellman, and Tennessee Williams. The Guild is governed by a Board of Directors, elected from its membership, which currently includes such writers as Edward Albee, Stephen Sondheim, John Guare, Marsha Norman, and John Patrick Shanley. Past presidents include Richard Rodgers, Moss Hart, Oscar Hammerstein, Alan Jay Lerner, Robert Sherwood, and Peter Stone.

Since its inception, the mission of the Guild has been to assist playwrights in protecting the artistic and economic integrity of the work which they create. These efforts have taken a variety of forms, most significantly the development of a series of standard contracts the terms of which have guaranteed to playwrights the ability to control the content of the plays which they write, to control the disposition of those plays, and to earn a living from those plays if and when they are produced.

Despite a predictable amount of noisy opposition from various elements within the theater community, these efforts have been largely successful. The American theater, organized around the unique, idiosyncratic voice of the American playwright, has thrived, first and foremost, because of the brilliance of quintessentially American dramatists like Eugene O’Neill, Tennessee Williams, Stephen Sondheim and the equally brilliant interpretive artists with whom they’ve collaborated, but also because of the stable framework—both creative and economic—within which those dramatists and their partners have been able to do their work.

Where did that stability come from? For as long as anyone can remember, the community of artists and businessmen who make theater have shared a common set of assumptions about how a play or a musical makes its way from the page to the stage.

Not infrequently, a new production has rung minor changes on these assumptions, but the basic assumptions have endured. Everyone has known who did what. Everyone has known who owned what. Everyone has known who was in charge and who had the last word. These assumptions were givens; they were taken for granted.

They are not taken for granted anymore.

Beginning perhaps ten to fifteen years ago, in what is still a developing but potentially seismic shift in the way theater is made, these assumptions began to be challenged, deliberately and aggressively, with consequences as yet uncertain for the future of the American playwright and, by
extension, for the future of the American Theater and the American theater-going public.

The challenges have come, primarily, from two sources: First, from a group of producers, new to the business, and largely new to New York, and second, from directors, acting in concert through their union, the Society of Stage Directors and Choreographers, or SSD&C.

At their core, both challenges are about the same thing: copyright. The playwright’s copyright. The playwright’s undisputed ownership of his play, legally and artistically, which, heretofore, has been the bedrock constant around which all theater-making has been organized.

Until now.

First, I want to talk about the challenges being mounted by producers. But before I do, a brief digression into the difference between writing for the theater and writing for the movies.

Playwrights write plays. Screenwriters write screenplays. On the most fundamental level, they both engage in the same creative exercise. The writer sits down in front of a blank piece of paper and stares at it with a mounting sense of dread until, as George S. Kaufman said, blood begins to seep from his forehead. Writing can be painful, whether you’re writing a play or a screenplay. But the intermittent sense of suicidal desperation which playwrights and screenwriters sometimes share is about the only thing they share.

A screenwriter is an employee. The work he does is work for hire. From the beginning, he understands that everything he writes will immediately become the property of the studio which employs him.

As legal author of the film, that studio can change the content of the screenwriter’s script at will. His pirate captain can become a teenage runaway, his teenage runaway a Cocker Spaniel, his original story, set in Boston during the War of 1812, can be moved to the fifth moon of Jupiter.

Sooner or later, things like this will happen, because things like this always happen, and when they do, the screenwriter will feel talentless, humiliated, and, most importantly, every single author’s impulse that made him want to be a writer in the first place will be ground into the dust.

What about the playwright? The playwright is an independent contractor. He owns his work and is free to dispose of it as he sees fit. If a producer wants to mount a production of his play, the playwright will grant the producer a
defined package of performance rights for a limited time while reserving all other rights to himself. The producer will not be able to hire a director, or actors, or designers to work on his play without his approval. And no one will be able to change a word of what he’s written without his permission.

So why would anyone choose to write for the movies when they could write for the theater? The answer is—as it so often is—money.

Screenwriters are actually paid to write. The typical studio deal involves a hefty advance paid to the writer before he goes to work, and as he continues working, he can count on receiving a predictable series of additional payments.

The playwright, on the other hand, works for nothing. Some plays are written on commission, but the vast majority are simply written—by someone, somewhere with an impulse and an idea.

The playwright will be compensated, if at all, not with studio-style advances and step deal payments, but with a small prospective sliver of every dollar which may or may not one day come in at the box office. Which means he will not see any return on his labors unless and until a producer decides to produce his play and an audience decides to buy tickets to see it.

So why does he do it?

He does it because it is in the theater, and only in the theater, that the dramatic writer can retain ownership and control of the work which he creates. He does it because it is in the theater, and only in the theater, that he knows his own unique, idiosyncratic voice will be heard, unedited and uncompromised.

Which brings us back to copyright. That the playwright owns his copyright is both a reflection of the fact that the theater is a writer's medium, and a legal firewall guaranteeing that it will remain that way.

Assaults on that copyright would have been unheard of thirty years ago. But as Jerry Brown said, that was then and this is now. And now, as I have said, assaults on the playwright’s copyright are being mounted by both producers and directors.

First the producers.

Twenty-five years ago, something happened on Broadway. The musical *Cats* opened, and in certain fundamental ways, the commercial theater was changed forever. Prior to *Cats*, a hit show was a show which ran for
two, perhaps three years. A smash hit, like My Fair Lady, might run for five or six. Cats ran for eighteen years. And even more significantly, the London production, which had been replicated on Broadway, was then replicated in dozens of other Broadway-like productions around the world.

In the old days, meaning let’s say the 1960s, the producers of a hit Broadway show might send out a national touring company, after which they might mount the show in London’s West End.

From the point of view of the producers, the investors, and the authors, the income from these productions would certainly have been substantial, but not so substantial as to call attention to itself outside the relatively insulated economic world of the theater.

Cats, along with sister shows like Les Miserables and Phantom of the Opera, changed all that. The money to be made from two dozen identical versions of a hit show, playing to sold out houses in two dozen cities around the world, was clearly enormous. Indeed, in January of this year, Variety reported that Phantom of the Opera had become the most successful entertainment venture of all time—more successful than Star Wars, more successful than Harry Potter—grossing 1.9 billion dollars in the United States, 3.2 billion dollars world wide, from ticket sales alone.¹

Clearly, these were sums of money not to be left in the hands or the pockets of what had heretofore been thought of as a mere Broadway producer.

About whom a brief aside: Max Bialystock, Mel Brooks’s super-shyster impresario, when accused of defrauding the investors in his new musical, Springtime for Hitler, defends himself to the judge as follows: “It’s true, your honor, I’ve spent a lifetime lying and cheating and stealing, but I couldn’t help myself. I was a Broadway Producer.”²

It should be noted that at the first staged reading of Brooks’s show this line got the afternoon’s biggest laugh—from an audience made up almost entirely of Broadway producers. But in what I am still referring to as the old days, for every producer like a Max Bialystock or a David Merrick, there were half a dozen Kermit Bloomgartens, Leland Haywards, and Harold Princes—consummate professionals who had made

¹ Zachary Pincus-Roth, Movies Aren’t the Only B.O. Monsters, VARIETY, Jan. 9, 2006.
lives for themselves in the theater, perhaps first as stage managers, then as company managers, then finally as full-fledged producers. These were men and women as dedicated to the theater as the most dedicated playwright. They survive today in the person of producers like Manny Azenberg and Liz McCann.

But with the geysers of money tapped into by shows like *Cats* and *Les Miserables*, it was only a matter of time before a new breed of producer appeared on the scene. And when that new breed arrived, predictably, it came from Hollywood.

First came Disney, mounting enormously successful stage versions of its animated features like *Beauty and the Beast* and *The Lion King*. Then came Fox Searchlight Pictures, Universal, and a number of other studios, often on their own, sometimes partnering with experienced Broadway presenters.

When in Rome, most people make at least some attempt to do as the Romans do. In this case, however, in at least one crucial area, the attempt was minimal.

What the most aggressive of the movie studios brought with them was a desire to do business, not according to the theater model which put the playwright in first position, but according to the Hollywood model, in which the producing studio owned the author’s copyright and writers could be hired and fired at will.

Individual writers, supported by organizations like the Dramatists Guild, have for the most part been able to resist the pressure to work under these conditions. Usually, by simply refusing to do it. But the pressures are intense, and with the appearance of more and more studio-produced musicals like *Tarzan* and *Aida*, those pressures are only going to grow more intense.

Case in point: Dreamworks Animation is gearing up to produce a stage version of its wildly successful animated feature film, *Shrek*. The first *Shrek* grossed 455 million dollars. Its sequel grossed 880 million dollars. Add to this the vast revenues from toys, t-shirts, and who knows what else, and one would have to agree with the executives at Dreamworks Animation that the *Shrek* imprint represents a franchise of goldmine-like proportions.

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4. Id.
As such, the studio would argue, it has a duty to its shareholders to maintain control of anything and everything which appears under the *Shrek* banner. And that control would extend to the content, to every line of dialogue uttered in a dramatic adaptation.

Who could disagree?

The appearance behind a drugstore counter of one package of green, ogre-sized *Shrek* condoms could do immeasurable damage to the *Shrek* franchise. As could a stubborn lyricist who insisted on making a green, ogre-sized *Shrek* condom joke in the middle of the opening number of *Shrek: The Musical*.

So what’s to be done? The studio’s interest in maintaining control of the content of the stage version of *Shrek* seems irreconcilable with the theatrical mandate which gives the playwright ultimate control of the work which he creates.

Apparently a stand-off, but maybe one that doesn’t matter that much. You could make a case that a great big Broadway musical version of an animated film like *Shrek* is *sui generis*. That like other great big Broadway musicals based on animated films it has so little to do with what we traditionally think of as theater—Chekhov, Beckett, Rodgers & Hammerstein—that it’s actually O.K. if it makes its own rules. That whatever those rules are, you can build a wall around them and keep them quarantined.

You could make that case, but you’d regret it. Because if the author’s copyright in a *Shrek*-sized musical migrates from the bookwriter, composer, and lyricist to the producer, it will only be a matter of time before the producer of a straight play demands the same arrangement.

Why? Because as a general rule, what one producer gets, all producers want. And the lowest common denominator deal tends to become the deal.

In addition, the producer will argue, with some justice, that in order to raise money from his investors he must demonstrate that he has a deal which will protect their money at least as well as the next producer’s deal. And if the next producer owns the author’s copyright and he doesn’t, he may have a hard time capitalizing his show.

So—what we are looking at is indeed a slippery slope, down which the playwright’s copyright runs the risk of sliding into oblivion.

Imagine for a moment that this change has already taken place. Now imagine that Arthur Miller is still alive and
that he has just completed a play called *Death of a Salesman*. A producer has optioned it, put it into production, and that producer is now standing at the back of the theater as the curtain comes down at the end of the first preview. The audience looks shell-shocked. Middle-aged men are weeping openly as they walk past him up the aisle. Understandably nervous, the producer wonders if maybe the Willy Loman story might not run just a little bit longer if it didn’t have such a downbeat ending. After all, Willy doesn’t *have* to drive his car into a bridge abutment. Why can’t all the Lomans—Linda, Happy, Biff, maybe even the hooker from the hotel in Boston—why can’t they all pile into the family jalopy and take off on a comical but heartwarming cross-country road trip in which they confront their demons, defeat them, and start a new life in Alaska with Uncle Ben?

Miller doesn’t want to write it? The producer fires him and finds somebody who will.

And now, on to the directors.

Beginning perhaps ten years ago, theater directors launched an aggressive campaign to establish a new, independent property right—a director’s copyright—in the work which they create. Speaking through their union, directors have gone to great pains to emphasize that, unlike producers, they are not attempting to wrest copyright away from the playwright.

Which is true.

They then go on to emphasize that the creation of a director’s copyright will have no impact on playwrights or on the way in which theater is and has been made for decades.

Which is not true.

On the contrary, if a director’s copyright is ever established, it will drastically limit a playwright’s ability to control the work which he creates, it will inevitably undermine the spirit of trust and openness which is essential to the collaborative process that makes theater happen, and it will have a deeply disruptive, potentially paralyzing effect on theatrical production generally.

Unlike playwrights, directors are employees. When a producer acquires the live performance rights in a play, he begins to hire the people who will make those performances possible: A set designer, a lighting designer, a costume designer, actors of course, and most importantly, a director.
It is the director's status as an employee which has allowed directors as a group to organize, and to be certified as a labor union.

And it is the directors' union, the SSD&C, which has led the fight to create an intellectual property right where none has previously existed. Ted Pappas, former President of the SSD&C, writing in the February, 1999 issue of American Theater Magazine, attempted to take this non-existent right for granted.

"Property rights," wrote Mr. Pappas, "give a director or a choreographer ownership of the staging they create for a production of a play or a musical." This is certainly true of choreographers, who are specifically identified in the Copyright Act of 1976. But it is not true of directors.

In fact, there is no recognized property right that gives a director ownership of any aspect of a theatrical production. Traditionally, directors have not attempted to copyright their work, and no court has ever recognized the validity of a director's copyright claim.

Ron Shechtman, attorney for the SSD&C, has referred to the law in this area as "murky." In order to support this characterization, he and his union rely heavily on two cases, and perhaps one other, recently decided.

The first, Mantello v. Hall, is generally cited as having supported the notion that directors can copyright their stage directions. In fact, it did nothing of the kind.

The case arose out of a production of Terrence McNally's play Love! Valor! Compassion! mounted at the Caldwell Theater in Boca Raton, Florida in 1996. In 1994, Joe Mantello—a brilliant director with whom I have had the immense pleasure of working—staged the original production of Love! Valor! Compassion! in New York, where it won the Tony Award for Best Play.

Two years later, Mantello's attention was directed to the Caldwell production, which was reportedly a virtual replica of his New York production, and he sued, alleging among other things, infringement of a copyright which he had acquired when he filed a copy of McNally's script with his stage

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6 Mantello v. Hall, No. 97cv8196 (S.D. Fla. filed Mar. 21, 1997).
7 Id.
8 Id.
directions written in the margins with the U.S. Copyright Office.\footnote{Id.}

*Mantello v. Hall* was settled before it went to trial.\footnote{See Jesse Green, *Exit, Pursued by a Lawyer*, N.Y. TIMES, Jan. 29, 2006, § 2, at 1.} Mantello’s copyright filing had been processed by the Copyright Office without any opinion offered as to whether the stage directions which he had filed were in fact copyrightable or not. The court reached no decision on the matter.

In response to defendant theater’s motion for summary judgment, the court did find that Mantello had in fact received a copyright certificate from the Copyright Office. But both the filing of the claim and the issuance of the certificate were purely mechanical. Nevertheless, “Possession of this certificate,” said Judge Ryskamp, “creates the presumption that the work in question is copyrightable.”\footnote{Order Granting in Part and Den. in Part Mot. to Dismiss and/or for Summ. J. at 14, Mantello v. Hall, No. 97cv8196 (S.D. Fla. July 22, 1997).} Defendant’s assertion that stage directions are not copyrightable as a matter of law might or might not have been resolved at trial, but to quote Judge Ryskamp again, “with the record in its present undeveloped state, the Court cannot grant summary judgment on this basis.”\footnote{Id.}

And that’s as far as it went.

Another, more recent case, *Einhorn v. Mergatroyd Productions*,\footnote{426 F.Supp. 2d 189 (S.D.N.Y. 2006).} raised a director’s copyright claim in a similar, but slightly different context. Plaintiff Einhorn was hired by defendant Mergatroyd to direct playwright Nancy McLernan’s play, *Tam Lin*.\footnote{Id. at 191.} Einhorn was fired before the play opened.\footnote{Id. at 192.} Subsequent to his firing, he filed a copy of McLernan’s script with some of his stage directions written in the margins with the Copyright Office, a filing which—to quote Judge Kaplan in his opinion delivered from the bench—eventually “matured into a certificate of registration.”\footnote{Transcript of Record at 12, Einhorn v. Mergatroyd Prods., 426 F.Supp. 2d 189 (S.D.N.Y. Apr. 25, 2006) (No. 05 Civ. 8600).}

Whether or not that certificate had any legal force—indeed, whether, as a matter of law, stage directions are copyrightable at all, was an issue the court never reached—
because prior to Judge Kaplan delivering his opinion, plaintiff director Einhorn had agreed to withdraw the registration.

And that’s as far as that went.

Finally, the granddaddy of all these cases, Gutierrez v. DeSantis.\(^{17}\) It was the first one to stir the pot and the one which demonstrates most clearly the potentially devastating effect of a director’s copyright on the way playwrights do their work, and on the vitality of theatrical production generally. The case involved a production of Frank Loesser’s *The Most Happy Fella*, directed at the Goodspeed Opera House and subsequently on Broadway, by Gerry Gutierrez in 1991.\(^{18}\)

As would later be the case in Einhorn and Mantello, Gutierrez attempted to copyright his work by filing a copy of his stage directions, written in the margins of Frank Loesser’s script, with the U.S. Copyright Office.

As has been noted, such a filing is simply that—a filing. It does not establish a copyright, and in fact, there has never been a judicial determination that stage directions, filed by a director, are copyrightable.

But for the sake of argument, let’s say they are. Let’s say Mr. Gutierrez could and did acquire copyright ownership of his staging of *The Most Happy Fella*. What would be the consequence?

*The Most Happy Fella* opened on Broadway in 1956. In the thirty-five years between that opening and Mr. Gutierrez’s revival, there must have been thousands of productions of this brilliant musical play.

If Mr. Gutierrez could acquire copyright ownership of his staging, then the directors of each and every one of these productions could have acquired copyright ownership of theirs as well. Had this happened, over the course of the last four decades *The Most Happy Fella* would have gradually ceased to exist as an independent piece of dramatic literature, giving way instead to a multitude of “Most Happy Fellas,” each one a legal partnership between Frank Loesser and a director whose production he and his heirs had, in all likelihood, never even seen.

Should such copyright partnerships ever come into existence, they would clearly operate as liens on a playwright’s play, restricting—often in unknown and unpredictable ways—


\(^{18}\) Green, *supra* note 10.
the playwright’s fundamental right to control what he has created.

But beyond that, they would have a potentially devastating effect on the facility and vitality of theatrical production.

For example. If at some point in the future, a theater wished to produce *The Most Happy Fella*, they would be faced with a choice. They could examine—how?—each of the then existing copyrighted productions and select the one they wished to reproduce. Or they could proceed with their own original production, running the risk that a particular piece of business, or a stage effect, or their overall approach would be attacked by a director as an infringement of his previously copyrighted version.

Of course, *The Most Happy Fella* is merely illustrative.

Even plays which are currently in the public domain, plays which have been freely available to producers and directors and most importantly to the public for hundreds of years—*Hamlet, King Lear*—would acquire *de facto* copyrights as more and more directors asserted ownership of their versions of these classics. Producing them would become increasingly problematic.

And risky.

Theaters do not want to be sued. Indeed, most of them cannot afford the expense of defending a lawsuit. And if directors are able to copyright their work, the day will inevitably come—and soon—when a theater decides to cancel a production simply because they have been threatened by a director who perceives—rightly or wrongly, it doesn’t matter—that the theater’s production will infringe on a version which belongs to him.

Infringement, of course, requires copying. And copying requires access. But directors are not attorneys, they are artists. And there are plenty of artists—and I am not exempting playwrights—who are prone to see their influence in other people’s entirely original work. It is not difficult to initiate a lawsuit. It is even less difficult to write a letter threatening one.

Which brings us back to the SSD&C.

The directors’ union lays great emphasis on the fact that it has acted with restraint, that it has only pursued cases in which a director’s work has been copied intentionally, and in which the copying was substantial and pervasive.
These limits are meant to be reassuring. But obviously they are self-imposed. And if a director’s copyright is ever established, it will belong, not to the union, but to directors individually.

Consider Mr. Mantello and Mr. Gutierrez again. Both have said that the directing work they've done has not always risen to a level where they personally felt it deserved copyright protection. Yes it did, said Mr. Mantello of his award-winning production of Love! Valor! Compassion! No it didn’t, of his award-winning production of Glengary Glenn Ross. Yes it did, said Mr. Gutierrez, of his award winning production of The Most Happy Fella. No it didn’t, of his award-winning production of The Heiress.

Could any judgment be more subjective? What if Mr. Mantello disagreed with Mr. Gutierrez, and argued that Mr. Gutierrez’ staging of The Heiress did deserve copyright protection? Who would be the better judge?

In a letter to the New York Times, director Charles Marowitz offered the following:

As a director who has found his staging appropriated by less resourceful colleagues, I know that without the text prompting motivation, movement and gestures, no director would be able even to begin ‘staging’ a play. Directorial conception, however, is altogether different from staging and adds an entirely new dimension to a dramatist’s work. Reinterpretations of both modern or classic plays should be entitled to copyright protection because they are the original outgrowth of a director’s imagination.19

But who decides? Who determines when a “director’s imagination” has been sufficiently activated to give birth to a copyrightable piece of work? Who decides when it hasn’t? Are objective standards even possible? And isn’t any line in the sand which makes some direction copyrightable and some not an invitation to an avalanche of litigation casting a cloud over some theatrical productions and paralyzing others?

Clearly, I would say yes. I would also say that I share the universal feeling that something fundamentally unfair has happened when a “less resourceful” director, to use Mr. Marowitz’s phrase, puts up a production which clearly duplicates one mounted by someone else. If an artist is proud of what he’s done, he wants credit for it. He certainly does not

19 Charles Marowitz, Letter to the Editor, Stage Copyrights; What the Director Brings, N.Y. TIMES, Feb. 5, 2006 (responding to Green, supra note 10).
want someone else taking credit for it. And without question, what happens in a case like this feels instinctively like stealing.

In the end, of course, it’s only stealing if the thing taken belonged to somebody. And not everything which feels unfair, or is unfair, can or should be corrected by the courts.

At first glance, it would appear that the SSD&C’s campaign to create a director’s copyright is an attempt to correct the fundamental unfairness described above. But let’s take a second glance.

Interviewed by the New York Times for an article about director’s copyright and the Einhorn case, SSD&C attorney Ron Shechtman had this to say:

If it’s truly a collaborative art form, then why is it only the author who participates in the subsidiary rights that flow from a successful New York production? The appropriate resolution is to give fair credit to all the artists’ contributions. One day, it may end up that the author gets eighty percent, the director ten percent, the original cast X and the designers Z. Because, at bottom, this is all about money.20

“Well, maybe it is, and maybe it isn’t, but for the moment, let’s take Mr. Shechtman at his word. If the union’s push to establish a director’s copyright is even mostly about money, and even more specifically money generated from a first New York production, then the director should be looking, not to the playwright, but to the New York producer for his payday.

When a producer takes the risk involved in mounting a new play or musical on Broadway, he is giving the authors something of enormous value beyond the production itself. He is giving them the visibility and status which attaches to having written a “Broadway show.”

This visibility immediately increases the value of all the subsidiary rights which the authors retain. These include the right to license stock and amateur productions of the show, the right to sell it to the movies, the right to authorize a future Broadway revival, and so on.

In recognition of this value added, the authors grant the producer a participation, and a substantial one, in all revenues

20 Green, supra note 10.
they realize from the exploitation of these rights for a defined period of time.

The revenues flow to the authors because, as authors, the sub rights belong to them. But they share them with the producer in recognition of the production he mounted, and by extension, in recognition of the contributions made by all of the artists the producer hired to make that first production possible.

Foremost among those artists is, of course, the director, who has negotiated an employment contract with the producer specifying the compensation he will receive in exchange for his labors. If, as part of his compensation, the director, and the director’s union, feel he should be entitled to a participation in the author’s sub rights, then it is not to the author, but to the producer’s pre-negotiated share of those sub rights that he should logically look when he is negotiating his contract.

Copyright, as wielded by the SSD&C, has begun to feel like a sledgehammer. If directors think they can use it to surgically remove a small stream of income from the playwright’s subsidiary rights, then not only do they have their hands on the wrong weapon, but if they continue to swing it, aggressively and irresponsibly, the law of unintended consequences says the landscape of theatrical production in this country may be altered in ways which no one can entirely predict, but which we may all, directors included, come to regret.

Copyright law, as I understand it, exists to maximize the creative output of artists, so that their work can enrich the marketplace of ideas necessary to inform and challenge the citizens of a vital, vibrant democracy.

What is and isn’t entitled to copyright protection should be determined by this largest goal.

David Mamet once said that people come to the theater to be told the truth. From Sophocles to Shakespeare to O'Neill, the voice that has spoken that truth has been the voice of the playwright. Anything we do, whether intentionally or inadvertently, which hobbles that voice or hampers access to it, we do as a society at our peril.
NOTES

State and Local Law Enforcement Response to Undocumented Immigrants

CAN WE MAKE THE RULES, TOO?

I. INTRODUCTION

In 2005, in the towns of New Ipswich and Hudson, New Hampshire, local police arrested eight suspected undocumented immigrants on charges of criminal trespass when they failed to provide proper identification. Local police resorted to this tactic after the federal authorities declined to take action against the suspects. This novel approach to immigration regulation at the state level drew national attention as several other local law enforcement offices throughout the country contemplated administrating a similar approach. On August 12, 2005, however, a state judge dismissed these charges, stating that they represented an unconstitutional attempt to regulate the enforcement of

1 The term “undocumented immigrant” is used to describe persons who “(1) have entered the country without inspection or with false documents; (2) have stayed beyond the expiration of their visas; (3) are working without authorization; or (4) are otherwise in violation of immigration laws.” Victor C. Romero, Whatever Happened to the Fourth Amendment?: Undocumented Immigrants’ Rights After INS v. LOPEZ-MENDOZA and UNITED STATES v. VERDUGO-URQUIDEZ, 65 S. CAL. L. REV. 999, 999 n.1 (1992).


3 Id.

4 Andrew Wolfe, Immigrants Cleared of Trespass Charges, NASHUA TELEGRAPH, Aug. 12, 2005.
immigration violations. The judge reasoned that the police action violated the supremacy clause because the federal regulation was “so pervasive” that it left no room for supplementation by the states.

While the charges against these eight suspects were dismissed, the fact that law enforcement felt compelled to take the action they did reflects the growing nation-wide concern about undocumented immigrants who live and work in the United States. Typically, handling immigration matters is something that falls within the purview of the federal government. This New Hampshire case illustrates, however, that the federal government does not always take action, or at least, as swiftly as some might hope. As a result, local authorities across the country have started to take their own action by expanding criminal statutes to cover undocumented immigration, discriminatorily applying the law against undocumented immigrants, and acting as deputies of the federal immigration law. They have resorted to these methods because it is thought that the federal government’s limited number of agents is inadequate to address the large numbers of undocumented immigrants.

This Note argues that the immigration legislation should remain within the purview of the federal government and that the state and local governments should neither expand laws nor arbitrarily and discriminatorily administer existing laws to address the issue of undocumented immigration, despite the perceived incapability of the federal government to handle the issue. Instead, the local authorities should adhere to the systematic delegation of authorities that are made available by the existing federal immigration laws. Part II of this Note provides background information regarding

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6 Id. (quoting Appeal of Conservation, 147 N.H. 89 (2001)).


With a maximum of 5,500 federal immigration agents available to enforce immigration controls and an estimated eight million undocumented immigrants within the United States, the federal government is in dire need of increased manpower if it chooses to prioritize undocumented immigration control and criminal immigration enforcement issues on the federal agenda.

Id.
the undocumented immigration situation within state and local communities, as well as a brief overview of the powers at both the federal and state level dealing with immigration matters. Part III describes and analyzes the various and conflicting ways that state and local authorities address undocumented immigrants within their communities. Part IV argues that these state and local methods should not be used to combat illegal immigration because of their unlawful expansion of established authority and inherent ineffectiveness. Instead, this Note advocates that adherence to the established method of regulated delegation of local enforcement by federal authorities is the more appropriate response to the undocumented immigration issues.

II. BACKGROUND

The issue of undocumented immigration is of significant importance. The population of undocumented immigrants is reportedly at a record high and the rate of increase appears to be steady. It is the local communities that must ultimately absorb the impacts of this trend. The communities have voiced their concerns and are now looking for solutions. The federal government has primary authority to regulate and enforce the immigration law. However, the steady increase in the population of undocumented immigrants reveals that the federal government does not have adequate resources to address the situation alone. Where the federal government lags, the onus falls on state and local law enforcement forces to assist in the cause. This has increasingly placed state and local authorities under scrutiny. The question becomes if and how state and local law enforcement agencies can take matters into their own hands. Both statutory law and the general judicial support for state and local enforcement of immigration law uphold the view that this is a viable option. Serious

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11 Sessions & Hayden, supra note 8, at 330.
12 Id.
13 Id.
concerns arise, however, when considering where the appropriate limits of this authority should be set.

A. Undocumented Immigration Issues in Context

The federal government appears to be overwhelmed by its efforts to control immigration, especially considering the large and increasing number of undocumented immigrants. There are an estimated eight to ten million undocumented immigrants living within the United States.\textsuperscript{14} The efforts made by the federal government to control the influx had little success as the population has shown a continuous growth at a rate of approximately 400,000 undocumented immigrants a year.\textsuperscript{15} One former U.S. ambassador\textsuperscript{16} has criticized the “very chaotic [federal immigration] system” as being under-funded and lacking any true cooperative effort with local authorities.\textsuperscript{17} The Department of Homeland Security is said to be “choking on massive workloads” with an estimated backlog of 4.1 million pending immigration applications of various kinds.\textsuperscript{18}

The backlog at the federal level can create havoc on the state and local levels, since it is ultimately the local community that must absorb the growing population of undocumented immigrants. The main complaints voiced by these communities are that these undocumented immigrants are responsible for a significant amount of job displacement among documented immigrants and native-born Americans, adversely affect their general way of life, and drain valuable resources from the communities forced to deal with this sizable population.\textsuperscript{19}

\textsuperscript{14} Id. at 324 n.1. See also Paul Magnusson, Go Back Where You Came From: Across the Country, a Grassroots Backlash Against Illegals is Building, BUS. WK., July 4, 2005, at 86 (according to a new study by the Pew Hispanic Center, 1.4 million Mexicans have crossed over into the U.S. with 85% of them entering illegally since 2000).


\textsuperscript{16} George Bruno, a private attorney in Manchester, and former U.S. ambassador to Belize.

\textsuperscript{17} Stephen Seitz, Judge: Fining Illegals for Trespass Intrudes on Federal Authority, UNION LEADER, Aug. 13, 2005 (quoting George Bruno).

\textsuperscript{18} Immigration Reform II, supra note 15.

In past years of rising unemployment, state and local communities have contended that immigrants, in particular undocumented immigrants, are responsible for taking jobs away from American citizens.\footnote{Id.} Empirical studies conducted in the early 1990s estimated that the total cost of job displacement due to undocumented immigrants would reach approximately $171.5 billion between 1993 and 2002.\footnote{Turoff, \textit{supra} note 9, at 184 n.40.} A recent study has also shown that new undocumented immigrants have substantially increased their ability to find work while the documented immigrants and native-born American citizens have seen a decrease in their ability to find employment between 2000 and mid-2003.\footnote{Frei, \textit{supra} note 19, at 1379.} Even the Supreme Court has supported the view that undocumented immigrants deprive citizens and legally admitted aliens of jobs and that their continued employment poses a threat to the wages and working conditions of citizens and legally admitted aliens.\footnote{DeCanas v. Bica, 424 U.S. 351, 356-57 (1976): Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. \textit{Id.}}

The impact of lost jobs is especially concentrated in the area of low-skilled American workers where an estimated forty to fifty percent of wage loss is due to undocumented immigrants.\footnote{Frei, \textit{supra} note 19, at 1379.} It is estimated that there are more than 100,000 day laborers\footnote{Day laborers can be defined as individuals who gather at a particular hiring site to sell their labor for an hour, the day, or a particular job. Due to their undocumented status or their inability to speak English, these laborers turn to this trade out of necessity. Mauricio A. Espana, \textit{Day Laborers, Friend or Foe: A Survey of Community Responses}, 30 \textit{FORDHAM URB. L.J.} 1979, 1980-81 (2003).} distributed over at least four hundred different hiring sites within the United States.\footnote{Steven Greenhouse, \textit{Front Line in Day Laborer Battle Runs Right Outside Home Depot}, \textit{N.Y. Times}, Oct. 10, 2005, at A1.} These workers for hire supply the increasing demand for cheap labor found in various communities.\footnote{Espana, \textit{supra} note 25, at 1980.}

Aside from taking jobs away, many communities contend that these groups create “unsanitary conditions” and are simply “aesthetically detrimental” to their neighborhood,
thus lowering the quality of life for many local residents.\textsuperscript{28} The complaints that the day laborers are unsanitary and aesthetically detrimental demonstrate the general disfavor that some local communities find with the presence of undocumented immigrants.\textsuperscript{29} The citizens of towns bordering Mexico cite this as a major issue within their communities.\textsuperscript{30} In one border town residents complained that the constant flow of approximately three hundred undocumented immigrants that travel through their town each night is overwhelming.\textsuperscript{31} The residents associate this growing population with an increase in crime, nuisance, and reckless behavior.\textsuperscript{32} Regardless of the validity of these concerns,\textsuperscript{33} the undocumented immigrants, whether working as day laborers or in transit from a border country, are highly visible, and local residents point the finger at them for unfairly forcing them to shoulder increased economic and social burdens.\textsuperscript{34}

The burdens that the local communities complain about are supported by empirical evidence from recent studies.\textsuperscript{35} One study estimated that $5.4 billion was spent in public assistance to undocumented immigrants in 1990.\textsuperscript{36} That same study stated that $11.9 billion was spent in public assistance and displacement costs for an undocumented population of 4.8 million in 1992.\textsuperscript{37} More recent studies support these findings with an estimated $24 billion spent on social services for undocumented immigration.\textsuperscript{38} With an undocumented immigration population that is already estimated to be nearly double the amount cited in 1992,\textsuperscript{39} it is not surprising that the state and local communities are beginning to look to their local

\textsuperscript{28} Id.; See also Jon Ward, Arrests Not Linked to Illegals Crackdown, WASH. TIMES, Oct. 29, 2004, at B1 (local police receive “complaints about disorderly conduct by some of the day laborers such as public drunkenness, urinating in public and harassment of women who were entering a nearby rape crisis counseling center.”).

\textsuperscript{29} Frei, supra note 19, at 1380.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} There are arguments that these assertions are facially invalid and that undocumented immigrants actually provide positive contributions to the U.S. economy and help create jobs in urban areas. Turoff, supra note 9, at 184 n.41.

\textsuperscript{34} Frei, supra note 19, at 1380.

\textsuperscript{35} Turoff, supra note 9, at 183-84.

\textsuperscript{36} Id. at 183.

\textsuperscript{37} Id. at 183-84.

\textsuperscript{38} Id. at 184.

\textsuperscript{39} Current estimates state that there are eight to ten million undocumented immigrants within the U.S. Sessions & Hayden, supra note 8, at 327.
law enforcement agencies to address these issues that they deal with on a daily basis.

B. Exclusive Federal Authority over Immigration Law

Historically, the federal government has had exclusive authority over immigration issues since the late nineteenth century. In 1849, the Supreme Court stated that the “whole subject of the admission of foreigners into the United States, and the terms upon which they shall be admitted, belongs, and must belong, exclusively to the national government.” The text in both the Constitution and the subsequent legislation by Congress, as well as general foreign policy concerns, empower the federal government with this exclusive authority.

The enumerated and implied Constitutional powers are viewed as the source of Congress’ exclusive authority over immigration issues. The enumerated powers are derived from the commerce, naturalization, migration and importation, and war power clauses. The implied Constitutional powers stem from the notion that this authority is simply an incident of sovereignty. This concept has its foundation in the “accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within

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40 Although there was no established federal immigration law until 1875, there was limited state legislation in the area to varying degrees. Frei, supra note 19, at 1361, 1363.
42 Kurzban, supra note 10, at 25.
43 Congress is authorized to “regulate Commerce with foreign Nations, and among the several States.” U.S. CONST. art. I, § 8, cl. 3.
44 Congress is granted the power to “establish a uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4.
45 “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” U.S. CONST. art. I, § 9, cl. 1.
46 Congress has the authority to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. CONST. art. I, § 8, cl. 11. This war power “permits the federal government to stop the entry of every alien and to expel them from the U.S.” Kurzban, supra note 10, at 25.
47 Kurzban, supra note 10, at 25; Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (J. Field declared that the power to exclude foreigners is “an incident of sovereignty.”).
its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”

Congress's pervasive legislative activity further establishes that the federal government’s “plenary authority over immigration extends to the control of aliens within the borders of the U.S.” Congress demonstrated this authority when it first enacted the Immigration and Nationality Act (“INA”) in 1952, which remains the basic statute of current immigration law to this day. Within the general framework regarding admittance and deportation, there are many provisions of the INA that regulate the activities of foreign nationals within the United States. Since its enactment, there have been several significant amendments to the INA which have reached even further into the regulation of foreign national activity. One recent example is the USA PATRIOT Act which was enacted into law in response to the terrorist attacks on the United States on September 11, 2001.

With regard to the administration of the federal law, Congress has delegated most of its immigration authority to the executive branch. Now, instead of the Immigration and Naturalization Service (“INS”), the Department of Homeland Security (“DHS”), part of the executive branch, has nearly all of the authority to administer and enforce the federal immigration laws. The DHS is subdivided into three bureaus: the U.S. Citizen and Immigration Services (“UCIS”), Immigration and Customs Enforcement (“ICE”), and Customs

48 Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).
49 Austin T. Fragomen, Jr. & Steven C. Bell, IMMIGRATION PRIMER 4 (1985).
52 Yale-Loehr, supra note 50, at 56.
53 Id. at 57.
54 Fragomen & Bell, supra note 49, at 4.
55 Yale-Loehr, supra note 50, at 59.
and Border Protection (“CBP”) bureaus.\textsuperscript{57} The regulations promulgated by these various agencies provide the basic structure for enforcing the INA.\textsuperscript{58}

Separate and apart from the Constitution and the federal statutes lie foreign policy concerns related to the direct impact that immigration matters have on relations with other countries.\textsuperscript{59} These concerns grant inherent authority over this area to the national government.\textsuperscript{60} Therefore, the federal government must act in uniformity, as it does in all other areas of foreign policy, in order to advance two important aspects of immigration regulation.\textsuperscript{61} First, the manner in which the United States decides to treat foreign nationals, including deciding which ones to admit or expel, impacts U.S. relations with the home country of those nationals.\textsuperscript{62} Second, the federal government proactively utilizes immigration policy to advance significant foreign policy objectives that reach far beyond the admittance of individuals into the United States.\textsuperscript{63} These two critical aspects are the main reasons why the Supreme Court has ruled in favor of federal exclusivity over immigration matters. For example, when the Court struck down a California statute that regulated the arrival of foreign passengers in \textit{Chy Lung v. Freeman}, it noted that the federal government alone would be called to respond to any foreign policy consequences of state created immigration policy; therefore, the federal government alone should be the one to create such policy.\textsuperscript{64}

\textsuperscript{57} Id. The CBP and ICE Bureaus handle the functions of border patrol, detention and removal, intelligence, investigations and inspections. Id.
\textsuperscript{58} Yale-Loehr, supra note 50, at 59.
\textsuperscript{60} Kurzban, supra note 10, at 25.
\textsuperscript{61} Pham, supra note 59, at 994.
\textsuperscript{62} Id. at 992-93.
\textsuperscript{63} Id. at 993-94.
\textsuperscript{64} Chy Lung v. Freeman, 92 U.S. 275, 279-80 (1875).

If [the federal] government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just re clamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations
The effect of post September 11th immigration legislation on relations between the United States and Mexico provides a specific example of how immigration policy decisions directly affect foreign policy.\textsuperscript{65} The United States severely restricted the immigration admittance standards in the interests of national security after the attacks by terrorists on September 11, 2001.\textsuperscript{66} Prior to these attacks, the United States and Mexico were involved in negotiations that would have established a historic bilateral migration agreement between the two countries.\textsuperscript{67} However, the September 11th terrorist attacks halted these discussions.\textsuperscript{68} This was seen as a principal driving force behind the Mexican President’s decision to break from the United States and vote against military action in Iraq.\textsuperscript{69} Foreign relations between the two countries have been described as “colder” ever since.\textsuperscript{70}

The changes that the federal government has made to the definitions regarding the admittance of refugees demonstrate the second foreign policy concern surrounding immigration.\textsuperscript{71} The President, in consultation with Congress, has the authority to determine the number of refugees to be admitted based on “humanitarian concern” or for other reasons of national interest.\textsuperscript{72} The United States has historically used this power to modify the refugee guidelines to admit nationals from countries that the United States considered adversaries.\textsuperscript{73} By labeling these foreign nationals “legitimate refugees,” the United States uniformly denounced the policies advanced by their home countries.\textsuperscript{74} The federal government would lose the ability to send any strong unified statement without the exclusive authority to create these definitions.

\textit{to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.}

\textit{Id.} at 280.

\textsuperscript{65} Pham, \textit{supra} note 59, at 992.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.} at 993.

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} Pham, \textit{supra} note 59, at 993.

\textsuperscript{72} \textit{Id.} at 992 n.139.

\textsuperscript{73} \textit{Id.} at 993.

\textsuperscript{74} \textit{Id.}
C. State and Local Authority to Enforce Immigration Law

Despite what appears to be overwhelming authority for exclusive jurisdiction over immigration matters by the federal government, some argue that state and local law enforcement agencies can enforce immigration laws and have had inherent authority to do so ever since Congress enacted the Immigration and Nationality Act in 1952. Three sources that support this viewpoint are: (1) specific text within the INA; (2) federal judicial decisions; and (3) Congressional amendments that followed the enactment of the USA PATRIOT Act and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) that added further explicit authority to the powers of the state and local law enforcement agencies.

1. Statutory Support for Local Enforcement of Immigration Laws

There is text within the INA that specifically supports local enforcement of immigration law. Title 8 Section 1324(c) states that:

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

Some argue that state and local law enforcement personnel fall under the “all other officers whose duty it is to enforce criminal laws” provision. This interpretation is most strongly supported by the INA’s legislative amendment history.

When Section 1324 was first enacted in 1954, the text read: “and all other officers of the United States whose duty it is to enforce criminal laws.” However, subsequent amendments ultimately removed the phrase “of the United States” from the statute. This reflects the Congressional...
intent not to limit the arrest authority to members of the federal government agencies, but rather to include state and local law enforcement departments as well.\textsuperscript{83}

In order to clarify any confusion surrounding the state and local enforcement authority, Congress passed the Doolittle Amendment to the AEDPA of 1996.\textsuperscript{84} The amended Act now states:

\begin{itemize}
  \item[(a)] In general

  Notwithstanding any other provisions of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who:

  \begin{itemize}
    \item[(1)] is an alien illegally present in the United States; and
    \item[(2)] has previously been convicted of a felony in the United States and deported or left in the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such a period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.
  \end{itemize}

  \item[(b)] Cooperation

  The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.\textsuperscript{85}

After the terrorists attacked the United States on September 11, 2001, Congress enacted the USA PATRIOT Act, the Homeland Security Act, and the Enhanced Border Security and Visa Entry Reform Act.\textsuperscript{86} All of these amendments had a common stated goal: “to improve federal and local cooperative efforts to detect and detain aliens participating in terrorist activities in the United States.”\textsuperscript{87} Section 287(g) of the INA addresses this particular legal concern by specifically authorizing the Attorney General to contract with state and

\begin{itemize}
  \item[{83}] Id. at 86-87.
  \item[{84}] Sessions & Hayden, supra note 8, at 344.
  \item[{86}] Hethmon, supra note 75, at 83-84.
  \item[{87}] Id. at 84.
local agencies and have them perform certain functions of a federal immigration officer. The specific provision states that:

[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

State or local law enforcement officials that operate under one of these agreements receive extensive immigration law training. They are also given much broader authority to enforce the immigration laws as compared to their non-deputized counterparts who only retain general inherent authority.

2. Judicial Support for Local Enforcement of Immigration Law

Some courts have upheld the general proposition that state officials are not preempted from enforcing the federal immigration laws. In People v. Barajas, the California Supreme Court did not find any express limitation on the local enforcement of specific areas of federal immigration law. The defendant in Barajas was originally arrested by local police for a traffic violation and for possession of a knife. The arresting police officer proceeded to question the defendant about his immigration status after reading him his Miranda rights. The defendant replied that he had left his “green card” at home. The police issued a misdemeanor citation and released the defendant. The local police still suspected that the defendant was an undocumented immigrant and therefore
inquired with federal officials about the defendant’s status. 97 The INS agent informed the police that the defendant was apprehended on two prior occasions and was “formally deported” the second time. 98 The INS agent then instructed the local police to arrest the defendant for violating Section 1326 of Title 8 by reentering the country after deportation without express permission from the Attorney General. 99 The local police officers arrested the defendant as instructed. 100

The defendant in Barajas claimed that the local police officers did not have the authority to arrest him for violations of federal immigration law. 101 The court rejected this argument and stated that the specific text found in Sections 1325 and 1326 of Title 8 at the time did not contain the limiting language that Section 1324 had. 102 The court stated that all three sections were originally drafted together, yet only Section 1324 was subsequently amended to include only “officers of the United States.” 103 The court drew from this a clear Congressional intent that “arrests for violation of Section 1324 were to be made only by federal personnel, while by clear implication, Sections 1325 and 1326 arrests were to be made by state and local officers as well.” 104 The court went on to cite the supremacy clause as a “two-edged sword, and in the absence of a limitation, the states are bound by it to enforce violations of

97 Id.
98 Barajas, 147 Cal. Rptr. at 197.
99 Id.

Any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien’s reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

100 Barajas, 147 Cal. Rptr. at 197.
101 Id. at 198.
102 Id.
103 Id.
104 Id.
the federal immigration laws." This proposition strongly supports state and local enforcement authority by not only deeming it to be constitutionally acceptable, but a required obligation.

All of the federal circuit courts that have ruled on this issue have held similarly when it comes to criminal violations of federal immigration laws. In Gonzalez v. City of Peoria, the Ninth Circuit placed an interesting gloss over the Barajas decision. The defendants in Gonzalez, like the ones in Barajas, were stopped by local police, questioned, arrested, and detained in order to be released to federal immigration authorities. The defendants made similar claims that these arrests were unlawful under federal immigration law. The Gonzalez court ruled against them, however, stating that the text of Title 8 Section 1325 did not preclude local police from enforcing the statute. The distinguishing aspect of the Gonzalez decision lies in the particular attention to the fact that the Barajas opinion was based on a criminal offense. The court stated that local authorities must distinguish between the criminal violation of illegal entry and the civil violation of illegal presence when enforcing violations of the federal immigration statute. The opinion went on to state that the civil provisions of the code constituted a “pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”

In Lynch v. Cannatella, the Fifth Circuit also addressed the issue of state and local enforcement of federal immigration laws. The court struck down the defendants’ arguments for

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105 Id. at 199.
106 Gonzalez v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983), overruled on other grounds by Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1041 (9th Cir. 1999).
107 Id. at 472.
108 Id. at 474.
109 Id. at 475-77.
110 Id. at 476.
111 Id. at 477.
112 Gonzalez, 722 F.2d at 477. It has been argued that this is merely dicta and outside the scope of the decision since the civil provisions of the INA were not an issue in this case. Sessions & Hayden, supra note 8, at 333. However, in support of the Ninth Circuit position, some states have specifically authorized the arrests for criminal violations of the INA but do not permit arrests based solely on undocumented immigrant status since these individuals may only be in violation of the civil provisions of the INA. Office of the Attorney General State of New York, Informal Opinion No. 2000-1, (2000) available at http://www.oag.state.ny.us/lawyers/opinions/2000/informal/2000_1.html.
113 Lynch v. Cannatella, 810 F.2d 1363, 1366 (5th Cir. 1987).
preemption and broadly held that there was no federal immigration law that precluded the enforcement of immigration law by state and local law enforcement personnel. With this broad statement the Lynch court seemed to indirectly disagree with the civil and criminal distinction drawn by the Ninth Circuit in Gonzalez.

In United States v. Vasquez-Alvarez, the Tenth Circuit rendered a decision that seemed to be more consistent with the broad holding in Lynch than the more restrictive decision set forth in Gonzalez. The Oklahoma police arrested the defendant in Vasquez-Alvarez based on his suspected undocumented status. Federal immigration authorities revealed that he had been previously arrested on felony charges and subsequently deported just as the defendant in Bajaras. The Vasquez-Alvarez Court reviewed the post AEDPA version of Title 8 U.S.C. Section 1252(c) and ruled that one of the main purposes in amending the statute was to settle any confusion regarding the authority of state and local authorities to enforce the federal immigration law. The Tenth Circuit used this reasoning to uphold the general concept that federal immigration law did not preempt the

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114 Id. at 1371. The court referenced the 1970 version of 8 U.S.C. § 1223(a) which outlined the duties of agents whose vessels bring aliens into U.S. ports and the duties of the immigration officials with regard to the removal of those aliens from the vessel. Despite including the text “immigration officer” within the text of § 1223(a) the court stated that “[n]o statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation’s immigration laws.” Id.

115 See Lynch, 810 F.2d at 1371.


117 Id.

118 Id.

119 Id. at 1300.
ability of state and local law enforcement personnel to enforce the federal statutes.  

The essential holding of the *Bajaras* opinion has been supported by the subsequent federal court decisions in the Fifth, Ninth, and Tenth Circuits. The general rule that federal immigration law does not preempt state and local law enforcement remains intact even if the parallel courts did not address the specific warning regarding civil penalties pointed out by the *Gonzalez* court. This authority at least signifies that criminal law enforcement of federal immigration law is not out of the reach of state and local authorities.

## III. THE STATE AND LOCAL LAW ENFORCEMENT RESPONSE TO UNDOCUMENTED IMMIGRANTS

The state and local law enforcement agencies dealing with the rising population of undocumented immigrants within their communities have taken various steps to address the issue. The response taken by the New Hampshire authorities represents a novel technique, but not the only one. There are three main categories of responses that state and local authorities have used recently. First, existing state criminal statutes have been expanded to cover undocumented immigrants. The second category is similar in that it involves existing state laws, but distinct in that it deals with the arguably discriminatory enforcement of laws such as loitering and criminal nuisance. Third, state and local law enforcement agencies have received specific authority from the Department of Homeland Security to act as deputies of the federal immigration law pursuant to Section 287(g) of the Immigration and Nationality Act as amended by the Homeland Security Act of 2002.

### A. Expansion of Existing State Laws to Address Undocumented Immigration

Local authorities have expanded existing state criminal statutes to cover undocumented immigrants. In the recent
New Hampshire case, police arrested the eight suspected undocumented immigrants on separate occasions for criminal trespass after they produced fake identifications during traffic stops.124 The current New Hampshire criminal trespass statute states that “[a] person is guilty of criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place.”125 The local police from New Ipswich and Hudson, New Hampshire read this statute as authorizing them to arrest the suspected undocumented immigrants within the state’s borders because, as undocumented immigrants, they do not have any legal permission to be anywhere in the United States.126

Richard E. Gendron, the police chief in one of the New Hampshire towns said, “the problem of illegal immigration is a real one faced by local police officers across the country.”127 He further stated that he “resorted to local charges after federal Immigration and Customs Enforcement officers declined to pick up the defendants when [the] officers stopped them earlier this year and the defendants could not produce valid immigration documents.”128 Officer Gendron was then quoted as saying that he still believed that he was “acting within the mission to enforce the laws of the state of New Hampshire, and acting in the best interests of the citizens of Hudson and in the interest of homeland security.”129 This novel interpretation of the reach of the statute was not explicitly struck down by the state judge citing a lack of precedent or legislative history on the subject.130 Instead, the judge relied on federal preemption standards stating that the charges were unconstitutional attempts to regulate in the area of enforcing immigration violations.131 Despite the court’s ruling, some still support the police chief’s broad interpretation of the criminal trespass statute. State Representative David Buhlman has stated that he would seek legislation that would “beef up” the statute to

124 Judge Dismisses Trespassing Charges Against Illegal Immigrants, FOSTERS, Aug. 12, 2005.
126 Wolfe, supra note 4.
127 Vaishnav, supra note 4, at B3.
128 Id.
129 Id.
130 Wolfe, supra note 4.
legitimize its use against undocumented immigrants despite the ruling on federal preemption.\textsuperscript{132}

New Hampshire is not the only state that has considered using this type of response. State Representative Courtney Combs of Ohio has announced that he is drafting a new offense called “state trespass” that would make it a state criminal offense for an undocumented immigrant to cross Ohio’s borders.\textsuperscript{133} The proposal is only a portion of a multi-tiered program that Combs is hoping to implement with the help of the Butler County Commissioner and a local Sheriff in an effort to round up all of the undocumented immigrants in the state and deport them.\textsuperscript{134} The proposed plan also involves adding a charge of falsification against inmates who lie about their citizenship when they are booked for another crime.\textsuperscript{135}

Once arrested, the state will make a demand to the federal immigration authorities to begin deportation proceedings or charge the federal government a fee of seventy dollars a day per prisoner.\textsuperscript{136} Butler County has already acted on the threat by billing the federal government $71,610 to house fifteen undocumented immigrant prisoners from June to October, 2005.\textsuperscript{137} It is conceded, however, that this is merely a symbolic protest since the federal government does not have any obligation to pay the fines.\textsuperscript{138} The symbolism behind this movement and others like it represents the growing frustration with the inadequate federal government response to the issue of undocumented immigration. Representative Combs denies that this is any sort of discrimination against a particular ethnic group, but instead believes that it is “about national security and the federal government’s failure to act.”\textsuperscript{139} Whichever way people feel about Representative Combs’ action, what seems apparent is that this is just the beginning of states’

\begin{footnotesize}
\begin{enumerate}
\item Judge Dismisses Trespassing Charges Against Illegal Immigrants, supra note 124.
\item Id.
\item Id. The charge of seventy dollars is said to offset the cost of keeping these individuals in state run holding facilities. Id.
\item \textit{U.S. Billed For Immigrants}, CINCINNATI ENQUIRER, Oct. 27, 2005, at 3.
\item Id.
\item Lolli, \textit{supra} note 133, at A10.
\end{enumerate}
\end{footnotesize}
actions to deal with the growing undocumented immigrant population.

The local governments in New Hampshire and Ohio are not the only communities seeking new ways to address undocumented immigrants. A recent case in Canyon County, Idaho further exemplifies the trend of local communities prepared to use creative interpretations of state and local laws in order to address immigration issues within their regions.\footnote{Canyon County v. Syngenta Seeds, Inc., No. CV05-306-S-EJL, 2005 WL 3440474, at *1 (D. Idaho Dec. 14, 2005).} Canyon County filed suit in the District of Idaho against several local employers for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO").\footnote{Id.} A violation under 18 U.S.C. § 1962(c) requires that an enterprise be conducted through a pattern of racketeering activity.\footnote{18 U.S.C. § 1962(c) (1988).} Further, any RICO plaintiff must allege a direct causal link between the injury and the defendant’s violation in order to make a valid claim.\footnote{Canyon County, 2005 WL 3440474, at *2.} Canyon County claimed that the defendants used their businesses as “association-in-fact enterprises for the purpose of obtaining and employing illegal immigrant workers to reduce labor costs.”\footnote{Id. at *1.} Canyon County further asserted that it was harmed by being forced to provide medical and criminal justice services to these undocumented immigrants as a direct result of the defendants’ illegal racketeering activity.\footnote{Id. at *2.}

The court first focused on Canyon County’s standing based on the alleged harm being inflicted by the defendants.\footnote{Id.} The defendants cited the “municipal cost recovery rule” in an effort to bar Canyon County’s claim.\footnote{Id.} This rule holds that “the cost of public service for the protection from fire or safety hazards is to be borne by the public as a whole, not assessed...
against the tortfeasor whose negligence creates the need for the service.\textsuperscript{148} Canyon County alleged that the racketeering conducted by the defendants constituted criminal activity and therefore the “public nuisance” exception to the “municipal cost recovery rule” should apply.\textsuperscript{149} The court refused to apply this “public nuisance” exception for two reasons.\textsuperscript{150} First, the current Idaho Code does not “specifically identify criminal conduct as a public nuisance.” Secondly, the court did not see this as a proper public nuisance claim.\textsuperscript{151} The court stressed the fact that Canyon County was not acting as a government entity “attempting to ‘abate’” a public nuisance in this action.\textsuperscript{152} Instead, the court labeled the action a civil lawsuit in which Canyon County was appearing as a private party seeking to recover damages.\textsuperscript{153} Therefore, granting the relief sought in this action would “do nothing to stop or ‘abate’ the Defendants’ alleged criminal conduct.”\textsuperscript{154} The court went on to state that the action should be dismissed due to the plaintiff’s failure to overcome the “basic flaw” that the action was predicated on recovery for the “costs of municipal services.”\textsuperscript{155} This critical decision was celebrated by the local migrant worker council as a message that the immigration problems cannot be “solved in this manner.”\textsuperscript{156} However, the county commissioner, who is just as determined as Representative Renzullo in New Hampshire and Representative Combs in Ohio to address the undocumented immigrant situation without the assistance of federal authorities, is seeking to appeal this decision.\textsuperscript{157} It would not be surprising to see similar actions taken by more local communities throughout the country if the undocumented immigrant population continues to expand at its current rate.

\textsuperscript{148} Flagstaff v. Atchison, Topeka & Santa Fe Railway Co., 719 F.2d 322, 323 (9th Cir. 1983) (citing City of Bridgeton v. B.P. Oil, Inc., 369 A.2d 49 (1976)).
\textsuperscript{149} Canyon County, 2005 WL 3440474, at *3.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Canyon County, 2005 WL 3440474, at *6.
\textsuperscript{156} Rebecca Boone, \textit{Judge Dismisses Idaho Lawsuit Against Employers of Allegedly Illegal Immigrants}, \textit{COLUMBIAN} (Vancouver, WA), Dec. 15, 2005, at C5.
\textsuperscript{157} Id.
B. Targeted Enforcement of Existing State Laws to Address Undocumented Immigration

Other state and local enforcement agencies have taken a different approach to the undocumented immigration problem by enforcing existing laws in arguably discriminatory ways rather than expanding those laws’ interpretations or creating new legislation. In Virginia, twenty-two day laborers were arrested near a 7-Eleven on a charge of loitering, after being warned for several weeks that they should not be gathering around the convenience store.\(^{158}\) The local police denied that this was an immigration concern, and instead labeled it “purely a community maintenance issue.”\(^{159}\) However, once the immigrants were arrested, those that could not produce identification were immediately taken into custody and officers performed background checks on them. The investigations revealed that some of them were flagged with deportation notices from the Bureau of Immigration and Customs Enforcement.\(^{160}\) These men were reported and faced deportation.\(^{161}\) Given the loitering provision’s history of discriminatory enforcement in the past,\(^{162}\) the local immigrant population may have reason to become alarmed about the precedent that these arrests have created.\(^{163}\) The local police still maintain, however, that deportation of these individuals was not the ultimate goal of the arrests. They claim that the arrests were in response to numerous complaints from local citizens regarding the disorderly conduct of some of the day laborers.\(^{164}\)

Similar community maintenance concerns were used as the justification for the raiding and closing of a home in

\(^{158}\) Ward, supra note 28, at B1.

\(^{159}\) Id.

\(^{160}\) Id.

\(^{161}\) Id.

\(^{162}\) In Chicago v. Morales, the Supreme Court struck down a city ordinance which prohibited “criminal street gang members” from ‘loitering’ with one another or with other persons in any public place” due to a vagueness violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. The Court concluded that the ordinance afforded “too much discretion to the police and too little notice to citizens who wish to use the public streets.” It further stated that the ordinance’s “relative importance to its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.” 527 U.S. 41, 45-46, 63-64 (1999).

\(^{163}\) Ward, supra note 28, at B1.

\(^{164}\) Id.
Farmingville, New York, which sheltered as many as sixty-four male occupants believed to be day laborers. This was the first house in the locality to be shut down for illegal overcrowding, and the raid resulted in an additional 117 people being targeted for investigation. The police arrested the owner of the home on criminal contempt and criminal nuisance charges due to her failure to adhere to State Supreme Court orders regarding compliance with building codes. Supporters of the immigrant workers point out that a discriminatory intent may have been present because non-immigrant homes in neighboring communities would violate the specific text of the illegal overcrowding ordinance yet were not targeted. County executive Steve Levy has argued that he is merely enforcing the law. However, he also admitted to first trying to deputize

166 Id.
167 Id. See N.Y. PENAL LAW § 215.50 (McKinney 2000); N.Y. PENAL LAW § 240.45 (McKinney 2000).

Criminal contempt in the second degree

A person is guilty of criminal contempt in the second degree when he engages in any of the following conduct:

3. Intentional disobedience or resistance to the lawful process or other mandate of a court except in cases involving or growing out of labor disputes as defined by subdivision two of section seven hundred fifty-three-a of the judiciary law; or

6. Intentional failure to obey any mandate, process or notice, issued pursuant to articles sixteen of the judiciary law, or to rules adopted pursuant to any such statute or to any special statute establishing commissioners of jurors and prescribing their duties or who refuses to be sworn as provided therein . . .

N.Y. PENAL LAW § 215.50.

Criminal nuisance in the second degree

A person is guilty of criminal nuisance in the second degree when:

1. By conduct either unlawful in itself or unreasonable under all the circumstances, he knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons; or

2. He knowingly conducts or maintains any premises, place or resort where persons gather for purposes of engaging in unlawful conduct.

N.Y. PENAL LAW § 240.45.

168 Lambert, supra note 165.
169 Paul Vitello, Responding to the Law of ‘Nimby,’ N.Y. TIMES, July 17, 2005, at 14LI.
county police officers as federal immigration agents before being halted by the police union, thereby calling his stated innocuous motivation into question.  

C. Recruitment of State and Local Enforcement Agencies by the Federal Government

Although Mr. Levy did not have much success in his attempt to deputize his local police force, other states have effectively implemented such programs. The judge that handed down the opinion in the New Hampshire case specifically stated that there were provisions in the federal law under which local authorities could be deputized to enforce federal immigration law.  

On August 15, 2005, Arizona Governor Janet Napolitano declared a state of emergency along the state border in an effort to provide relief to areas affected by a rising undocumented immigrant population and an increasing amount of cross-border crime. This action freed up both state and federal emergency funds that are normally reserved for natural disasters. Prior to this declaration, Napolitano expressed disappointment and impatience with the federal government’s “red tape,” and its inability to provide any response to the immigration issues in her state. The Secretary of the Department of Homeland Security, Michael Chertoff, finally gave in to the requests for action and offered to coordinate efforts between the federal agencies and the local police forces in Arizona. The Arizona Department of Corrections and the U.S. Department of Homeland Security entered into a Memorandum of Understanding (“MOU”) on September 16, 2005. This agreement set forth the terms by which the U.S. Immigration and Customs Enforcement Bureau authorizes qualified state law enforcement personnel to

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170 Id.
171 Judge Dismisses Trespassing Charges Against Illegal Immigrants, supra note 124.
173 Id.
175 Id.
perform certain functions of an immigration officer. The authority to enter into this agreement comes from Section 287(g) of the Immigration and Nationality Act, as amended by the Homeland Security Act of 2002, Public Law 207-276.

The agreement contains specific terms and conditions under which the federal and state departments must operate, including: the procedures for nominating and training personnel, supplying certification and authorization, and the supervision activities of the U.S. Immigration and Customs Enforcement agency. This last section is significant given the concerns surrounding such a delegation of power. It specifically affirms that state corrections personnel “cannot perform any immigration officer functions pursuant to DHS authorities . . . except when working under the supervision of an ICE officer.” The agreement goes on to state that the actions of state personnel “will be reviewed by the ICE [agents] on an ongoing basis to ensure compliance with the requirements of the immigration laws and procedures and to assess the need for additional training or guidance for that specific individual.”

IV. THE IMPROPER USE OF STATE AND LOCAL LAW ENFORCEMENT TO ADDRESS UNDOCUMENTED IMMIGRANTS; DEPUTIZING IS THE BETTER ALTERNATIVE

The expansion and discriminatory enforcement of existing state laws to address undocumented immigration suffer from two critical flaws. First, these tactics impermissibly expand the powers that are recognized within the states’ authority under statutory law and case law and are in direct contradiction to established federal authority. Second, the methods imposed by these state and local authorities are not effective in addressing the concerns of their local communities and are merely shortsighted solutions to particularly complex issues. These state and local agencies should therefore rely on their ability to work in coordination with the federal authorities as deputies of federal immigration

177 Id. ¶ I.
179 Memorandum of Understanding, supra note 176, ¶ I.
180 Id. ¶ IV-VII, IX.
181 Id. ¶ IX.
182 Id.
law as a more effective solution to their local concerns regarding undocumented immigrants.

A. State and Local Actions Represent an Unlawful Expansion of Established Authority

The state and local authorities are in direct conflict with established law when they choose to address the undocumented immigrant situation by either expanding or discriminatorily enforcing their existing state laws. These methods go beyond the limited recognized authority that state and local agencies have in the enforcement of immigration laws. More importantly, these tactics severely hamper the uniformity requirement that is inherent within all foreign policy areas in which the field of immigration law is undoubtedly a member.

Unlike the federal government, the states do not have any expressed constitutional authority over foreign policy. However, this does not mean that they are completely devoid of the ability to assist in the enforcement of federal immigration laws. The courts have already determined that the Immigration and Naturalization Act “cannot be inferred [to mean] that the federal government has occupied the field of criminal immigration enforcement.” The Act even provides specific provisions that allow state and local police officers to act as immigration officers within certain limitations.

This established authority has its limits. By accepting the concept that state and local law enforcement personnel have the inherent authority to make arrests under the federal immigration law, one must also accept the fact that this authority is limited to enforcement and does not include any permission to regulate. Proposing otherwise would contradict the Supreme Court’s idea that “the federal government, as represented by Congress, has nearly complete power to determine immigration policies, thereby restricting the states

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184 Gonzalez v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983), overruled on other grounds by Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1041 (9th Cir. 1999). See also supra notes 105-20 and accompanying text.
185 See 8 U.S.C. §§ 1252(c), 1324(c), & 1357(g) (2000) (different provisions within title 8 of the United States Code specifically authorizing limited arrest powers to “state or local law enforcement officials” and “others whose duty it is to enforce criminal laws”).
186 See DeCanns v. Bica, 424 U.S. 351, 354 (1976) (stating that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”).
from enacting immigration legislation of their own.”\textsuperscript{187} However, the Court has never held that every state law that somehow deals with aliens is “a regulation of immigration and thus per se pre-empted.”\textsuperscript{188} Federal authority is preemptive of state regulatory power only when there are “persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”\textsuperscript{189}

When state and local authorities expand or interpret local laws as tools to deal with undocumented immigration, as they hope to do in New Hampshire and Virginia, they are impermissibly entering into the area of immigration regulation. Congress has unmistakably spoken regarding the limited role that state and local law enforcement agencies may play in the arrest of individuals for immigration violations. Indeed, Congress has provided specific statutes in each instance where it deemed it appropriate.\textsuperscript{190} These statutes carry with them conditions and prerequisites by which state and local authorities must abide.\textsuperscript{191} When the states target undocumented immigrants by creating new expansive trespass laws or by discriminatorily enforcing a nuisance statute, they are granting themselves new powers that are entirely separate from those enumerated in the federal code. This expanded authority goes “directly to the subject matter of sanctions and penalties for immigration violations set forth in the INA,” and are therefore preempted by federal authority.\textsuperscript{192}

Most importantly, if state and local authorities were permitted to unilaterally create new immigration regulation in this manner they would be working directly against any attempt to have a uniform federal immigration policy. The

\textsuperscript{187} Yale-Loehr, supra note 50, at 55.
\textsuperscript{188} DeCanas, 424 U.S. at 355.
\textsuperscript{189} Id. at 356. (citing Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963)).
\textsuperscript{190} Supra note 185 and accompanying text.
\textsuperscript{191} See 8 U.S.C. § 1252c (2000) (explicitly authorizes state and local police to make arrests of undocumented immigrants who have committed a felony and have been previously deported, but “only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such a period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States”).
“very nature” of immigration regulation and its impact on foreign relations provide persuasive reasons why this should not be permitted.\(^{193}\) If Ohio and New Hampshire, or their respective municipalities, passed their own trespass laws covering undocumented immigrants there would be no obligation on either party to pass identical or even similar regulations. Their definitions could be entirely independent of each other and therefore treat the same federally determined undocumented immigrant in drastically different ways.

The discriminatory enforcement of state and local laws such as nuisance and loitering, which is the other technique used by state and local law enforcement, lacks uniformity even within the borders of the municipality that is practicing it. This impact would only be exacerbated when brought to a nationwide basis. The end result would be a single country with a “thousand borders” which would be in direct conflict with the “constitutional mandate for uniform immigration laws.”\(^{194}\)

\[\text{B. State and Local Actions are Ineffective}\]

The conflict with established law is not the only difficulty that the states will face in adopting these methods to address their local undocumented immigration issues. These methods are ineffective since they do not address the primary issue and involve various difficulties in their implementation. These tactics not only fail to reach their supposed goals, but also promote a distrust of state and local authorities with the potential to further disrupt the lives of the local residents.

The fact that the loitering arrests in Virginia revealed undocumented immigrants that are already facing deportation procedures\(^{195}\) does not justify the use of these statutes in this manner. The clearest counter to this justification is the fact that the state and local law enforcement agencies already have the authority to arrest individuals that they have probable cause to believe are undocumented immigrants.\(^{196}\) The case law supports this approach and it is consistent with the rest of the existing immigration authority.\(^{197}\) The law does not support

\(^{193}\) See supra notes 58-93 and accompanying text.

\(^{194}\) Pham, supra note 59, at 967.

\(^{195}\) Ward, supra note 28, at B1.

\(^{196}\) See supra Part II.C.

\(^{197}\) Id.
arresting individuals that fit a broad category of stereotypical norms.\textsuperscript{198} It should be pointed out that half of the supposed loiterers that were arrested in Virginia actually had valid documentation and were eventually released.\textsuperscript{199} This rate of success should not be deemed an acceptable justification for rounding up individuals based on certain patterns of activity or appearance that fit a “typical” undocumented immigrant.

The closing of the crowded house in Long Island, New York addresses the situation with little more success than the arrests in Virginia. The individuals that were living within the home were not evicted and there were no reports that they were either arrested or submitted to any form of immigration proceedings.\textsuperscript{200} The individuals were merely forced out onto the streets to look for accommodations elsewhere, thereby pushing them out into neighboring communities, without solving the true national concerns that these local authorities rely on as their principal reason for acting in the first place. The court in \textit{Canyon County} spotted this as a principal reason why the public nuisance claim should fail, since the civil claim was not directly targeted at abetting the practice of hiring undocumented immigrants.\textsuperscript{201}

The lack of federal cooperation at the outset of these independent actions only adds to the difficulty. The individuals that are eventually taken into custody are not guaranteed to reach the national agencies that can administer available solutions through deportation hearings if necessary or through proper immigration filings to gain legitimate status to remain and work within the United States.\textsuperscript{202} Due to this fact, all individuals arrested by the state will be held in local jails, thus costing state and local communities more. Furthermore, the state system is not one that can address immigration issues. The states cannot propose it would be in their interests to construct a local immigration processing facility to administer immigration proceedings the federal

\begin{footnotesize}
\begin{enumerate}
\item United States v. Brigoni-Ponce, 422 U.S. 873, 886-87 (1975) (holding that the targeting of individuals based on their apparent Mexican ancestry by immigration officers was a violation of the Fourth Amendment).
\item Ward, \textit{supra} note 28, at B1.
\item Lambert, \textit{supra} note 165, at B1.
\item The CBP and ICE Bureaus of the federal government have exclusive authority over the functions of border patrol, detention and removal. Divine, \textit{supra} note 56.
\end{enumerate}
\end{footnotesize}
government currently controls. The costs and administration of such a system would pose tremendous burdens to law enforcement agencies that are already complaining about the costs of these quick fix approaches.  

Proponents of these tactics still argue that the proliferation of undocumented immigration is a threat to national security and could expose the country to terrorism. It is conceded that the Department of Homeland Security has taken a stricter stance on border control as a direct response to this very concern. However, it is a much more difficult proposition to argue that the arrests of a group of day laborers gathered around a 7-Eleven addresses this issue with any degree of effectiveness. The loiterers arrested in Virginia were never initially accused or investigated for any supposed threat to national security. It is possible that the expansion of criminal laws such as the trespass laws could provide the sufficient breadth to address any individual suspected of terrorism ties. Proponents of this idea are quick to point out that three of the suicide terrorists hijackers from the September 11th attacks were all stopped by local police forces for traffic violations, but were eventually released without any involvement of federal immigration authorities. This terrorist attack was unquestionably one of the worst experiences in our national history. However, the malevolence that surrounded it should not further disrupt our way of life by permitting arbitrary arrests and unlawful interrogations.

The proliferation of these discriminatory practices is one of the principle reasons why opponents of the state and local enforcement of immigration laws feel that there will be a detrimental impact on the lives of those affected by such an administration. The big difficulty that arises is the distrust amongst the general population of the state and local authorities called to implement this sort of administration.

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203 See Pham, supra note 59, at 984.
204 Sessions & Hayden, supra note 8, at 327-28.
205 Yale-Loehr, supra note 50, at 57.
207 Id.
208 Sessions & Hayden, supra note 8, at 327-28.
209 Three main concerns surrounding the local enforcement of immigration law are: 1) the lack of training in the intricacies of immigration law that may result in racial profiling, 2) a general distrust of local police amongst immigrant communities, and 3) deprivation of police resources. Pham, supra note 59, at 981.
210 Id. at 983-84.
The basic idea surrounding this theory is that the state and local authorities lack the training and expertise to make valid arrests or inquiries and may choose to use inappropriate signals such as apparent ethnicity or race to determine whether or not to inquire about a person’s immigration status. This distrust of local authorities could have severe impacts on the way people carry out their daily lives. Some municipalities such as New York City have addressed this concern by prohibiting certain city officers and public employees from inquiring about someone’s immigration status. This policy was part of an effort to ensure that all residents regardless of their immigration status receive critical services such as emergency healthcare and police protection.

C. Deputizing State and Local Authorities Represents a Better Solution

This is not a proposal to eliminate local enforcement of immigration laws within the United States. It is merely a suggestion that there is a more effective and efficient way of approaching the situation that does not tread on preemptive authority while at the same time adding significant controls against discrimination and non-uniformity. One such approach is the authority to deputize local law enforcement agencies to work for, and under the supervision of, national immigration authorities.

211 Id. at 982-83.
212 Id. at 983-84 (stating that Hispanic communities have neglected to inform police about situations revolving around the sniper attacks in October 2002 out of a fear of being investigated for their immigration status).
213 In the wake of the sweeping reforms of the PATRIOT Act, New York City Mayor Bloomberg issued Executive Order 41 on September 17, 2003 in an effort to ensure that “all New Yorkers, including immigrants, can access City services that they need and are entitled to receive.” The executive order protects the confidentiality of a broad range of information including immigration status. Anyone who seeks assistance from the police will not be asked about their immigration status unless there is a suspicion of illegal or criminal activity. It assures those seeking city services that they will not be asked about their immigration status unless it is necessary to provide those services. The order further instructs city workers to hold any information regarding immigrant status completely confidential. Mayor’s Office of Immigrant Affairs, Mayor Bloomberg’s Executive Order 41 Protects All New Yorkers, available at http://www.nyc.gov/html/imm/downloads/pdf/eo41english.pdf.
214 Id.
215 Some writers have supported the position that any state and local enforcement of immigration laws would be a bad policy to follow regardless of the involvement of federal authorities. See Pham, supra note 59, at 987-1003.
any practical implementation of an immigration law enforcement program in a local jurisdiction.\footnote{Hethmon, supra note 75, at 126.}

This method of law enforcement addresses almost all of the flaws inherent in the previously mentioned techniques. The state and local authorities will be trained to “avoid actions that could constitute unconstitutional discrimination against citizens and lawfully-present aliens on the basis of national origin or foreign appearance.”\footnote{Id. at 125-26.} Moreover, these actions will be under the direct supervision and authority of the federal agencies that can actually take federally reserved actions such as deportation.\footnote{News Release, U.S. Immigration and Customs Enforcement, DHS, ICE, State of Arizona and ADC Agree to Speed Criminal Alien Removals (Sept. 20, 2005), available at http://www.ice.gov/pi/news/newsreleases/articles/050920phoenix.htm.} Most importantly, all deputized state and local authorities would be enforcing the single federal immigration law.\footnote{Id.} This is in sharp contrast to the non-uniform tactics of creating new expansive trespass laws or discriminatorily enforcing public nuisance regulations. The burden, however, lies on the state governments to request this assistance and on federal authorities to act once they are asked, instead of waiting for a governor to declare a state of emergency before agreeing to cooperate.\footnote{See Marizco, supra note 172, at B4.}

V. CONCLUSION

State and local authorities should not feel powerless in their attempts to address the undocumented immigrant situations within their communities. The current federal structure of immigration regulation leaves room for the involvement of state and local officials. Those officials have specific authority to enforce the federal immigration law when it comes to criminal violations and can even enter into specific agreements with the federal government to receive the training and supervision necessary to allow their agencies to take on more expansive roles in the area of immigration enforcement. Conflicts only arise when the state and local authorities take it upon themselves to unilaterally create new immigration regulation whether by directly enacting new expansive laws or enforcing existing laws in a targeted manner against undocumented immigrants. These tactics not only go against
established law, but present further difficulties for the local communities that are forced to deal with them. It would be more appropriate for these state and local entities to adhere to their federally structured authority in order to protect against unlawful discrimination and preserve a single unified immigration policy across the entire nation.\footnote{222 U.S. \textsc{const.} art. I, § 8, cl. 4 (authorizing Congress with the power to establish a “uniform Rule of Naturalization”).}

\textit{Michael J. Almonte}†

\footnote{† B.S., Rensselaer Polytechnic Institute; J.D. candidate 2007, Brooklyn Law School. I am extremely grateful to the editors and staff of the \textit{Brooklyn Law Review}, especially Kristy Pocious and Jennifer Diana, for all their hard work and insightful suggestions. I would also like to recognize the advice, guidance, and support of Prof. Stacy Caplow which was indispensable to the completion of this note. Finally, I would like to say thank you to my father, mother, ate, brothers and the rest of my family and friends for their unconditional love and for always making me smile and laugh.}
Voluntary Surgical Castration of Sex Offenders

WAIVING THE EIGHTH AMENDMENT PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT

INTRODUCTION

In July 2005, Keith Raymond Fremin was about to go on trial in Covington, Louisiana for four counts of aggravated rape involving an eleven-year-old girl and her thirteen-year-old sister. Fremin, a neighborhood resident, first gained the girls’ trust before victimizing them. Fremin started playing basketball with the young girls, eventually invited them to his home and sexually abused them. One of the victims told a classmate about the abuse and later reported the incidents to her teacher. Police arrested Fremin on January 27, 2004. Like most sex offenders, this was not Fremin’s first offense. When police charged him with the 1999 rapes of these sisters,

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1 Under Louisiana law, aggravated rape occurs when the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.

(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.

(4) When the victim is under the age of thirteen years.

LA. REV. STAT. ANN. § 14:42 (Supp. 2006).

2 Meghan Gordon, Child Rapist OKs Surgical Castration: Rare Penalty Avoids Possible Life in Jail, TIMES-PICAYUNE (New Orleans), July 13, 2005, at 1.

3 Id.

4 Id.

5 Id.

6 Id.

7 Id.
Fremin was already on probation for molesting another young girl in 2003.8

Fremin would face life imprisonment if a jury convicted him of this latest sexual offense.9 But prior to the start of trial, Fremin decided to plead guilty to two counts of forcible rape10 and two counts of molestation.11 He also volunteered to be surgically castrated.12 The victims, then seventeen and nineteen-year old young women, agreed to the plea bargain.13 The Louisiana State Court judge, Donald Fendlason, accepted the plea bargain and agreed to reduce Fremin’s sentence from forty years to twenty-five years in prison without parole or probation if Fremin underwent surgical castration.14 If Fremin did not undergo the procedure by August 18, 2005, the judge retained the authority to revoke the reduced sentence.15

Due to the unique nature of sex offenders,16 it has been difficult for government agencies and courts to effectively punish sex offender activity. Research has shown that sex offenders do not change their behavior in response to

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8 Gordon, supra note 2.
10 Forcible rape, as compared to aggravated rape, is committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape.

LA. REV. STAT. ANN. § 14:42.1 (Supp. 2006). The maximum sentence for forcible rape under Louisiana law is forty years. See id.
11 Gordon, supra note 2.
12 Id. Surgical castration is an irreversible procedure that involves removal of the testes, which produce male hormones. See infra Part I.
13 Gordon, supra note 2.
14 Id.
15 Plea Agreement Includes Castration, N.Y. TIMES, July 14, 2005, at A20. As of late August 2005, Fremin had not undergone the procedure and subsequent hearings on his case were postponed due to Hurricane Katrina. E-mail from Meghan Gordon, Staff Writer, TIMES-PICAYUNE (New Orleans) (Jan. 3, 2006, 12:43:00 EST) (on file with author).
16 Sex offenders are divided into four types. A Type I offender denies commission of the crime. The Type II offender will admit to committing the crime but will blame the commission on nonsexual or non-personal forces, such as drugs or stress. A Type III offender engages in violent behavior prompted by non-sexual gain, such as power or anger. The Type IV offender is a paraphiliac who demonstrates a pattern of sexual arousal, erection, or ejaculation. Kimberly A. Peters, Chemical Castration: An Alternative to Incarceration, 31 DUQ. L. REV. 307, 312 (1993).
traditional deterrents, such as prison, reproach from society, and other shame-inducing alternatives.\textsuperscript{17}

Sex offenders are not a homogenous group and motivations to commit sex offenses vary.\textsuperscript{18} This makes categorizing or treating sex offenders difficult.\textsuperscript{19} “Studies have shown that incarcerated child molesters continue to victimize young children once they are released on parole.”\textsuperscript{20} The United States Department of Justice reports that sex offenders are four times more likely than non-sex offenders to be rearrested for another crime after their discharge from prison.\textsuperscript{21} High recidivism rates suggest that incarceration alone is ineffective and does not deter future sex offenses.\textsuperscript{22} As a result, state legislatures have turned to innovative and unusual approaches to punish sex offenders.\textsuperscript{23} Castration of sex offenders is among

\textsuperscript{17} Avital Stadler, California Injects New Life Into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution, 46 E. Mory L.J. 1285, 1285 (1997) ("[S]exual offenders apparently do not change their behavior in response to traditional disincentives such as prison, shame and the like, to the same degree that ordinary criminals do.").

\textsuperscript{18} Carol Gilchrist, An Examination of the Effectiveness of California’s Chemical Castration Bill in Preventing Sex Offenders from Reoffending, 7 S. Cal. Interdisc. L.J. 181, 186 (1998) ("Although all pedophiles exhibit [an] attraction to prepubescent children, child molesters are not a homogenous group. No accepted or empirically derived reason explains why people are attracted to minors . . . .").

\textsuperscript{19} Id. (stating that "because sex offenders' motivations vary, sex offenders cannot be easily categorized or cured").


\textsuperscript{22} Bund, supra note 20.

\textsuperscript{23} Such innovative and unusual approaches to punishing and deterring sex offender activity include two recent appellate court decisions. Those cases held that sexually explicit writing can be considered child pornography and that a person can be punished for sexually fantasizing about children. Jennifer B. Siverts, Punishing Thoughts Too Close to Reality: A New Solution to Protect Children from Pedophiles, 27 T. Jefferson L. Rev. 393, 407 (2005) (discussing State v. Dalton, 793 N.E.2d 509 (Ohio Ct. App. 2003) and Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004)). One attempt to deter sex offender activity requires sex offenders to register with the local communities in which they settle after completing their prison sentence. Katie Granlund, Does Societal Input Lead to Successful Sex Offender Legislation?, 29 Law & Psychol. Rev. 197, 206 (2005) (discussing Megan’s Law, which requires a state to release information to the public about registered sex offenders). A recent development in imposing harsher penalties for sex offenders involves requiring offenders to wear global positioning ankle bracelets for a decade or more after they get out of prison. Kim Chandler, Tougher Penalties OK’d for Sex Offenders: Some Must Wear Ankle Bracelet Monitors for Decade or Longer After Leaving Prison, Birmingham News (Ala.), July 27, 2005, at 1. Alabama’s legislature became one of the first to enact this program. Id. Florida also requires certain offenders to wear the bracelets for life and New Jersey has approved a two-year pilot program. Id. Other states are currently experimenting with the idea. Id. Additionally, one recent case highlights the newest approach states might use to preempt sex offenders from re-offending. In
the methods states are using to fill the gaps left by more traditional punishments.

The case of Keith Fremin adds a new dimension to the ongoing debate about using castration to punish sex offenders since Fremin volunteered for surgical castration in exchange for a reduced sentence. First, surgical castration raises the issue of whether such a punishment violates the Eighth Amendment prohibition against cruel and unusual punishment. Second, since the procedure has been considered cruel and unusual punishment by one state supreme court and is unlikely to pass constitutional scrutiny if it reaches the United States Supreme Court, surgical castration raises the

Pennsylvania, a young woman married for three years to a previously convicted sex offender became pregnant with his child. The husband had been convicted twenty-two years earlier of rape and sodomy of two teenage girls and served ten years in jail. Pennsylvania authorities monitored the woman’s pregnancy and, upon her giving birth, removed the newborn from its home pursuant to a court order. Kate Zernike, Officials Remove Newborn over Father’s Abuse Case, N.Y. TIMES, Oct. 22, 2005, at A5. Even the power of celebrity is being used to protect children from sex offenders. In October 2005, Oprah Winfrey launched a campaign on her daytime television show in which she appealed to the public to help locate, arrest, and convict sex offenders on the run. See Child Predator Watch List, http://www2.oprah.com/presents/2005/predator/predator_main.jhtml (last visited Sept. 14, 2006).


Some scholars have argued that waiver of a constitutional right pursuant to plea bargaining can never be voluntary. Edward A. Fitzgerald, Chemical Castration: MPA Treatment of the Sexual Offender, 18 AM. J. CRIM. L. 1, 21 (1990) (“Critics contend that since a convicted offender will go to great lengths to retain his freedom—including bartering his body—voluntary consent to [chemical castration] is precluded.”); Pamela K. Hicks, Castration of Sexual Offenders: Legal and Ethical Issues, 14 J. LEGAL MED. 641, 651 (1993) (“The mere fact that the accused must face the consequences of his crime does not make consent invalid. The pressure in making a decision alone does not vitiate a voluntary act or admission if state actors do not impose any coercion or duress.”); Jeffrey N. Hurwitz, House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction, 135 U. PA. L. REV. 771, 794-95 (1987) (“[A]lthough the doctrine appears to expand individual choices by allowing a person to forego a given right in exchange for some benefit, waiver of rights often occurs in situations where the individual has, in fact, no real choice at all.”). While there are strong arguments in support of that position, for the purposes of this Note, we assume that sex offenders who choose surgical castration make a voluntary rather than coerced choice.

Gordon, supra note 2 (stating that “Fremin . . . volunteered to undergo castration, a move criminal justice experts called extremely rare” and that the “[P]resident of the Louisiana Association of Criminal Defense Lawyers . . . said the surgery is a ‘very unusual’ penalty that could only be initiated by the defendant”).

U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

See discussion infra Part II.B.

See discussion infra Part III.
question of whether a sex offender who has voluntarily chosen to undergo the procedure should be able to waive the Eighth Amendment protection.

This Note focuses on the legal and practical reasons sex offenders should be able to waive the Eighth Amendment protection and choose surgical castration. Part I of this Note discusses why surgical castration is an effective approach to punishing sex offenders and the growing acceptance of the procedure. Part II examines the history of the Eighth Amendment’s protection from cruel and unusual punishment and cases interpreting the constitutionality of surgical castration. Part III of this Note then applies the analytical framework created by the Supreme Court to determine when a punishment violates the Eighth Amendment and argues that surgical castration is cruel and unusual punishment.

Part IV examines waiver of the Eighth Amendment protection and asserts that, in cases where sex offenders volunteer for surgical castration, society’s interest in the Eighth Amendment is diminished. Therefore, sex offenders should be permitted to waive the Eighth Amendment and choose surgical castration. Finally, Part V proposes that the best approach to determining when surgical castration, and therefore a waiver of a constitutional protection, is acceptable requires courts to balance the interests of the defendant, criminal justice system, and society.
I. SURGICAL CASTRATION AS A RESPONSE TO SEX OFFENDER ACTIVITY

Surgical castration, also known as orchiectomy, is an irreversible procedure that involves the removal of the testes, which produce the male hormones. It does not involve amputation of the penis. The procedure itself is simple and  

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30 Castration of sex offenders is not a new concept. In the past decade, chemical castration has emerged as a response to sex offender activity. The procedure involves the use of medroxyprogesterone acetate (“MPA”), which is more commonly known as Depo-Provera, a birth control drug for women. The drug restricts the release of luteinizing hormones from the pituitary gland. This treatment addresses sex offenders’ inability to control their sexually offensive behavior. Peters, supra note 16, at 310-11. By reducing testosterone levels, the drug also diminishes compulsive erotic fantasies and lowers male sex drive. Id. at 311. The drug does not cause impotence during treatment and individuals can still experience erections and ejaculations. Karen J. Rebish, Nipping the Problem in the Bud: The Constitutionality of California’s Castration Law, 14 N.Y.L. SCH. J. HUM. RTS. 507, 518 (1998). In 1996, California became the first state to enact chemical castration legislation in response to sex offender activity. See Philip J. Henderson, Section 645 of the California Penal Code: California’s “Chemical Castration” Law—A Panacea or Cruel and Unusual Punishment?, 32 U.S.F. L. REV. 653, 653 (1998). A number of other states followed California’s lead and more than half have either considered or passed chemical castration legislation. Robert D. Miller, Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?, 4 PSYCHOL. PUB. POL’Y & L. 175, 188 (1998). There has been a vocal community of critics, including medical practitioners and the American Civil Liberties Union, against chemical castration of sex offenders. Hicks, supra note 25, at 665-66; Siverts, supra note 23, at 403 (“California’s bold measure has raised the eyebrows of more than a few critics, most notably the American Civil Liberties Union, which has condemned the law as cruel and unusual punishment.”). But see Lisa Keesling, Practicing Medicine Without a License: Legislative Attempts to Mandate Chemical Castration for Repeat Sex Offenders, 32 J. MARSHALL L. REV. 381, 395 n.129 (1999) (In a June 1994 survey of American voters conducted by Princeton Survey Research, 59% of respondents said they supported surgical or chemical castration for repeat sex offenders.). See also Douglas J. Besharov & Andrew Vachhs, Sex Offenders: Is Castration an Acceptable Punishment?, 78 A.B.A.J. 42 (“Chemical ‘castration’ . . . has been an accepted treatment for many sex offenders.”). Chemical castration is not an effective method of dealing with sex offender activity for a number of reasons. Unlike surgical castration, chemical castration does not permanently alter the sex offender since testosterone levels can normalize once the injections cease. Stadler, supra note 17, at 1290. This is of particular concern because, when not taking the drugs, the sex offender “will not have the willpower to control his deviant sexual behavior.” Rebish, supra, at 517. Further, in states with chemical castration laws, the decision to administer the procedure is not left up to the defendant. Rather, these laws often mandate court-ordered chemical castration for repeat sex offenders. William Winslade, T. Howard Stone, Michele Smith-Bell & Denise M. Webb, Castrating Pedophiles Convicted of Sex Offenses Against Children: New Treatment or Old Punishment?, 51 SMU L. REV. 349, 376-81 (1998) [hereinafter Winslade et al.]. Experts claim that deterrence of future sexual offenses depends significantly on whether the sex offender understands that what he did was wrong and whether he has volunteered for the procedure. Peters, supra note 16, at 313.  

31 Rebish, supra note 30, at 517; Winslade et al., supra note 30, at 369 (discussing the details of surgical castration).  

32 Winslade et al., supra note 30, at 369.
involves a small incision in the scrotum to remove the testes.\textsuperscript{33} The procedure’s “primary effect is to diminish [the sex offender]’s physical and emotional ability to respond to sexual stimuli.”\textsuperscript{34}

Surgical castration has been used successfully by other countries to treat sex offenders.\textsuperscript{35} Research from these countries indicates that the removal of the testes is an effective method in reducing recidivism rates.\textsuperscript{36} A 1979 European study of sex offenders found that the recidivism rate of castrates was 2.3 percent, compared to thirty-nine percent for non-castrates.\textsuperscript{37} Still another study indicates that only three percent of surgically castrated offenders committed a subsequent sex offense, while members of the non-castrate control group had a forty-six percent recidivism rate.\textsuperscript{38} These studies provide strong evidence that surgical castration is an effective method of deterring sex offenders.

Proponents of the procedure argue that surgical castration is minimally invasive because it is not major surgery and is often performed on an outpatient basis.\textsuperscript{39} Further, the primary advantage of surgical castration to other forms of punishment is in its permanence. In fact, there is no risk that offenders will manipulate the procedure as they could with drug therapy\textsuperscript{40} and this produces long-lasting results.\textsuperscript{41}


\textsuperscript{34} Rebish, \textit{supra} note 30, at 515 (discussing the effectiveness of surgical castration).

\textsuperscript{35} Surgical castration has been used by many European countries, including Denmark and Germany, and studies show that those countries have drastically reduced recidivism rates compared to sex offenders who were not surgically castrated. Winslade et al., \textit{supra} note 30, at 370, 372. \textit{See also} Stacy Russell, \textit{Castration of Repeat Sexual Offenders: An International Comparative Analysis}, 19 HOUS. J. INT'L L. 425, 442-47 (1997) (surveying surgical castration legislation in European countries).

\textsuperscript{36} Amy Dorsett, \textit{Castration Success Considered}, SAN ANTONIO EXPRESS-NEWS, May 8, 2005, at 1B (“Surgical castration, when used in conjunction with other forms of therapy, can dramatically reduce sexual predators’ rates of re-offending.”).


\textsuperscript{38} Winslade et al., \textit{supra} note 30, at 371 (discussing another study in Germany of surgically castrated sex offenders).

\textsuperscript{39} Druhm, \textit{supra} note 33, at 295.

\textsuperscript{40} Hicks, \textit{supra} note 25, at 646.

\textsuperscript{41} Winslade et al., \textit{supra} note 30, at 353.
Others argue that surgical castration is a fitting punishment for heinous sexual crimes.\textsuperscript{42} An ardent supporter of surgical castration, Texas district court judge Michael T. McSpadden, subscribes to this justification.\textsuperscript{43} In 1992, McSpadden presided over the case of Steven Allen Butler, who sexually assaulted\textsuperscript{44} a thirteen-year-old girl while he was still on probation for fondling a seven-year-old girl in 1989.\textsuperscript{45} Butler volunteered to be surgically castrated in exchange for a lighter sentence\textsuperscript{46} and McSpadden agreed.\textsuperscript{47} While surgical castration is still only rarely used in the United States to respond to sex offender activity, there have been recent indications that the procedure is becoming more acceptable to society as a way to punish sex offenders.

\textsuperscript{42} Id.


\textsuperscript{44} Under Texas law, a person commits sexual assault on a child when the person intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of a child by any means;

(B) causes the penetration of the mouth of a child by the sexual organ of the actor;

(C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.


\textsuperscript{45} Robert Crowe, Castration no Cure for Pedophilia: Drugs, Surgery May Temper Drive, but Sexual Interest Won’t “Normalize,” HOUS. CHRON., May 10, 2005, at B1.

\textsuperscript{46} Peters, supra note 16, at 307 (“In March, 1992, Steven Allen Butler, an accused rapist, asked a Texas District Judge to punish him via castration rather than imprisonment.”).

\textsuperscript{47} Crowe, supra note 45. However, the surgery never took place due to public opposition. Kari A. Vanderzyl, Castration as an Alternative to Incarceration: An Impotent Approach to the Punishment of Sex Offenders, 15 N. ILL. U. L. REV. 107, 107 (1994) (“In March of 1992, Steven Allen Butler . . . requested that [Judge McSpadden] order surgical castration rather than sentencing him to prison. Judge McSpadden initially assented to the request, but ultimately withdrew approval in the wake of national publicity and protests by civil libertarians. Physicians in the area refused to perform the operation, and even Butler found himself reconsidering his unusual request.”). See also John Makeig & Julie Mason, Butler’s Family Relieved: Controversy Kills Castration Plan: Physicians won’t Do Procedure on Accused Child Rapist, HOUS. CHRON., Mar. 17, 1992, at A1.
A. State Legislation and Surgical Castration

Texas is currently one of a few states that have passed legislation explicitly allowing surgical castration. On May 21, 1997, then Governor George W. Bush signed into law a bill entitled Orchiectomy for Certain Sex Offenders. The bill provides that prison inmates over the age of twenty-one “who have been twice convicted for indecency, sexual assault, or aggravated sexual assault involving a child younger than seventeen [may]...undergo surgical castration.” The offender must submit to a mental health examination before it can be performed.

The legislation expressly forbids judges and the parole board from requiring defendants to be surgically castrated. Instead, the offender must volunteer for surgical castration. Notably, the legislation is entirely devoid of any penal objective and the state is not allowed to offer reduced sentencing or probation in lieu of sentencing to induce sex offenders to volunteer for the procedure. This might explain why only a few Texas inmates have volunteered to have the surgery since the procedure became available in 1997. Without the promise

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48 Other states that allow for surgical castration include California and Montana. See generally Winslade et al., supra note 30. In 1999, the Oklahoma legislature considered a bill that would allow surgical castration for convicted sex offenders, but “[e]ven its most ardent supporters in the House believe it is unconstitutional because it would impose cruel and unusual punishment.” Tim Tulley, Politically Charged Legislation, THE JOURNAL RECORD (Okla. City), Mar. 16, 1999, available at http://www.findarticles.com/p/articles/mi_qn4182/is_19990316/ai_n10125190. However, Oklahoma senators passed legislation to give judges the option of sentencing sex offenders to chemical castration or surgical castration. John Griener, Senate Approves Castration of Sex Offenders, DAILY OKLAHOMAN, Mar. 11, 1999, at 8.


50 Winslade et al., supra note 30, at 385 (describing the Texas legislation).

51 Id. (“Additionally, a psychiatrist and a psychologist who have experience in treating sex offenders must evaluate the inmate...”).

52 Id.

53 Id. (“There are several provisions in [the Texas bill] that...are clearly intended to ensure that surgical castration is a voluntary, non-coercive, and clearly therapeutic undertaking.”).

54 Id.

55 Dorsett, supra note 36; Robert Tharp, Molester is Judged Threat to Dallas: Pedophile Jones to Remain under House Arrest Indefinitely, DALLAS MORNING NEWS, June 17, 2005, at 1B. “The first castration [occurred] in December 2001. The other [two] took place in March 2004.” Crowe, supra note 45. “[Texas] officials will not release the names of the three who [opted for] the procedure.” Id. However, notorious
of reduced incarceration, sex offenders are less willing to undergo the procedure.

A number of states have considered or are now considering following Texas and enacting surgical castration laws. In Minnesota, a group of legislators proposed that serious sex offenders should be subject to court-ordered castration, either surgical or chemical. The legislation received significant public support. A 1991 poll found that fifty-six percent of the public support surgical castration of repeat sex offenders.

In Alabama, Rep. Steve Hurst pre-filed a bill in September 2005 that would allow persons over the age of twenty-one who are convicted of sex offenses against a child younger than twelve to be surgically castrated before gaining their release from the Department of Corrections. Hurst introduced an amendment in 2005 providing for surgical castration that passed in the House, but later withdrew it because of concerns that the amendment could be unconstitutional. His new bill was scheduled to be considered in the 2006 legislative session.

Notably, in most states that allow chemical castration, surgical castration is often an option for the sex offender. In California, Florida, and Montana, states which have chemical castration laws, a defendant may also voluntarily undergo surgical castration. The Florida legislation places a premium on the sex offender’s consent to the procedure. In emphasizing the requirement that the defendant must consent to surgical castration, the law refers to language used to describe when waivers of constitutional rights are valid. The law provides that sex offenders may request surgical castration only if their

child molester Larry Don McQuay admitted that he is one of three to have undergone surgical castration. Dorsett, supra note 36. See also discussion infra Part I.B.

56 Conrad deFiebre, Bill Proposes Castration for Some Sex Offenders, STAR TRIBUNE (Minneapolis, Minn.), Feb. 18, 2005, at 4B.
57 Id.
59 Id. See also Chandler, supra note 23 (“Some House members reluctantly agreed to remove language that would have required mandatory surgical castration for sex offenders convicted of crimes against children under 12. [Attorney General] King and some lawmakers said they feared the castration provision would make the bill unconstitutional because of inhumane punishment.”).
60 Davis & McGrew, supra note 58.
61 Winslade et al., supra note 30, at 377, 381 (discussing state chemical castration bills, some of which also allow surgical castration).
62 Id. at 383.
consent is “intelligent, knowing, and voluntary.” Based on this language, it appears that involuntary or court-mandated surgical castration is more of a concern to states than when the defendant volunteers for the procedure.

B. A Growing Number of Sex Offenders Have Volunteered for Surgical Castration When Reduced Sentencing is an Incentive

A number of sex offenders have chosen to undergo surgical castration. Sex offenders who volunteer for surgical castration often do so because they believe their chances of an early release from prison will increase and the likelihood of re-offending will decrease. In these cases, courts must determine whether the procedure is an effective substitute to the more traditional punishment of prolonged incarceration.

If the court considers the procedure an effective substitute, the sex offender might gain his release from prison or a lighter prison sentence. Of paramount consideration is whether the sex offender is likely to commit more sex crimes. A number of courts have granted sex offenders their freedom for undergoing the procedure or given drastically reduced sentences.65

Jim Elkins, a former baseball coach in Bossier, Louisiana, pled guilty to three counts of fondling juveniles in

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63 Id. (citing FLA. STAT. ANN. § 794.0235).
64 Guy Ashley, Sex Offender at ASH is Set for Castration: Greg Grant is Convinced Surgery Will Bring a Cure for the Fantasies That Have Ailed Him; The Procedure Puts Him at the Center of Decades-old Controversy, THE TRIBUNE (San Luis Obispo, Cal.), Aug. 29, 2005, available at 2005 WLNR 13556669 (“Greg Grant is scheduled for castration this morning, convinced that [it is] a cure for the deviant sexual fantasies that have ailed him for decades”); Dorsett, supra note 36 (Larry Don McQuay, “who claimed to have molested more than 200 children and animals, was granted his wish of surgical castration within the last year by the Texas Department of Criminal Justice”); Monte Morin, Graduate of Sex Offender Program is Released, L.A. TIMES, Sept. 14, 2004, available at 2004 WLNR 19749979 (stating that “[i]n an effort to win his freedom, [Brian] DeVries underwent voluntary chemical and surgical castration”); Tharp, supra note 55 (stating that David Wayne Jones elected to undergo surgical castration as his parole date approached); Terry Vau Dell, Trial Begins in Molester’s Bid for Freedom/Castration, OROVILLE MERCURY REGISTER (Cal.), Sept. 2, 2005 (LexisNexis) (stating that Bruce Clotfelter underwent voluntary surgical castration after he was released on parole for a prior conviction but arrested a few months later when he was found near elementary schools); Brian Vernellis, Keeping Sexual Predators out of Youth Sports, THE TIMES (Shreveport, La.), June 26, 2005 (Lexis Nexis) (“Jim Elkins, a former Bossier Police Jury president and longtime Bossier Dixie baseball coach, pleaded guilty to three counts of fondling juveniles in 1997. He volunteered for surgical castration and is serving a 25-year sentence.”).
65 See infra Part I.B.
1997 and volunteered for surgical castration as part of the plea bargain.\textsuperscript{66} After learning that Elkins had been surgically castrated, the judge sentenced Elkins to twenty-five years in prison.\textsuperscript{67} The judge admitted that if Elkins had not been castrated, he would have imposed the maximum penalty of forty-five years in prison.\textsuperscript{68}

Brian DeVries served an eight-year prison sentence for molesting nine young boys.\textsuperscript{69} He became California’s first sexually violent offender to receive treatment at Atascadero State Hospital\textsuperscript{70} where he underwent seven years of intensive psychiatric treatment.\textsuperscript{71} In an effort to win his freedom, DeVries also underwent voluntary surgical castration in 2001.\textsuperscript{72} DeVries spent one year of strict monitoring that a state court judge called severe and extreme supervision.\textsuperscript{73} In September 2004, the judge graduated DeVries from the state treatment program and granted him unconditional release.\textsuperscript{74} The judge stated that surgical castration and time spent in the treatment program meant DeVries was no longer a danger to the public\textsuperscript{75} and pointed to the fact that DeVries was not aroused by deviant pornography during treatment.\textsuperscript{76}

Larry Don McQuay is one of the few sex offenders in Texas known to have been surgically castrated. He molested more than 200 children and animals.\textsuperscript{77} McQuay’s first prison sentence for child molestation came in 1990 for a term of eight years.\textsuperscript{78} But a jury again indicted him in 1996 on three new charges for which he was convicted and sentenced to twenty years.\textsuperscript{79} In 1996, McQuay waged a public campaign to be

\textsuperscript{66} Vernellis, supra note 64.
\textsuperscript{67} Id.
\textsuperscript{68} The judge also stated that “[t]here’s no way I can make you be castrated.... If you plea and don’t get castrated, [it could mean] 45 years.” Briefly/Nation, THE HERALD SUN (Durham, N.C.), Aug. 9, 1998, at A9.
\textsuperscript{69} Morin, supra note 64; Alan Gathright, Judge Declares Molester Free to Leave, S.F. CHRON., Sept. 14, 2004, at A1.
\textsuperscript{70} Alan Gathright, supra note 69.
\textsuperscript{71} Morin, supra note 64.
\textsuperscript{72} Id.; Gathright, supra note 69.
\textsuperscript{73} Gathright, supra note 69.
\textsuperscript{74} Morin, supra note 64.
\textsuperscript{75} Gathright, supra note 69.
\textsuperscript{76} Id.
\textsuperscript{77} Dorsett, supra note 36.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
surgically castrated because he believed it would prevent him from committing future sexual assaults. McQuay's case pushed Texas to allow surgical castration of repeat sex offenders under the 1997 Texas Bill. Finally, in 2004, the Texas Department of Criminal Justice granted his request for surgical castration. In May 2005, the court released McQuay from prison for good behavior. These cases suggest that voluntary surgical castration can not only convince courts that the offender is less likely to re-offend, but can also be an effective punishment of sex offender activity.

II. SURGICAL CASTRATION AND CRUEL AND UNUSUAL PUNISHMENT

Despite some acceptance and positive findings, surgical castration remains rare and is not widely supported in the United States. In fact, one court has held, and others have intimated, that surgical castration is cruel and unusual punishment. With the possibility that more states will enact legislation allowing surgical castration or courts will confront more cases where the defendant volunteers for the procedure, 

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80 Id.
81 Crowe, supra note 45.
82 Dorsett, supra note 36. Interestingly, McQuay's case came only two years after public outrage over Steven Allen Butler's request for surgical castration. See infra Part I (discussing Steven Allen Butler and his request for the procedure). McQuay's request did not produce the same opposition and, in fact, led to public pressure on Texas to allow the procedure, mainly because McQuay's request was based on his belief that he would continue to re-offend if he was not castrated. Druhm, supra note 33, at 291-92 (discussing McQuade's case).
83 Dorsett, supra note 36.
84 Id.
85 Larry Helm Spalding, Florida's 1997 Chemical Castration Law: A Return to the Dark Ages, 25 FLA. ST. U. L. REV. 117, 121 (1998). See also Besharov & Vachhs, supra note 30 ("Surgical castration has never been very popular in this country . . . . Although many castrated men may be capable of intercourse, the limited research that exists suggests that the repeat-offense rate is low. On humanitarian and civil liberties grounds, however, most experts now oppose the procedure and it is unlikely that many courts will turn to it as an alternative to incarceration"); Druhm, supra note 33, at 296 ("Despite the evidence indicating its effectiveness, surgical castration as a treatment is not widely accepted, especially in America"); Rebish, supra note 30, at 523 ("Surgical castration of sexual offenders has not been well received in American courts."). But see deFiebre, supra note 56 ("A 1991 Star Tribune Minnesota Poll found support among 56 percent of the public for surgical castration of repeat sex offenders").
86 State v. Brown, 326 S.E.2d 410, 412 (1985) (holding that surgical castration is a form of mutilation and, therefore, cruel and unusual punishment under state law). See infra Part II.B.
courts must consider whether this type of punishment is constitutional under the Eighth Amendment.

A. History and Purpose of the Eighth Amendment

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”87 In Trop v. Dulles,88 the Supreme Court observed that the Eighth Amendment protection is aimed at preserving “nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”89 This articulation describes the purpose and spirit of the amendment.

The Court has established certain criteria to determine when a punishment violates the Eighth Amendment.90 First, a court must determine whether the punishment is inherently cruel. This is done by examining “objective indicia that reflect the public attitude toward a given sanction.”91 The analysis must consider that the Amendment draws its meaning “from the evolving standards of decency that mark the progress of a maturing society.”92

The punishment must not be unacceptable to society.93 Whether a punishment conforms to society’s contemporary standards of decency depends on “whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”94 A society that once considered a particular punishment acceptable may later consider it indecent and, therefore, a violation of the Eighth Amendment.95 Similarly, a punishment that might have been indecent decades ago might be appropriate today.

87 U.S. CONST. amend. VIII.
89 Id. at 100.
91 Gregg, 428 U.S. at 173.
93 Hicks, supra note 25, at 658 (“In determining whether a punishment falls within the meaning of the Eighth Amendment ban, the Supreme Court has used several criteria, including whether the punishment is . . . unacceptable to society”).
95 Id. at 329-30.
Second, a punishment must not exceed what is necessary to accomplish the state’s legitimate aims.\textsuperscript{96} This means that the punishment must be commensurate with the offense for which it is imposed rather than be grossly out of proportion to the severity of the crime.\textsuperscript{97} Also, the punishment must not be inflicted arbitrarily.\textsuperscript{98}

The Supreme Court has held certain kinds of punishments to be unconstitutional. It has found extreme physical suffering to be cruel and unusual because it is disproportionate to the crime.\textsuperscript{99} The Court has also considered severe mental pain cruel and unusual punishment even though there may be “no physical mistreatment.”\textsuperscript{100} In dicta, the Court has mentioned that beheadings, burning alive, and emboweling would all violate the Eighth Amendment.\textsuperscript{101}

While the Court has not addressed the particular issue of whether surgical castration imposed as part of a sentence would violate the Eighth Amendment, there is language in lower court Eighth Amendment cases that intimate that castration would be unconstitutional. In \textit{Whitten v. State},\textsuperscript{102} a jury convicted the defendant of assault and battery and sentenced him to six months in prison. On appeal to the Supreme Court of Georgia, the defendant claimed that his sentence was cruel and unusual.\textsuperscript{103} Concerning whether the punishment was cruel and unusual, the court observed that the clause “was, doubtless, intended to prohibit the barbarities of quartering, hanging in chains, [and] castration”.\textsuperscript{104} The court affirmed the punishment, stating that “the object of punishment is to prevent crime.”\textsuperscript{105}

In \textit{Davis v. Berry},\textsuperscript{106} the Iowa Board of Parole ordered that a prison inmate receive a vasectomy, pursuant to a state statute requiring the procedure for repeat felons.\textsuperscript{107} The court compared vasectomy to castration and observed that castration

\textsuperscript{96} \textit{Gregg}, 428 U.S. at 173.
\textsuperscript{97} \textit{Weems v. United States}, 217 U.S. 349, 367 (1910).
\textsuperscript{98} \textit{Gregg}, 428 U.S. at 173 (citing \textit{Weems}, 217 U.S. at 381).
\textsuperscript{99} \textit{Weems}, 217 U.S. at 370.
\textsuperscript{101} \textit{Wilkerson v. Utah}, 99 U.S. 130, 135 (1878).
\textsuperscript{102} \textit{Whitten v. Georgia}, 47 Ga. 297 (1872).
\textsuperscript{103} \textit{Id}.
\textsuperscript{104} \textit{Id.} at 301.
\textsuperscript{105} \textit{Id}.
\textsuperscript{106} \textit{Davis v. Berry}, 216 F. 413 (S.D. Iowa 1914).
\textsuperscript{107} \textit{Id.} at 417.
is more severe and that, for each procedure, “[t]he physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go.” The court held that the procedure was unconstitutional on cruel and unusual punishment grounds.

Aside from judicial opinions on the subject, there is a plethora of scholarly articles suggesting that surgical castration would not pass constitutional scrutiny. These arguments focus on the nature of the procedure, that it is permanent and disfiguring, and that surgical castration is more akin to other physical forms of punishment that courts consider unconstitutional or society finds repugnant.

B. The Leading State Decision on the Constitutionality of Surgical Castration: State v. Brown

The only court to have ruled on the constitutionality of surgical castration of sex offenders is the Supreme Court of South Carolina in State v. Brown. In that case, three defendants committed a brutal gang rape. Instead of going to trial, the defendants pleaded guilty to first-degree criminal sexual conduct. At sentencing, the trial judge ordered that each defendant be imprisoned for thirty years, the maximum

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108 Id. at 416.
109 Id. at 417.
110 Druhm, supra note 33, at 315 (“Surgical castration is very severe and unlikely to pass any Eighth Amendment analysis because it is permanent and disfiguring.”); Stadler, supra note 17, at 1322 (“There is little question that actual castration would be considered a violation of the Eighth Amendment.”).
112 Keesling, supra note 30, at 390 n.87 (discussing the facts of State v. Brown, 326 S.E.2d 410 (1985)).
113 Brown, 326 S.E.2d at 410. Under South Carolina law, (1) A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and if any one or more of the following circumstances are proven:
(a) The actor uses aggravated force to accomplish sexual battery.
(b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act.

sentence under South Carolina law at that time.\textsuperscript{114} The judge, however, went on to state a condition of probation that could reduce the sentence.\textsuperscript{115} The defendants could receive suspended sentences and probation imposed for five years if they agreed to surgical castration.\textsuperscript{116} The defendants initially appealed the sentence but later withdrew their appeals\textsuperscript{117} and defendant Brown sought a writ of mandamus to compel the execution of the suspended sentence.\textsuperscript{118}

On appeal, the Supreme Court of South Carolina ruled that voluntary surgical castration as a condition of a suspended sentence and probation was unconstitutional under the state constitution.\textsuperscript{119} While the court recognized that a trial judge has wide discretion in imposing conditions on sentences and probation, it emphasized the fact that a judge may not impose or accept conditions that are against public policy.\textsuperscript{120} In determining public policy, the court looked to the state constitution, statutes and judicial decisions,\textsuperscript{121} and determined that castration is a form of mutilation.\textsuperscript{122} Therefore, it constituted cruel and unusual punishment.\textsuperscript{123}

Given that the procedure would be cruel and unusual under the South Carolina constitution, the court rejected that the defendant could waive this constitutional right. The court stated that, “notwithstanding that the defendant accepted the condition, thereby attempting to waive his right to be free from cruel and unusual punishment, the condition was void because a state ‘cannot impose conditions which are illegal and void as against public policy.’”\textsuperscript{124} A defendant “may not waive the constitutional ban [on cruel and unusual punishment] and thus empower the state to impose a punishment that it is otherwise

\textsuperscript{114} Hicks, supra note 25, at 652 n.101.
\textsuperscript{115} Druhm, supra note 33, at 289 (“No South Carolina statute required castration at the time; instead, the judge was using his discretion to suspend sentences subject to court-imposed conditions.”).
\textsuperscript{116} Brown, 326 S.E.2d at 410.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 412. The South Carolina state constitution is similar to the United States Constitution. It states that: “Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.” S.C. CONST. art. I, § 15 (2005).
\textsuperscript{120} Brown, 326 S.E.2d at 411.
\textsuperscript{121} Id. at 412.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 411.
forbidden to inflict.”125 Notably, the court’s argument was not that courts allowing defendants a choice is unconstitutional, but rather that conditioning parole on an impermissible alternative to incarceration is unconstitutional.126

State v. Brown does not involve a similar set of facts to Keith Fremin’s case. Fremin is a repeat sex offender and molested children.127 However, the case suggests that, even if a defendant decides of his own volition to undergo the procedure, surgical castration might still implicate the Eighth Amendment’s ban on cruel and unusual punishment, making waiver of this constitutional protection complicated for courts.128

III. APPLICATION OF THE EIGHTH AMENDMENT: VOLUNTARY SURGICAL CASTRATION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

The most likely constitutional challenge surgical castration faces is under the Eighth Amendment. Surgical castration evokes aversion from people because it compromises a defendant’s bodily integrity by permanently altering the body.129 This conflicts with the idea that “[t]here should be an overwhelming presumption against having the long arm of government touch the human body . . . in intimate ways.”130 It


126 Hicks, supra note 25, at 653 (“This decision should not be misinterpreted as holding that allowing a defendant to choose between castration and a substantial prison sentence constitutes cruel and unusual punishment. What the court found to be cruel and unusual was the castration of criminals, not the allowance of a choice.”).

127 See discussion supra. Introduction.

128 But see Briley v. California, 564 F.2d 849, 852 (9th Cir. 1977) (discussing the case in which a convicted child molester was allowed to plead to a lesser charge with a suspended sentence if he voluntarily submitted to surgical castration, which he did).

129 Druhm, supra note 33, at 315 (“Surgical castration is very severe and unlikely to pass any Eighth Amendment analysis because it is permanent and disfiguring.”); Miller, supra note 30, at 178-79 (“There have continued to be attempts to use surgical castration to reduce inappropriate sexual behavior; however, because the procedure is irreversible, because the clinical evidence demonstrates that it is not always effective, and because reversible medications are now widely available, it has largely fallen into disfavor.”); Stadler, supra note 17, at 1322 (“There is little question that actual castration would be considered a violation of the Eighth Amendment.”).

also conflicts with society's values of physical autonomy and personal privacy.131

Opponents of the procedure argue that surgically castrating sex offenders is nothing more than bodily mutilation and a return to a time when hangings and beheadings were acceptable punishments.132 These arguments suggest that surgical castration will have a difficult time passing constitutional scrutiny under the Supreme Court’s Eighth Amendment jurisprudence.133

A. Voluntary Surgical Castration is Punishment

Some scholars have suggested that castration might pass constitutional scrutiny if it is prescribed as treatment rather than as punishment.134 To determine whether something is punishment rather than treatment, many courts have used a four-part test established in Rennie v. Klein as a useful guide.135 Under that test, a court must consider whether surgical castration has any therapeutic value, is recognized and accepted medical practice, “is . . . part of an ongoing psychotherapeutic program,” and has unreasonably harsh adverse effects.136 If surgical castration meets all four prongs, then it is considered treatment rather than punishment.137

While surgical castration may have therapeutic value and may be imposed as part of an ongoing psychotherapeutic program, a court would consider the procedure punishment rather than treatment because it fails the second prong of the test. The procedure is not recognized as an acceptable medical treatment for sex offenders in this country.138 Further, a court may find that the adverse effects of surgical castration are unreasonably harsh. Side effects of surgical castration are permanent and include “excessive perspiration and blushing,

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131 Spalding, supra note 85, at 127 (discussing the importance of requiring a sex offender’s consent to chemical castration).
132 See supra note 129 and accompanying text.
133 Id.
134 Winslade et al., supra note 30, at 387 (“Used therapeutically, surgical castration may very well survive a constitutional ‘cruel and unusual punishment’ challenge”).
136 Id. at 1143; Rebish, supra note 30, at 527-28.
137 Rebish, supra note 30, at 527-28.
138 Id. at 528 (“First, surgical castration fails the second prong of the [Rennie] test because it is not a medically acceptable treatment for criminals in the United States.”).
loss of hair both on the body and face, increase in body weight, and softening of the skin.\textsuperscript{139}

Where a sex offender volunteers for surgical castration, the issue is simpler. In this situation, the defendant knows that if he volunteers for the procedure pursuant to a plea bargain or in post-trial sentencing, his sentence will likely be reduced.\textsuperscript{140} When the judge accepts surgical castration and where the procedure is a condition for a reduced sentence, the procedure becomes part of that reduced sentence. Therefore, it qualifies as punishment and is subject to constitutional scrutiny under the Eighth Amendment.

\textbf{B. Voluntary Surgical Castration is Cruel and Unusual}

Surgical castration would fail most prongs of the Eighth Amendment’s test to determine what punishment is cruel and unusual. First, a court would find the procedure to be inherently cruel for a number of reasons. The procedure involves permanent change to the body\textsuperscript{141} and eliminates the ability of the offender to procreate.\textsuperscript{142} The Supreme Court has held procreation to be a fundamental right.\textsuperscript{143} This severe consequence of surgical castration renders the procedure inherently cruel.

Society’s support of using the procedure to punish sex offenders is also questionable. Physical torture and mutilation, once accepted in American society, are no longer so. Since the operation involves injury to the body, this would shock the conscience.\textsuperscript{144} Further, the criminal justice system is no longer primarily focused on retribution in the form of an eye-for-an eye.\textsuperscript{145} The public would not support surgical castration as a

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  \item \textsuperscript{139} Id. at 515.
  \item \textsuperscript{140} Nancy Jean King, \textit{Priceless Process: Nonnegotiable Features of Criminal Litigation}, 47 UCLA L. REV. 113, 118 (1999) (stating that a defendant enters into a plea bargain in exchange for a prosecutor’s “promise to forego or reduce charges against the defendant . . . and her promise to recommend a more lenient sentence”).
  \item \textsuperscript{141} William Green, \textit{Depo-Provera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues}, 12 U. DAYTON L. REV. 1, 3 (1986) (stating that surgical castration would shock the conscience because it permanently mutilates the body).
  \item \textsuperscript{142} Peter J. Gimino III, \textit{Mandatory Chemical Castration for Perpetrators of Sex Offenses Against Children: Following California’s Lead}, 25 PEPP. L. REV. 67, 92 (1997).
  \item \textsuperscript{143} Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
  \item \textsuperscript{144} Rebish, \textit{supra} note 30, at 529.
  \item \textsuperscript{145} \textit{Michel Foucault, Discipline and Punish: The Birth of the Prison} 11 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (“Physical pain, the pain of the body itself, is no longer the constituent element of the penalty. From being an art
sanction of sexually deviant behavior given the nature of surgical castration and its side effects.

Second, a court would find surgical castration to be excessive compared to what is necessary for the state to accomplish its goals. Certainly, protecting children and deterring sex offender activity are legitimate state aims. But surgical castration would fail this test since there are less intrusive and traditionally accepted punishment alternatives available, such as imprisonment and therapy. There are also innovative methods that are available or being tested that are less intrusive than surgical castration, such as chemical castration, requiring sex offenders to register with local communities, and tracking devices.

Another reason courts would find that surgical castration is excessive is that research remains inconsistent on whether surgical castration does more to deter perpetrators from re-offending than other punishment methods. If it were otherwise, courts might consider the procedure more favorably under this test, but that is not currently the case.

Surgical castration would also fail the proportionality prong of the test. Surgical castration is an irreversible procedure and has numerous and long-lasting adverse side effects of unbearable sensations.

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146 Rebish, supra note 30, at 529.
147 Side effects include “excessive perspiration and blushing, [and] loss of hair both on the body and face.” Id. at 515. Unlike with chemical castration, these side effects are permanent. Id.
148 Green, supra note 141, at 22 (“Surgical castration would fail the . . . test for cruel and unusual punishment because the less intrusive alternatives of imprisonment or psychotherapy are available.”).
149 One attempt to deter sex offender activity requires sex offenders to register with the local communities in which they settle after completing their prison sentence. Granlund, supra note 23, at 205-06 (discussing Megan’s Law, which requires a state to release information to the public about a registered sex offender). A recent development in imposing harsher penalties for sex offenders involves requiring offenders to wear global positioning ankle bracelets for a decade or more after they get out of prison. Chandler, supra note 23. Alabama’s legislature enacted this program and Florida followed by “requiring certain offenders to wear [the bracelets] for life. New Jersey [has] approved a two-year pilot program.” Id. Other states are currently experimenting with the idea. Id.
150 Miller, supra note 30, at 178-79 (“There have continued to be attempts to use surgical castration to reduce inappropriate sexual behavior; however, because the procedure is irreversible, because the clinical evidence demonstrates that it is not always effective . . . it has largely fallen into disfavor.”)
effects.¹⁵¹ “[P]hysical side effects include excessive perspiration and blushing, loss of hair . . . body weight [gain], and softening of the skin.”¹⁵² Psychological side effects are unclear, but some research points to increased suicidal tendencies.¹⁵³ However, the possibility of a court finding that surgical castration is disproportionate is less certain than the other prongs of the test. If one considers that offenders often commit multiple crimes over a long period of time and that sex crimes leave deep permanent emotional marks on the victim, a court might find that the procedure is proportionate to the offense.¹⁵⁴

Finally, the last element of an Eighth Amendment analysis is irrelevant. Since sex offenders would volunteer for surgical castration, there is no risk that the punishment would be inflicted arbitrarily. Still, this would not be enough for a court to uphold surgical castration since the procedure fails the other elements of the test. Therefore, a court would find that the procedure is unconstitutional as cruel and unusual punishment under the Eighth Amendment.

IV. WAIVING THE EIGHTH AMENDMENT PROTECTION

While a court is likely to find that surgical castration is cruel and unusual punishment, a court should allow a sex offender who volunteers for the procedure to waive the Eighth Amendment protection. So long as the waiver is done voluntarily, knowingly and intelligently and “with sufficient awareness of the relevant circumstances and likely consequences,”¹⁵⁵ the defendant’s choice is valid. Voluntary waiver means that there is “no physical or mental coercion” that prompts the defendant to waive the right.¹⁵⁶ Even though

¹⁵¹ Rebish, supra note 30, at 515.
¹⁵² Id. (listing the side effects of surgical castration).
¹⁵³ Druhm, supra note 33, at 296 (“Furthermore, some research suggests that surgically castrated men may be more likely to commit suicide following the operation.”).
¹⁵⁴ Kenneth B. Fromson, Beyond an Eye for an Eye: Castration as an Alternative Sentencing Measure, 11 N.Y.L. SCH. J. HUM. RTS. 311, 321 (1994) (“[W]hen one considers the seriousness of sexual abuse, and the suffering that victims are subjected to as a result of sexual abuse, castration should not be seen as a punishment disproportionate to the offense.”).
¹⁵⁶ Beckman, supra note 24, at 894 (arguing that sex offenders should have the opportunity to waive constitutional protections).
a defendant may be motivated by the possibility of a reduced sentence, such a waiver may still be voluntary.157

The Supreme Court has recognized in numerous cases that a defendant may waive fundamental constitutional rights.158 When a defendant enters a guilty plea, he waives a number of constitutionally protected rights.159 By not going to trial, the defendant waives his right to a trial by jury and his right to see and confront witnesses.160 If a defendant is an American citizen and pleads guilty to a crime, he might waive his right to vote.161

Waiver of the Eighth Amendment protection pursuant to a plea bargain raises thornier issues than waivers of procedural protections.162 Unlike with other constitutional rights, the Eighth Amendment analysis is based largely on current societal standards.163 “The [E]ighth [A]mendment represents a societal interest above and beyond that of the individual.”164 The Supreme Court has noted that the Eighth Amendment is not only intended to protect defendants but “also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric

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157 Id. (citing Brady, 397 U.S. at 751) (arguing that sex offenders should have the opportunity to waive constitutional protections). See also Hicks, supra note 25, at 651 (“The mere fact that the accused must face the consequences of his crime does not make consent invalid. The pressure in making a decision alone does not vitiate a voluntary act or admission if state actors do not impose any coercion or duress.”).

158 For example, the Court has recognized the ability to waive the right to counsel. Gannett Co. v. DePasquale, 443 U.S. 368, 417-18 (1979). See also Linda E. Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 TENN. L. REV. 95, 128 (1987) (“Limits on an individual defendant’s ability to waive constitutional rights are warranted when society’s interests are balanced against those of the defendant”).

159 Hicks, supra note 25, at 652 (“A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.” (quoting McCarthy v. United States, 394 U.S. 495, 466 (1969))).

160 Kirchmeier, supra note 90, at 630.

161 Id.

162 Id. at 646 (“The justification for disallowing waiver of constitutional rights applies with more force where the issue involves a barbaric punishment instead of a procedural violation.”).

163 Id. at 643. Arguments against a defendant waiving the Eighth Amendment focus on the strong societal interest in this constitutional protection. See id. at 617-18.

164 Carter, supra note 158, at 144-45.
punishments.”165 Society has a stake in protecting defendants from cruel and unusual punishment.166

Typically, debates involving waiver of the Eighth Amendment protection arise in cases involving a defendant who accepts the death penalty without going to trial or who, having been sentenced to death, waives his right to appeal and “volunteer” for execution.167 However, the arguments raised in the death penalty context are also relevant for the purposes of deciding when a sex offender should be allowed to waive the Eighth Amendment protection. Those opposed to waiver of the Eighth Amendment argue that the Amendment is fundamentally different from other constitutional protections that a defendant has in the criminal justice process.168 This is primarily because of the purpose behind the Amendment, which is to limit the state’s power to inflict punishment on an individual.169

Further, while some critics recognize that a defendant has an interest in controlling his defense and deciding his fate,170 they claim that, from a public policy perspective, the

166 Lenhard v. Wolff, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (“Society’s independent stake in enforcement of the Eighth Amendment’s prohibition against cruel and unusual punishment cannot be overridden by a defendant’s purported waiver.”).
167 John H. Blume, Killing the Willing: “Volunteers,” Suicide and Competency, 103 M ICH. L. REV. 939, 939-40 (2005) (stating that “there have been 885 executions, 106 of which, including the first, involved ‘volunteers,’ or inmates who waived their appeals and permitted the death sentence to be carried out.” (footnotes omitted)); Anthony J. Casey, Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings, 30 AM. J. CRIM. L. 75, 76 (2002); Tim Kaine, Capital Punishment and the Waiver of Sentence Review, 18 HARV. C.R.-C.L. L. REV. 483, 487 (1983) (“So-called ‘voluntary’ executions raise difficult questions in . . . death penalty jurisprudence. Allowing a defendant to terminate the review of his capital sentence injects a disturbingly arbitrary element into the infliction of the death penalty.”).
168 See Kirchmeier, supra note 90, at 617. See also Steven A. Blum, Public Executions: Understanding the “Cruel and Unusual Punishments” Clause, 19 HASTINGS CONST. L.Q. 413, 451 (1992) (“One may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture.”).
169 Gilmore, 429 U.S. at 1019 (Marshall, J., dissenting) (“T]he Eighth Amendment . . . also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”); Casey, supra note 167, at 94 (“The rights created by the Eighth Amendment are not merely personal. They are guarantees to society that the integrity of the criminal justice system will be maintained.”).
170 Bonnie, supra note 125, at 1366-67 (recognizing that the prisoner has an interest in controlling his own fate); Casey, supra note 167, at 76 (stating that an individual has “autonomy interests in controlling her own defense”).
interests of the states must trump the defendant’s interests. Prohibiting a capital defendant from waiving the Eighth Amendment right and essentially choosing death assures society that no person in a democratic nation will receive such a punishment without a rigorous process.

The rights created by the Eighth Amendment are not simply individual rights. They offer security and assurance to society of the integrity of the criminal justice system, that punishments will not be inflicted arbitrarily or with undue harshness. The Eighth Amendment provides society with the comfort of knowing that the criminal justice system is a fair one. The Amendment’s goal of ensuring society that it will be free from cruel and unusual punishments suggests that waiver of this protection is prohibited when it would undermine this societal interest.

A. Societal Interest in the Eighth Amendment is Weak When Sex Offenders Volunteer for Surgical Castration

While the Eighth Amendment is an important guarantee against unchecked state powers, the societal interest in the prohibition against cruel and unusual punishment is weak when sex offenders volunteer for surgical castration pursuant to a plea bargain. This situation is significantly different from defendants in capital cases or inmates on death row who want to waive their appeals, where the societal interest is strongest. For this reason, sex offenders who choose

171 Carter, supra note 158, at 144-45; Kirchmeier, supra note 90, at 649 (“In the Eighth Amendment context, there is generally no benefit for defendants or society in allowing defendants to be punished in a cruel and unusual manner. In fact, such punishments would have a detrimental effect on society.”).

172 FOUCAULT, supra note 145, at 217 (“Our society is one not of spectacle, but of surveillance; . . . it is not that the beautiful totality of the individual is amputated, repressed, altered by our social order, it is rather that the individual is carefully fabricated in it”).

173 Gilmore, 429 U.S. at 1019 (Marshall, J., dissenting) (“I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments”). See also Casey, supra note 167, at 94 (“The rights created by the Eighth Amendment are not merely personal. They are guarantees to society that the integrity of the criminal justice system will be maintained.”).

174 But see North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970) (“Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . .”).
to undergo the procedure should be able to waive the protection from cruel and unusual punishment.\footnote{175}{Fromson, supra note 154, at 335 (“Consequently, if a court finds a defendant’s request for castration to be reasonable, it could grant the constitutional waiver of the right to be protected from cruel and unusual punishment.” (footnote omitted)). \textit{But see} Gilmore, 429 U.S. at 1018 (White, J., dissenting) (“I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.”).}

First, society’s interest in the Eighth Amendment protection is diminished when the sex offender volunteers for surgical castration. The purpose of the prohibition against cruel and unusual punishment expresses “a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”\footnote{176}{\textit{Gilmore}, 429 U.S. at 1019 (Marshall, J., dissenting).}

The Amendment is also about the dignity of man.\footnote{177}{Trop v. Dulles, 356 U.S. 86, 100 (1958).}

“[]nherent in the concept of human dignity is an assurance that a penalty is not imposed which offends the dignity and integrity of society.”\footnote{178}{\textit{Carter}, supra note 158, at 144.}

These arguments presuppose that the state initiates and inflicts the barbaric punishment on the defendant without his consent. But when it is the defendant himself who initiates the procedure and volunteers for surgical castration, this argument loses strength.

Second, the Eighth Amendment right in the particular context of sex offender cases is more like other constitutional rights a defendant may waive, such as the right to trial by jury,\footnote{179}{Kaine, supra note 167, at 502 (“Pleas of guilty are the rule in criminal cases even though such pleas involve waiver of many constitutional rights of the defendant, including his privilege against compulsory self-incrimination, his right to trial by jury, and right to confront his accusers [sic].” (internal quotes and citation omitted)).}

because waiver of this right can benefit the defendant. Waiving trial by jury can spare the defendant and his family the expense and stress of enduring a public trial.\footnote{180}{Kirchmeier, supra note 90, at 649.}

Waiving the Eighth Amendment and volunteering for surgical castration pursuant to a plea bargain is a similar strategic move since the defendant hopes to be treated for his deviant tendencies and receive a more advantageous sentence than may be expected if he went to trial.\footnote{181}{See Hicks, supra note 25, at 652 (discussing the reasons for plea bargaining).} Viewed in this light, society’s interest in prohibiting the state from inflicting cruel
and unusual punishment on a criminal defendant is diminished.

Finally, sex offenders waiving the Eighth Amendment are justified and less of a concern to society because the harm sex offenders suffer when they waive the protection is not comparable to the harm that results when defendants waive the Eighth Amendment in death penalty cases.\textsuperscript{182} Sex offenders are still able to function normally after being surgically castrated.\textsuperscript{183} And their motivations in waiving the protection are to stop committing sex offenses and to gain early release from prison or a reduced sentence.\textsuperscript{184}

V. BALANCING THE VARIOUS INTERESTS: WHEN SEX OFFENDERS MAY WAIVE THE EIGHTH AMENDMENT AND VOLUNTEER FOR SURGICAL CASTRATION

Given that society's interests in the Eighth Amendment protection is weak in cases where sex offenders volunteer for surgical castration, a sex offender may waive this right and consent to an otherwise unconstitutional punishment. But it does not follow that a judge must accept the waiver as part of a guilty plea\textsuperscript{185} or that a state must impose such a punishment for which a defendant volunteers.\textsuperscript{186} Castration places the judicial system in a unique position because judges may be sanctioning a procedure that some consider an intrusion into one's right to bodily integrity.\textsuperscript{187} This is of particular concern to jurists since the Supreme Court has dealt with the procedure's

\begin{footnotesize}
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\item[\textsuperscript{182}] See discussion supra Part IV.
\item[\textsuperscript{183}] See discussion supra Part I.
\item[\textsuperscript{184}] Hicks, supra note 25, at 652 (discussing the reasons for plea bargaining).
\item[\textsuperscript{185}] North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970) (“Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . .”).
\item[\textsuperscript{186}] Gilmore v. Utah, 429 U.S. 1012, 1018 (1976) (White, J., dissenting) (“I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.”). See also Bonnie, supra note 125, at 1371 (stating that “it is clear that one may not waive [a] constitutional ban and thus empower the state to impose a punishment that it is otherwise forbidden to inflict. Similarly, although it is easy to understand why a rational prisoner might prefer castration to a lengthy penitentiary sentence, it is unlikely that the state would be permitted to offer such a choice.”).
\item[\textsuperscript{187}] Druhm, supra note 33, at 315 (“Surgical castration is very severe . . . because it is permanent and disfiguring.”); Spalding, supra note 85, at 127.
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constitutionality only in dicta and not through a definitive ruling.\textsuperscript{188}

Courts must fashion ways to decide when it is reasonable for sex offenders to choose surgical castration. A defendant should be able to choose surgical castration when doing so meets the interests of the defendant, criminal justice system, and society. Courts should use a balancing test to determine when the various interests are aligned and waiver of the Eighth Amendment is permissible.

In sex offender cases, the defendant has an interest in shaping his own defense and a right to make decisions related to his physical autonomy.\textsuperscript{189} The state has an interest in promoting the integrity of the criminal justice system.\textsuperscript{190} Finally, the public has an interest in protecting itself from criminals while also promoting the values of a democratic society.\textsuperscript{191} If surgical castration preserves the dignity of the defendant and furthers the interests of the criminal justice system and society, then a sex offender should be allowed to waive the Eighth Amendment protection.

A. Defendant's Interests in Waiving the Eighth Amendment Right

When a defendant enters a plea bargain, he does so after careful negotiations between his attorney and prosecutors and after considering his chances at trial.\textsuperscript{192} A defendant also enters a plea bargain with the expectation that his punishment will be more favorable to him than if he had been convicted after trial.\textsuperscript{193} This is what induces sex offenders to plead guilty and volunteer for surgical castration.\textsuperscript{194} When deciding to volunteer for surgical castration, a sex offender has a number

\textsuperscript{188} Spalding, supra note 85, at 131 (discussing Eighth Amendment Supreme Court cases that mention castration).
\textsuperscript{189} Casey, supra note 167, at 76 (stating that an individual has “autonomy interests in controlling her own defense”).
\textsuperscript{190} See Fromson, supra note 154, at 323.
\textsuperscript{191} Bonnie, supra note 125, at 1369 (“[S]ociety has an interest, independent of the prisoner’s own interest, in the integrity of its institutions of criminal punishment and in the dignity of the processes through which these punishments are carried out.”).
\textsuperscript{192} Hicks, supra note 25, at 652 (discussing the reasons for plea bargaining).
\textsuperscript{193} Id. (“In return, the accused receives the certainty of a more advantageous sentence than may be expected if the accused were to stand trial and be convicted.”).
\textsuperscript{194} Id.
These include controlling his defense and his bodily integrity.

First, in some states, sex offenders face life in prison if they go to trial and a jury convicts them. In these situations, the interest in controlling their defense and entering into an advantageous plea bargain is significant. Defendants have the right to choose options that are more favorable to their case and to control their own fate. They also have an interest in avoiding the burdens of trial. Second, inherent in our legal and judicial system is respect for autonomy and personal dignity. This suggests that the informed and voluntary choice of the defendant deserves respect.

Voluntary surgical castration furthers these interests. Not only would defendants be able to choose a procedure they believe will help control their sexually deviant behavior, but they also would have decision-making power in the plea bargaining process. This self-determination and freedom to choose may enhance the dignity of their lives and further the purpose of the Eighth Amendment.

B. Interests of the Criminal Justice System

The state has a legitimate interest in protecting its citizens, especially the most vulnerable members. Surgical castration may achieve the goals of the criminal justice system. These goals are retribution for crime victims, deterrence of future criminal conduct by the offender and others, rehabilitation of the offender, and denunciation by society of

195 See discussion supra Part I.B.
196 Casey, supra note 167, at 76 (stating that there is a “tension between society’s interest in the appropriate application of the death sentence and an individual’s autonomy interests in controlling her own defense.”).
197 Bonnie, supra note 125, at 1376 (“[A] prisoner has [the] right to control his own fate within the constraints established by the law.” (emphasis omitted)).
198 Casey, supra note 167, at 104-05.
199 Id. at 101 (“The respect for autonomy and personal dignity inherent in our judicial system suggests an interest of the individual in determining whether an argument will be made on her behalf.”).
200 Blume, supra note 167, at 941 (“Were it not for the fact that the client’s choice, if unfettered, will result in his death, it would be clear that this is the kind of ultimate . . . decision that a client is entitled to make for himself . . . . Viewed from the client-choice vantage point, the only question is whether the client is competent to make that choice.”); Kaine, supra note 167, at 497 (discussing the rationale for waiver of a constitutional protection).
201 Blume, supra note 167, at 941 (examining arguments in favor of allowing death-row inmates to waive their appeals).
the conduct. Retribution involves revenge for the harm which society has suffered due to the criminal act. Deterrence is aimed at discouraging and preventing future criminal activity. Rehabilitation is an attempt at reforming the wrongdoer so that he does not commit more crimes. And denunciation is an expression of society’s condemnation of the criminal act.

Surgical castration in sex offender cases accomplishes the retribution and denunciation goals of the criminal justice system. If the victims accept the offender’s choice of surgical castration, this creates a sense of retribution and justice. Surgical castration also allows the community in which the sex offender committed the heinous acts to denounce his and similar behavior and reassures the community that the sex offender will not re-offend.

The procedure may also deter future sex offenses and help rehabilitate sex offenders. Surgical castration reduces the recidivism rate for sex offenders. It can also prevent the offender from experiencing the urge to commit sex crimes. With these results, the offender may re-enter society, “rebuild family ties, pursue employment,” and become an active participant in society.

Further, in the case of Keith Raymond Fremin, the police Sergeant said Fremin’s castration request and the twenty-five year sentence handed down so late in his life (Fremin was fifty-two when the sentence was imposed) satisfied the department that he posed no future threat. When sex offenders like Fremin are surgically castrated and must serve still lengthy prison sentences, it is unlikely that

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202 Fromson, supra note 154, at 323 (discussing the goals of the criminal justice system).
203 Id. at 323 n.71 (citing WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW § 1.5(a)(6) 25 (2d ed. 1986)).
204 Id. (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 5 (1987)) (discussing the goal of deterring crime).
205 Id. (discussing the goal of rehabilitation (citing DRESSLER, at 5)).
206 Id. (discussing the goal of denunciation (citing DRESSLER, at 8)).
207 Id. at 323 (“Castrating sexual offenders would serve both the retributive and denunciation goals of the criminal justice system because, as a punishment, it serves as a ‘device for the expression of feelings of resentment, indignation, and vindication.’” (quoting Lauren J. Abrams, Sexual Offenders and the Use of Depo-Provera, 22 SAN DIEGO L. REV. 565, 576 (1985))).
208 See discussion supra Part I.
210 Gordon, supra note 2.
they will commit similar crimes once they gain their release from prison.

C. Society’s Interests

Society has dual interests in protecting the individual integrity of the defendant while appropriately punishing the offender. The public legitimately wants to protect people from sex offenders who might commit crimes again and again. Because an offender has broken the law, society has an interest in seeing him punished.

Surgical castration of sex offenders might meet these interests. First, surgical castration furthers society’s interest in protecting the integrity of the defendant. The defendant himself has made the decision to undergo a medical procedure. By respecting this decision in the context of the other interests involved, the defendant’s integrity may be maintained.

Second, surgical castration can give the victims and community a sense of justice, denunciation, and retribution. Statistics reveal that the average sex offender may commit almost 400 sex crimes. Since surgical castration reduces recidivism rates among sex offenders, public safety is protected. Further, voluntary surgical castration shows that the defendant is publicly accepting responsibility for his acts, admitting guilt, and showing remorse. If courts allow sex offenders to volunteer for surgical castration, society stands to gain an enormous benefit.

VI. CONCLUSION

In today’s world, it is clear that incarceration alone is an insufficient punishment and deterrent for sex offender activity. Children continue to be molested and society is constantly seeking ways of preventing sex offenders from committing

211 See discussion supra Part I.B. Larry Don McQuay told a reporter on the television news program 20/20 that “we just bide our time in jail, daydreaming about children.” Berlin, supra note 37, at 169 (footnote omitted).
212 FOUCAULT, supra note 145, at 90.
213 See discussion supra Part V.B.
214 Runckel, supra note 209, at 589.
215 Casey, supra note 167, at 101 (discussing the respect for autonomy and personal dignity inherent in the judicial system).
216 Runckel, supra note 209, at 589 (stating that the average sex offender is likely to commit numerous crimes over his lifetime).
more crimes. The debate surrounding castration as a form of punishment for sex offenders began when California enacted the first chemical castration legislation. The growth in state legislation allowing surgical castration and the willingness of sex offenders to volunteer for the procedure suggest growing acceptance of the procedure among sex offenders as well as the court system.

Considering that deterring sex offender activity has been difficult and that sex offenders tend to re-offend, surgical castration is an effective punishment of sex offender activity. Unlike other forms of punishment, surgical castration is permanent and drastically reduces the sex offender’s recidivism rate.

Surgical castration likely violates the Eighth Amendment’s guarantee that individuals shall be free from cruel and unusual punishment. But when an informed sex offender volunteers for surgical castration, the arguments in support of the Eighth Amendment protection diminish. Therefore, a sex offender who volunteers for surgical castration should be allowed to waive the Eighth Amendment protection from cruel and unusual punishment. Courts may accept the waiver only when doing so meets the goals of the defendant, criminal justice system, and society.

Lystra Batchoo†

† B.A., Columbia University; J.D. candidate 2007, Brooklyn Law School. The author would like to acknowledge the staff of Brooklyn Law Review for its kind assistance and critical eye. She would also like to thank her husband, who has never failed to inspire her.

217 See supra note 23 and accompanying text.
218 See Stadler, supra note 17, at 1288, 1294.
219 See discussion supra Parts I.A, I.B.
Expanding the Rights of Recording Artists

AN ARGUMENT TO REPEAL SECTION 2855(b) OF THE CALIFORNIA LABOR CODE

I. INTRODUCTION

You’re a nineteen-year-old dropout without a nickel to your name. No car, no job, no credit. Your gigs at CBGB don’t even cover the rent for your studio in Alphabet City. Who in their right mind would hand you $750,000? Welcome to the record business, where giant corporations risk more than $1 billion each year on young, untested musicians whose careers typically crash and burn.1

Any recording artist who hopes to have his music played on radios across the world has little choice but to sign with a major label.2 Four companies, Universal, Sony BMG, EMI, and Warner Music, have acquired vertical and horizontal control over almost every aspect of the industry.3 These record

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1 Adaptation based on Chuck Philips, Record Label Chorus: High Risk, Low Margin; Music: With Stars Questioning their Deals, the Big Companies Make their Case with Numbers, L.A. TIMES, May 31, 2001, at A1, available at 2001 WLNR 10516413 [hereinafter Philips, Record Label Chorus].

2 The fact that “most recording [artists] who have the opportunity to exit the major label system typically re-sign with [another] major label” indicates the necessity of signing with one of the Big Four. Id. (quoting Hilary Rosen, President of the Recording Industry Association of America).

3 These record companies control over seventy-five percent of the worldwide music sales. Jack Bishop, Building International Empires of Sound: Concentrations of Power and Property in the “Global” Music Market, 28 POPULAR MUSIC & SOC‘Y 443, 443 (2005) (discussing “how the world’s media giants use their power and property to influence national and international laws in order to lock down culture and control creativity”).

Throughout the late 1970s and until the late 1990s, six major record companies, Warner, EMI, RCA/BMG, Polygram, MCA/Universal, and Sony, reaped virtually all the profits of the music industry, owned the major labels, and held the most profitable artists. Theresa M. Bevilacqua, Note, Time to Say Good-Bye to Madonna’s American Pie: Why Mechanical Compulsory Licensing Should be Put to Rest, 19 CARDOZO ARTS & ENT. L.J. 285, 301 n.114 (2001) (suggesting the possibility that “monopolistic practices [will] plague the music industry in the near future due to large corporate mergers”). After the purchase of Polygram by Universal and the merger of Sony and BMG, the major six became four. See David Lieberman, Lack is Determined to be More than a Music Man, USA TODAY, June 13, 2005, at 1B, available at 2005 WLNR 9342352.
companies, the “Big Four,” control manufacturing, distribution, retailing, shelf space, record clubs, and digital delivery, not only in the United States, but also in all markets worldwide. The Big Four specialize in marketing and promoting records to mass audiences, and they have the capital to take huge financial risks to advance an artist. Furthermore, only a few media companies control most of the nation's radio stations, making it that much more difficult for an artist to get her music on the air without the backing of one of the major labels. Recording artists describe the standard Big Four agreements as “unconscionable,” “indentured servitudes,” and “impossible” because of the control these contracts give the record company over the artists’ careers. Recording

Even though the discussions of an EMI/Warner Music merger have been put to a halt since the the European Court of First Instance in Luxembourg overturned regulatory approval of the 2004 merger of the music units of Sony and Bertelsmann, the possibility remains that the four could soon become three. See Andrew Ross Sorkin and Jenny Anderson, Decision on Bids for BMG Music Unit Could Be Imminent, NY TIMES, Sept. 5, 2006, at C1, available at LEXIS News Library, USAPPR file; Dan Milmo, Analysts Play Matchmaker to EMI and Warner: The Week Ahead, GUARDIAN (UK), Nov. 14, 2005, at 29, available at LEXIS News Library, UKPAPR file. See Bishop, supra note 3 (“Today’s music business is in the hands of mega-corporations, which also control TV, radio, publishing, electronics manufacturing, and global communications networks.”).


Chuck Philips, Courtney Love Seeks to Rock Record Labels’ Contract Policy; Music: Suit Challenges Universal’s Royalty Practices; Firm Says it is Fair, L.A. TIMES, Feb. 28, 2001, at A1, available at 2001 WLNR 10498258 [hereinafter Philips, Courtney Love]. One prominent artist, Courtney Love, asserts that the primary reason the [Big Four] record conglomerates have been able to call the shots for so long is that they control nearly 90% of the music sold throughout the world. They operate the label system under which most music is recorded, manufactured, marketed, promoted and distributed to radio, MTV and retail outlets.

Id.

Various other recording artists, such as Don Henley, Patti Austin, and LeAnn Rimes, argue that record contracts are unfair. See Bill Holland, Performers Give Testimony Before Judges and Lawmakers—Record Labels, Artists at Loggerheads
agreements contain various clauses and provisions that are usually non-negotiable. One of the foremost reasons for dissension between recording artists and record companies is the duration of a standard recording contract. In most instances, a musician signing a contract for the first time is expected to deliver five to seven albums. Under the standard recording agreement, artists must deliver an album every nine to eighteen months. While in theory an artist could deliver seven albums in seven years (if an album is actually delivered every nine to twelve months), standard recording industry practices preclude this possibility. “[R]ecord companies have preferred and often insisted on a minimum two-year gap between releases for . . . artists.” This typical two-year time span between album releases substantially increases the length of the term of the agreement.

10 Such provisions include: the recoupment clause, the work-for-hire clause, the controlled composition clause, discounted royalties for foreign and record-club sales, “phony” free goods clauses, cross-collateralization clauses, packaging royalty deductions, “breakage” royalty deductions, and new technology royalty deductions. See Holland, Performers Give Testimony, supra note 9. For further discussion on these provisions, see infra Part III.A.

11 See Note, California Labor Code Section 2855 and Recording Artists’ Contracts, 116 HARV. L. REV. 2632, 2633-34 (2003) (“Section 2855 has been an important aspect of almost every significant dispute between a recording artist and a major record company during the last decade.”).

12 DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 100 (5th ed. 2003) [hereinafter PASSMAN, 5th ed.] (Labels “insist on the right to get a total of five to seven albums over the course of the deal.”).

13 See Cross Complaint at 6, Love v. Geffen Records, Inc., No. BC 223364 (Cal. Super. Ct. filed Feb. 7, 2001) [hereinafter Love Cross Complaint] (“For example, the [Hole contract] provided for a standard delivery schedule, i.e., for a master recording no later than every approximately 18 months.”).

14 Chang, supra note 8, at 16-17.

15 Love Cross Complaint, supra note 13, at 6.
California Labor Code section 2855 is the most significant law impacting the duration of a recording agreement, and it has often been the focus of tension between artists and record labels. Under section 2855, “professional service providers, including actors and sports figures, are not required to remain under contract for their services for more

16 The statute states, in relevant part:

(a) Except as otherwise provided in subdivision (b), a contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

(b) Notwithstanding subdivision (a):

(1) Any employee who is a party to a contract to render personal service in the production of phonorecords . . . may not invoke the provisions of subdivision (a) without first giving written notice to the employer . . . specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision(a).
(2) Any party to such a contract shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law.
(3) In the event a party to such a contract is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.

CAL. LAB. CODE § 2855 (West 2005).


18 Nicholas Baumgartner, The Balance Between Recording Artists and Record Companies: A Tip in Favor of the Artists?, 5 VAND. J. ENT. L. & PRAC. 73, 77 (2003) (“The decades-old controversy surrounding [the Seven Year Statute], is at the heart of the current tension between recording artists and recording companies.”). See also MELVIN SIMENSKY ET AL., ENTERTAINMENT LAW 257-58 (3rd ed. 2003) (“Several major recording acts, including Metallica, Don Henley, Luther Vandross and the Smashing Pumpkins, have claimed violation of the seven-year rule in complaints filed against their record companies in an effort to get out of their recording agreements.”).
than seven years.” This limitation, however, is not applicable to musicians. Under subsection (b), an artist can notify his label that he wants to be released from his contract after seven years, but the label can then sue to recover damages for any undelivered albums remaining in the contract, a right that is not available to any other professional services employer.

Even though section 2855 currently exists only under California law, its effects are present in other jurisdictions. Since most recording contracts are signed in or otherwise made subject to the laws of New York or California, the Big Four, with offices operating on both sides of the country, have continued to use a standard form agreement, which includes a duration provision that is the same in both New York and California. The labels take advantage of the fact that section 2855(b) permits them to sue for damages for undelivered albums, therefore extending the duration of the agreement for as long as possible by requiring an unrealistic number of albums.

In reality, a recording artist is rarely able to deliver all the required number of albums under a recording contract in seven years. He is therefore never able to fulfill the terms of the agreement to leave the record label. If the artist tries to leave the label after seven years, like any other personal

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19 See A. Barry Cappello, Old Financial Ways are Over for Record Biz, 21-SPG ENT. & SPORTS LAW. 23 (2003).
20 See CAL. LAB. CODE § 2855(b)(3).
21 In Radioactive, J.V. v. Manson, 153 F. Supp. 2d 462 (S.D.N.Y. 2001), the agreement between recording artist Shirley Manson and her record label, Radioactive, was subject to New York jurisdiction, and the contract still obligated Manson to deliver at least one album, and at the sole option of Radioactive, up to six additional albums.
22 M. William Krasilovsky & Sidney Shemel, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 14 (8th ed. 2000) (“Most recording contracts are signed in or otherwise made subject to the laws of New York State or California.”).
23 Id. The only difference that exists between a recording agreement entered into in New York and one in California is a clause under section 3423 of the California Labor Code, which requires record companies to pay a guaranteed minimum amount per year before they can obtain an injunction against an artist attempting to leave the label while still under exclusive contract. This statute relates to obtaining a court order barring the artist from recording for another company, but does not affect the continuing right to sue for monetary damages. This recognizes the fact that it would be unfair for a label to require an artist to remain under contract if the artist is not receiving any income. See id. at 15.
25 Id. at 16.
26 Id.
services employee, the label will sue for damages. Recording artists allege this is a form of “involuntary servitude” because they are left with no choice but to work or be subject to legal sanction.27

Whereas section 2855(b) has continued to place artists in a disadvantaged position for the past nineteen years, the music industry has changed considerably.28 Music companies first fought with, but are now slowly accepting, a revolution in the way music is delivered via digital distribution.29 Today, record companies are reinventing themselves as full-service music companies, claiming exclusivity over new media such as ringtones and voicetones as well as over traditional media such as film and TV.30 It used to be that the label only acquired the exclusive right to record an artist during the term of the agreement.31 New clauses added to today’s recording contracts provide the label with a portion of the artist’s revenues in all ancillary activities.32 These provisions, however, deprive the artists of a substantial amount of income that they never before shared with the label.33

The changed music industry makes the application of section 2855(b) more unjust than ever before. Even though the statute lacks a definition of “damages,”34 record companies believe they should be able to recover lost profits based on the “expected profits on the additional albums that artists have neither delivered nor created.”35 Under the new form of recording agreements, the record company will likely argue that it should be able to collect not only expected profits on album sales, but also expected profits derived from all the new areas over which they have exclusive rights. This creates the prospect of enormous damages, and essentially leaves the artist with no choice but to work even if doing so will require the artist to perform beyond seven years.

27 Id. (quoting United States v. Kozminski, 487 U.S. 931, 942-43 (1988)).
28 See infra Part IV.
29 See id.
31 KRASILOVSKY & SHEMEL, supra note 22, at 16.
32 Record labels are “exploit[ing] and expand[ing] their traditional areas of exclusivity to include such media as ringtones, voicetones, mobile wallpaper, videogames, film and TV, and other formats that carry music.” Sloane, supra note 30.
34 Cappello & Thielemann, supra note 24, at 17.
35 Id.
This Note argues that section 2855(b) should be repealed because it permits unconscionable contracts that impose involuntary servitude. Part II provides some background to section 2855, including the history and purpose of the statute, and the addition of subsection (b). Part III describes the structure of recording agreements and the application of section 2855(b) to the music industry in 1987, when the amendment was adopted. Part IV examines the relationship between the evolving music industry and changes in recording agreements. Specifically, it will compare the state of the music industry and the structure of agreements that developed from the time the amendment was passed in 1987, to 2000 when digital distribution was introduced. This section will end with a look at 2005 as record labels expand their areas of exclusivity. Part V will argue for the repeal of the amendment. In doing so, this section will demonstrate the effects of section 2855(b) on the music industry today and analyze the legal doctrines of unconscionability and involuntary servitude in connection with today’s recording agreements. Throughout the discussion, these sections will examine the record labels’ justifications for keeping the amendment, and demonstrate how they are now even less valid than when it was passed.

II. BACKGROUND OF SECTION 2855

A. History and Purpose

The United States’ constitutional prohibition against involuntary servitude laid the foundation for the California legislature to enact section 2855. In 1872, California lawmakers passed legislation to protect against involuntary servitude in the form of unconscionable employment agreements. The United States Supreme Court has held involuntary servitude to mean a “condition of servitude in which the victim is forced to work for the defendant by use or threat . . . of coercion through law or legal process.” Accordingly, an employer cannot force an employee to work for

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36 U.S. Const. amend. XIII, § 1.
37 Revella Cook, The Impact of Digital Distribution on the Duration of Recording Contracts, 6 VAND. J. ENT. L. & PRAC. 40, 42 (2003) (discussing Senator Kevin Murray's testimony before the California State Senate in which he explains the legislative purpose behind the Seven Year Statute).
him when the work involves services of a personal nature, so courts refuse to order specific performance of contracts for personal services.\(^{39}\)

The California legislature was concerned with the rights of large classes of workers whose personal services constituted their means of livelihood.\(^{40}\) These employees were contractually prohibited from changing employers or occupations,\(^{41}\) which was a violation of the principles of unconscionability. The doctrine of unconscionability protects a contracting party from harsh and oppressive terms.\(^{42}\) Unconscionability presents itself in two forms: procedural unconscionability, which relates to procedural deficiencies in the contract formation process,\(^{43}\) and substantive unconscionability, which relates to the contract terms themselves and whether those terms are unreasonably favorable to the more powerful party.\(^{44}\)

Unconscionable working relationships were common before the first Civil Code was established in California in 1872.\(^{45}\) Inhabitants of California who did not share the same freedoms as others, legally or socially, lacked true freedom of contract and were often forced to work pursuant to harsh and oppressive terms since there was “little or no enforcement

\(^{39}\) Theresa E. Van Beveren, *The Demise of the Long-Term Personal Services Contract in the Music Industry: Artistic Freedom Against Company Profit*, 3 UCLA ENT. L. REV. 377, 385-86 n.26 (1996) (“Many contracts between musicians (or athletes) and recording or management companies contain a negative covenant ensuring the entertainer’s exclusivity. At least one court has held that if such a contract is for a specific period of time, then it should be classified as a contract for personal services. If, however, the contract has no time limitation, then it should be considered in light of case law dealing with employment contracts.” (referring to the majority opinion in Ichiban Records, Inc. v. Rap-A-Lot Records, Inc., No. 01-95-00085-CV, 1995 Tex. App. LEXIS 1739, at 15 (1st Dist., Aug. 1, 1995))).


\(^{41}\) Id.

\(^{42}\) See Anorga, supra note 8, at 772 (“The doctrine of unconscionability is an extraordinary remedy that should only be used to protect a contracting party from harsh and oppressive terms.”). See also 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW ON CONTRACTS § 18:8 (4th ed. 1993 & Supp. 2005) (“The principle [of the doctrine of unconscionability] is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.” (quoting U.C.C. § 2-302, comment 1 (2003))).

\(^{43}\) 8 WILLISTON & LORD, supra note 42, § 18:10.

\(^{44}\) Id.

against slavery.” 46 This oppressive environment left personal services employees in a situation where they were waiving their rights to limit the life of personal services agreements. 47 The lawmakers recognized a right of private contract and they believed that a restriction of such right in this situation better preserved “public comfort, health, safety, morals and welfare.” They therefore created section 1980 of the Civil Code, which later became section 2855 of the California Labor Code. 48

B. Section 2855(a)

California Labor Code section 2855, which is commonly referred to as the Seven Year Statute, 49 prohibits the enforcement of personal services contracts beyond seven years, and allows employees in California to terminate contracts after that period. 50 In 1947, De Haviland v. Warner Brothers Pictures, Inc. 51 established the prevailing interpretation of the

46 Id. at 652.
48 See id. at 985-88. As enacted in 1872, section 1980 of the Civil Code read as follows:

A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

In 1931, section 1980 was amended to read as follows:

A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, and other than a contract entered into pursuant to the proviso hereinafter in this section contained cannot be enforced against the employee beyond the term of seven years from the commencement of service under it;

Exceptional services. Provided, however, that any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not beyond a period of seven years from the commencement of service under it.

In 1937, the section was repealed and section 2855 of the Labor Code was enacted.

50 See CAL. LAB. CODE § 2855(a) (West 2005); California Labor Code Section 2855 and Recording Artists’ Contracts, supra note 11, at 2642.
51 153 P.2d 983 (Cal. 1944).
Seven Year Statute for all personal services contracts. Warner Brothers ("Warner Bros.") signed a contract with Hollywood actress Olivia de Havilland for a one-year term that gave Warner Bros., through various option clauses, the right to extend the contract for up to six successive one-year terms. The contract also gave Warner Bros. the right to suspend de Haviland for "any period or periods when she should fail, refuse or neglect to perform her services to the full limit of her ability and as instructed by [Warner Bros.]". In connection with this, Warner Bros. had the right to extend the term for a time equal to the suspension period(s).

Warner Bros. suspended de Haviland for a total of twenty-five weeks over the course of seven years. Consequently, Warner Bros. sought to exercise its option and extend the term of the contract for a time equal to the twenty-five week suspension period, which would have caused the term of the agreement to last more than seven calendar years. Warner Bros. contended that the personal services contract could be enforced for seven years of actual service. The court rejected this argument and held that section 2855 should be interpreted as limiting personal services contracts to seven calendar years.

In keeping with the purpose of the Seven Year Statute, the court reasoned that public policy encouraged limiting the term to seven calendar years to promote economic mobility.

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52 California Labor Code Section 2855 and Recording Artists' Contracts, supra note 11, at 2634-35.
53 De Haviland, 153 P.2d at 984.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id. at 985 ("[A] contract for 'exceptional services' could be enforced against an employee for seven years of actual service, even though the employee would thereby be required to render services over a period of more than seven calendar years.").
59 De Haviland, 153 P.2d at 986 ("We cannot believe that the phrase 'for a term not beyond a period of seven years' carries a hidden meaning. It cannot be questioned that the limitation of time . . . was one to be measured in calendar years. It is conceded that contracts for general services are limited to seven calendar years. The substitution of years of service for calendar years would work a drastic change of state policy with relation to contracts for personal services.").
60 Chang, supra note 8, at 18 ("The court further reasoned that public policy limited the term . . . because the ability to change employment after that allotted time, whether to afford a reasonable opportunity to move upward along with increased skillfulness, or exploit new economic conditions, was highly advantageous to the employee."). See also De Haviland, 153 P.2d at 988 ("As one grows more experienced
As the employee becomes more skillful, he should be able to seek new employment after the allotted time in order to obtain the highest compensation. The court’s interpretation of section 2855 created a new “free agency” era for actors. The powerful studios had previously stifled the careers of many actors by holding them to long-term contracts. As a result of the De Haviland decision, actors gained the power to negotiate new contracts with different studios and on better terms based on their true market value.

Section 2855’s application in the music industry was markedly different. Record labels attempted to avoid the law altogether by rewriting contracts of disgruntled stars; the labels offered large cash advances and higher royalty rates in exchange for more albums. Some labels were actually able to contravene the statute by telling artists that each renegotiation of a contract constituted a new contract with the “seven-year clock ticking anew.” It was only a matter of time before the record companies would petition for legislative action, ensuring their ability to hold a recording artist to an exclusive contract long after the allotted seven years. In 1987, the Recording Industry Association of America (“RIAA”)—the influential trade association representing the music industry—successfully lobbied for a proposal that became section 2855(b).

and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation.

61 De Haviland, 153 P.2d at 988 (“There are innumerable reasons why a change of employment may be to [the employees’] advantage.”).

62 See Holland, Performers Give Testimony, supra note 9 (“Many entertainment attorneys say the hearing [to repeal section 2855(b)] was reminiscent of challenges that eventually brought down the old Hollywood studio system, which hampered or ruined many actors’ careers by holding them to long-term contracts.”).

63 Id.

64 See California Labor Code Section 2855 and Recording Artists' Contracts, supra note 11, at 2635.

65 Chang, supra note 8, at 18-19. (“The application of § 2855 in the music industry . . . has seen different results. . . . Around 1985, the Recording Industry Association of America (RIAA), the industry’s lobbying arm, launched an attack on § 2855 on behalf of record labels and tried to get the statute extended to ten years.”).

66 Id. at 18.

67 Id. at 18-19.

68 California Labor Code Section 2855 and Recording Artists' Contracts, supra note 11, at 2632.

69 Id. at 2636 (“In 1987, after several revisions, the RIAA’s proposal became section 2855(b).”)

C. Exception to the Seven Year Statute: Section 2855(b)

Subsection (b) of the Seven Year Statute requires recording artists, unlike any other contractual employee rendering creative, intellectual, or professional services, to serve written notice of their intent to terminate a contract after seven years. Most importantly, subsection (b) subjects a recording artist, unlike any other artist under contract, to lawsuits for damages alleged to flow from the artist’s failure to deliver the required number of albums during the term of the contract. Essentially, the RIAA was able to exclude recording artists from the protections offered by the Code.

In its proposal to the California legislature, the RIAA argued that the application of section 2855 to the music industry was unfair for various reasons. First, the law allowed an artist to breach a recording contract after seven years, regardless of the artist’s remaining obligations. Second, record companies made large investments in an artist based primarily on the guarantee that the artist would deliver the specified number of albums required under the contract. Third, the RIAA argued that the primary reason most artists were not able to record and deliver the required number of albums in seven years was because the artists themselves were negligent.

While artists and attorneys later challenged the validity of these arguments, subsection (b) created an exemption for

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71 See id.
72 See id. (“The result of this exemption was to effectively lock out recording artists from the protections offered by the code, rendering the code moot on any practical level for only one group of individuals—the music makers.” (testimony of Michael Greene, President & CEO, Grammys)).
74 Id.
75 Id.
76 In 2001, Senator Kevin Murray (D-Cal.) proposed California Senate Bill 1246 (“S.B. 1246”) to repeal section 2855(b). See Cook, supra note 37, at 42. S.B. 1246 proposed the elimination of the exception for recording artists. This amended version would have left subdivision (a) of the Seven Year Statute in effect, deleted the provisions relating to personal services in the production of sound recordings, and modified the subdivision addressing damages for breaches of recording contracts to
the record companies that violated the public policy rationale behind section 2855—to optimize the welfare of employees by allowing them freedom to seek better employment opportunities after the allotted amount of time.\textsuperscript{77} By providing labels with the ability to sue recording artists for damages without regard to the Seven Year Statute, the legislature created a regime under which recording artists found little protection.\textsuperscript{78} The unconscionable provisions of recording agreements only further exposed the artist.

III. APPLICATION OF SECTION 2855(b) TO A RECORDING CONTRACT

A. Structure of the Recording Contract

Congratulations, you got yourself a deal. Beware, making a living from a business you don’t fully understand can be risky. A large number of artists, like yourself, including major ones, have never learned such basics as how record royalties are computed, what a copyright is, how music publishing works, and a number of other concepts that directly affect your life. But without understanding these basics as a foundation, it’s impossible for you to understand
the intricacies of your professional life. And as your success grows, and your life gets more complex, you’ll become even more lost.79

Because of the high failure rate of released albums,80 record companies absorb great losses on most albums, and thus insist that they must earn profits from the few successful acts on their rosters.81 The standard industry contract, then, is typically structured around a business model that allows labels to extract much of their earnings from the handful of blockbuster albums each year.82 Some of the devices used by the labels include minimum recording requirements with additional options, recoupable artist advances, and exclusive rights over the artist’s creative output.83 All of the major contract clauses described in this section continue to exist in agreements today even though the numbers have changed slightly.84 More importantly, however, is taking into account how the structure of agreements evolve, and how those changes affect the application of section 2855(b).85

Recording agreements set forth a minimum number of albums that the artist must deliver to the record company during the contract term.86 At the time the amendment was passed, companies typically insisted on one firm album

79 Adaptation based on DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 3 (1st ed. 1991) [hereinafter PASSMAN, 1st ed.]. Throughout this section the footnotes sometimes cite the first edition of Donald Passman’s book. The first edition is referred to because it provides a more accurate look at the way recording agreements were structured around the time subsection (b) was passed, specifically the numerical figures of deal terms (i.e. advance monies, royalty percentages). The general concepts of advances, royalties, and the like remain the same in recording agreements today, however, and therefore, the discussion of these provisions are supported by citations from both versions of the book as a method of comparison.

80 See Hearings: 2001, supra note 70 (testimony of Ann Chaitovitz, Director of Sound Recordings, AFTRA). In Ann Chaitovitz’ testimony, she recounted singer Sheryl Crow’s experiences. Crow did not receive any money until after her record had sold three or four million copies, demonstrating that it can take two or three years for an artist to become successful and actually receive a royalty payment. Ann stated that “in 1999, nearly 39,000 recordings were released, but only 3 singles and 135 albums—0.35%—were certified as selling three million units [reaching a level of recognizable success].” Id.

81 California Labor Code Section 2855 and Recording Artists’ Contracts, supra note 11 at 2638.

82 Philips, Recording Stars Challenge, supra note 9.

83 See infra notes 86-99 and accompanying text.

84 See infra Part IV.A & B for a description of the changes that occurred from the time the amendment was passed to today.

85 Part V of this Note asserts that the application of section 2855(b) in today’s record industry leads to even more harsh results.

86 KRASILOVSKY & SHEMEL, supra note 22, at 17.
obligation with options for seven to nine more. For each album, the artist receives an advance of monies, from which he pays all costs to produce the records and gets to keep any remaining portion as pre-royalty compensation. When the RIAA successfully lobbied for the amendment, a new artist typically received an advance of $175,000 to $250,000, whereas a mid-level recording artist may have received an advance of up to $400,000. The advance for a top-selling artist could rise to more than $500,000. Although these advances may seem substantial, they are quickly consumed by the costs necessary to release an album, including recording, video production, marketing and promotion costs.

87 See PASSMAN, 1st ed., supra note 79, at 91. A label, however, is not required to release every album that an artist is committed to deliver. The agreements contain a record company’s commitment to record and distribute only one album (a “firm album”) from the artist and option clauses that, if exercised by the company, require the artist to record and deliver additional albums (“options” or “option albums”). See KRAZILOVSKY & SHEMEL, supra note 22, at 14; PASSMAN, 1st ed., supra note 79, at 91; PASSMAN, 5th ed., supra note 12, at 100. The company therefore commits itself to the smallest obligation it can negotiate, while keeping the option to demand as much product as possible. PASSMAN, 1st ed., supra note 79, at 91; PASSMAN, 5th ed., supra note 12, at 100. Further adding to the one-sidedness of the agreement, after the initial album is released, the record company has the option of “dropping” the musician if he has not generated profits, or is no longer marketable.

88 Id. at 85.

89 Id. at 85.

90 See Downs et. al, Sound Recordings and Music Videos, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY, 311 PLI/PAT 11, 13-14 (1991) [hereinafter Sound Recordings and Music Videos] (Recording costs of up to $250,000, promotion, advertising and initial production of up to $300,000, and additional costs of distribution). In addition, the record company charges the artist 50% of video costs, to create music videos, and 100% of independent radio promotion costs, to get the songs played on the radio. Cook, supra note 37, at 41. In addition to a specific list of recoupable items (like cash to the artist, recording costs, and video costs), almost every contract has a general provision that says all amounts “paid to you or on your behalf, or otherwise paid in connection with this agreement” are recoupable unless the contract specifically provides otherwise. PASSMAN, 1st ed., supra note 79, at 76; PASSMAN, 5th ed., supra note 12, at 82.

In late 2005, payola payments made by record labels to get songs played on the radio made headlines again after some label executives were discovered bribing programmers to play songs by certain artists. “An investigation led by New York Attorney General Eliot Spitzer into pay-for-play schemes resulted in Sony-BMG
These expenses are all charged against the artist’s royalties. Royalties are the percentage the artist receives on records sold. A newly signed artist in the late eighties typically received a royalty of eleven to thirteen percent. Established artists could usually negotiate a higher royalty rate. An artist will not see a penny of these royalties, however, until the label recoups the entire advance and all other chargeable expenditures associated with the release of the album. Because advances are non-returnable, if an artist does not sell enough records to recoup the full amount of the advance, the record company loses that amount. It is this major loss that labels use in defense of their business practices that artists so often label as “unfair.” A label can, however, cross-collateralize the loss against future royalty streams. Therefore, if an artist delivers his first album, but does not recover the full advance, the deficit from the first album would

making a $10 million settlement and the Warner Group paying another $5 million.”

Steve Morse, Amid Industry Troubles Some Sterling Moment, Live 8, Stones and U2 Shows Stood Out, BOSTON GLOBE, Dec. 25, 2005, at N7, available at 2005 WLNR 21064330. The focus then turns to the question of whether or not the labels will continue to charge these independent promotion costs to recording artists even though the practice has been labeled as “illegal” and “deceptive.” Amanda Bronstad, Facing the Music: Debatable Point: Tough Stance may not Halt Tradition of Payola, L.A., BUS. J., Dec. 5, 2005, at 14, available at 2005 WLNR 22007369.

In Courtney Love’s cross complaint, it was argued that “[i]n addition to the unworkable theoretical delivery schedule, the Agreement effectively required the artist to incur production and other costs, recoupable against advances, which virtually guaranteed little financial return for most artists and monumental profits for the record company.” Love Cross Complaint, supra note 13, at 7.


PASSMAN, 1st ed., supra note 79, at 83.


California Labor Code Section 2855 and Recording Artists’ Contracts, supra note 11, at 2638 (“Because of the high failure rate of released albums, however, record companies absorb great losses and thus insist that they must earn profits from the few successful acts on their rosters.”). See supra note 9 and accompanying text for a listing of artists who argue that their contracts are unfair.

be recouped from the earnings of the second album in addition to the advance for the second album.100

As an additional incentive to underwrite the enormous costs of developing an unknown artist’s career, record companies acquire the exclusive right to record an artist during the term of the recording agreement.101 Traditionally, this simply meant that the artist could not make records for anybody else—it did not prohibit the artist from appearing on television, in a motion picture, or on the radio as long as the artist did not grant the use of his recordings for phonograph record purposes.102

Various other contractual provisions—the work-for-hire clause, the controlled composition clause, and numerous discounted royalty provisions—continue to be the source of rigid disagreement amongst those in the legal and music communities.103 While no American court has ever held a

101 See KRASILOVSKY & SHEMEL, supra note 27, at 16.
103 Anorga, supra note 8, at 754. These provisions include:

(1) The work-for-hire clause, which allows the labels to become the owners, or authors, of the sound recordings that the artist produces under that contract—this means the artist loses all rights and control in how the song will or will not be exploited by the record label. See Holland, Performers Give Testimony, supra note 9; Future of Music Coalition, Major Label Contract Clause Critique 2-3, Oct. 3, 2001, http://www.futureofmusic.org/contractcrit.cfm [hereinafter Contract Clause Critique] (last visited Sept. 22, 2006); see also PASSMAN, 1st ed., supra note 79, at 240-42; PASSMAN, 5th ed., supra note 12, at 276-79.

(2) The controlled composition clause, which puts a cap on how much money an artist can earn for musical contributions in the form of mechanical royalties (monies paid by a record company for the right to use a song in records). See PASSMAN, 1st ed., supra note 79, at 185-91; PASSMAN, 5th ed., supra note 12, at 209-19; Anorga, supra note 8, at 765-66 (discussing the controlled composition provision); Holland, Performers Give Testimony, supra note 9, Contract Clause Critique, supra, at 6-7.

The Copyright Office sets the statutory rate for mechanical royalties, increasing every two years according to changes in cost of living as determined by the Consumer Price Index. The first rate increase was in 1981. It was at about this time that the Controlled Composition clause became commonplace in record contracts.


(3) Discounted foreign and record-club sales provisions, which provide that an artist will receive a discounted royalty for the sale of his music in these formats. See PASSMAN, 1st ed., supra note 79, at 132-51 (discussing advanced
standardized music contract unconscionable,\(^{104}\) it is hard to deny the one-sidedness of these agreements. The record companies stand firm in their position, however, that they take huge risks investing extensively in unproven artists, and therefore need to capitalize on those artists who achieve success.\(^{105}\) Undeniably, labels do spend enormous amounts of money with no guarantee that they will see any return on that investment.\(^{106}\) Leaving the successful artists bankrupt and in debt to their record labels, however, is not a just way to make

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\(^{104}\) Anorga, supra note 8, at 740.

\(^{105}\) See Hearings Before the Senate Select Comm. On the Entm’t Indus., 2002 Leg., Reg. Sess. (Cal. 2002) (statement of Hilary Rosen, President and CEO, Recording Industry Association of America) (“The only reason record companies can risk investment in the new artists and absorb losses from failures is because, when successful artists make it, money goes back into the system.”).

\(^{106}\) See Philips, Record Label Chorus, supra note 1 (discussing one failed act that received a $750,000 advance, which was allocated to cover the cost of recording its first album and to provide the group with about $250,000 to live on after deducting legal and management fees. The company invested an additional $2.8 million to roll out a marketing campaign to reach retail stores, radio, music TV networks, and another $1.2 million for retail product placement, tour support, photo shoots, advertising and radio and TV show appearances to boost the CD. The album sold only 100,000 copies and the label dropped the act after losing more than $2.7 million on the project.)
up for these losses. The application of section 2855(b) allows just that.\textsuperscript{107}

B. Application of Section 2855(b)

Problems arise from the dissonance between the quantity-based requirements of the standard recording contract and the temporal requirements of the Seven Year Statute.\textsuperscript{108} Labels assert that an artist can easily deliver one album a year, and therefore can deliver seven albums within the statutory time period.\textsuperscript{109} When an artist is forced to promote records via tours, music videos, and television appearances, however, this makes the labels’ proposed delivery schedule almost impossible to meet.\textsuperscript{110} All these additional activities can extend the time period between albums to two years.\textsuperscript{111} In effect, section 2855(b) permits record labels to extend the duration of a recording agreement to fourteen years or more; because of this, the labels have no reason not to demand seven or more albums.\textsuperscript{112}

\textsuperscript{107} Marlowe, supra note 49 (“The nonprofit Future of Music Coalition . . . submitted a detailed written analysis of standard recording industry contracts. We are submitting this critique here as a means to shed light on the major-label working environment, which leaves an estimated 99.6% of artists in debt to their record labels.”).

\textsuperscript{108} California Labor Code Section 2855 and Recording Artists’ Contracts, supra note 11, at 2641 (“The combination of contract terms based on the number of albums delivered and the amendment of section 2855 to include 2855(b) in effect shifted the problems associated with the unanswered questions to the artists. The problems arose from the dissonance between the temporal requirements of section 2855 and the quantity-based requirements of the standard recording contract, the duration of which is defined by an album delivery requirement . . . .”).

\textsuperscript{109} See Holland, Performers Give Testimony, supra note 9 (“Answering questions from lawmakers about whether the number of albums contractually requested by labels can be delivered in seven years, MCA’s [senior VP of business and legal affairs, Mark] Goldstein [sic] gave a list of artists, such as Beba McEntire, who can consistently deliver an album every year.”).

\textsuperscript{110} See Chang, supra note 8, at 16-17:

Since no artist is able to turn out seven albums within seven years, considering the restrictions put on them by the labels to take two years between record releases to promote the record via tours, music videos, and television appearances . . . such quotas allegedly threaten to lock recording artists into personal service contracts for at least fourteen years, twice as long as the statutorily allotted time period [for other artists under contract].

\textit{Id.}

\textsuperscript{111} See, e.g., Love Cross Complaint, supra note 13, at 6 (“[R]ecord companies have preferred and often insisted on a minimum two-year gap between releases for artists.”; Cappello & Thielemann, supra note 24, at 17.

\textsuperscript{112} Cappello & Thielemann, supra note 24, at 16 (“When artists sign the industry standard contracts, no one expects them to deliver seven albums in seven
In addition to effectively allowing record labels to demand long-term recording agreements, section 2855(b)(3) purports to allow damages if an artist gives notice of termination under section 2855(a).\textsuperscript{113} The damages provision of section 2855(b)(3), however, is unclear.\textsuperscript{114} Although neither the statute itself nor any case law defines “damages,” record companies argue that the courts should equate damages with lost profits.\textsuperscript{115} Back when labels were granted exclusive control over recordings only, the record company could base damages solely on sales from these recordings.\textsuperscript{116} Under the theory of lost profits, a record company would have been entitled to recover the expected profits on the additional albums that an artist had yet to deliver when he breached the contract.\textsuperscript{117}

In awarding damages on the lost profits theory, the court would be required to make a calculation of the future worth of a contract.\textsuperscript{118} Recovery of damages for lost profits depends on three questions: whether the defendant’s conduct was the proximate cause of the damages; whether the damages were foreseeable as a probable result of the breach at the time the contract was made; and whether the damages can be proven with reasonable certainty.\textsuperscript{119} Assuming a record company will easily be able to meet the proximate cause and foreseeability prongs, the label will still need to prove that it would incur damages with “reasonable certainty.”\textsuperscript{120} The courts
have held that “if plaintiff’s proof leaves uncertain whether plaintiff would have made any profits at all, there can be no recovery.”

The record company would attempt to prove with certainty the future profitability of the artist with evidence of number of records sold, profits on past record sales, the popularity of the artist, and other indicators of success. While all this data would help the court assess the future profits a company expects to earn from record sales, nothing in the music business can be predicted with certainty. A hit record in the past does not guarantee similar sales in the future; often, artists are simply one-hit wonders. A popular group with many successful albums may not be able to create another album whose numbers match past sales figures. For example, unforeseen personality or substance abuse problems could surface.

121 Id. (quoting 1 Robert L. Dunn, Recovery of Damages for Lost Profits §§ 1.1, 1.4, 1.8 (5th ed. 1998)). See also Kids’ Universe v. In2labs, 116 Cal. Rptr. 2d 158, 169 (Ct. App. 2002) (“Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking (quoting S.C. Anderson, Inc. v. Bank of America, 30 Cal. Rptr. 2d 286, 289 (1994) (internal quotation marks omitted)).

122 Id. at 2647 n.109 (“The record company would put on evidence such as past record sales, increasing rates of sales, critics’ record reviews and predictions of popularity, plans for future touring and the revenue gained or lost by touring, testimony about the quality of marketability of partially completed songs and albums, stability and longevity . . . .”).

123 Van Beveren, supra note 39, at 412. As an example of the difficulty inherent in calculating lost profits, what if Alanis Morissette decided to leave her record label after seven years but still owed the company four more albums? It is unclear whether the company would be allowed to base the value of damages on her 30-million selling hit, “Jagged Little Pill,” or her follow-up, “Supposed Former Infatuation Junkie,” which sold just 2 million copies. Philips, lawmakers Take Aim, supra note 73.

124 For an in-depth look of all the one-hit wonders from the ’50s to the ’90s, visit http://www.onehitwondercentral.com. Some of the most played songs of all time were originally performed by artists that were never heard from again: The Penguins, “Earth Angel”; The Bobbettes, “Mr. Lee”; The Monotones, “The Book of Love”; Bobby Day, “Rockin’ Robin”; Devo, “Whip It”; Sugar Hill Gang, “Rapper’s Delight”; Bow Wow Wow, “I Want Candy”; Toni Basil, “Mickey”; Dexy’s Midnight Runners, “Come On Eileen”; House of Pain, “Jump Around”; the list goes on and on. Id.

125 Van Beveren, supra note 39, at 412.

Even “successful, established artists are subject to the same uncertainties that face the average artist.”127 Some of the most successful artists of all time have been unable to maintain past record sales. For example, Michael Jackson, the biggest-selling solo artist of all time, literally shattered sales records. Two of his albums, *Off the Wall* and *Dangerous*, reached a status of seven times platinum, *Bad* had sales of eight times platinum, and *Thriller*, which holds the title of best-selling album in history, was certified twenty-six times platinum.128 However, in 2002, Jackson’s album *Invincible* was certified only two times platinum,129 a number that fell far short of his past sales records. In addition to the inherent market uncertainties, it is completely speculative for record companies to assume that over the next twenty years they would actually exercise each and every one of the remaining options.130 Given the emotiveness of the various factors that can affect future lost profits, courts should not get involved with determining such an incalculable number.131

Even if a court was able to devise a fair and workable method for the calculation of lost profits, the outcome would become even more onerous for the artist. Because a record company’s profit on a single album typically exceeds the royalties that the artist earns, the lost profits a record company purportedly suffers would exceed whatever royalty the artist would earn under a new record deal.132 Artists who breach their contracts would be free to sign with a new record label, but would never see a dime since they would owe their previous record company more money in alleged lost profits than they would earn in royalties from their new record contract.133 The

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129 Id. As another example of the unpredictability that affects all artists, Mariah Carey’s self-titled album *Mariah Carey* was certified nine times platinum, *Music Box* and *Daydream* were both certified ten times platinum, while *Glitter* sold only one million albums. Recording Industry Association of America, Gold & Platinum Searchable Database: Mariah Carey, http://www.riaa.com/gp/database/ (search “Mariah Carey”) (last visited Sept. 22, 2006).
130 See Cappello & Thielemann, *supra* note 24, at 17.
131 Van Beveren, *supra* note 39, at 413-14 (“It is important to recognize that determining the value of an artist's contract is not synonymous with judging artistic merit. Courts have been extremely unwilling to judge a performer's quality.”).
132 Cappello & Thielemann, *supra* note 24, at 17.
133 Id.
artist would also owe financial commitments to her new record company, thus the artist's royalties would be paid to both her old record label and her new one.

Faced with these dismal prospects, few artists choose to terminate their contracts under section 2855(a). Many recording artists that attempted to litigate the issue in court\(^\text{134}\) alleged that the issue of "damages" imposes involuntary servitude, which exists because they have "no available choice but to work or be subject to legal sanction."\(^\text{135}\) While these artists most definitely had a strong argument, at least they could still rely on ancillary revenue streams for additional income. At this time, recording agreements only granted the labels control over recordings and merchandising; therefore, an artist being sued for damages could still bring in revenue from commercial endorsements, merchandising, music publishing, and acting deals.\(^\text{136}\) This would quickly change, however, as the industry evolved and record companies began to demand more control over an artist's creative works.

\(^{134}\) Several artists have sued their labels over contract disputes. See Holland, Performers Give Testimony, supra note 9, at 1, 4, 5. The list of artists that have sued their labels include: Prince, the Beatles, the Beach Boys, Sammy Hagar, L.A. Reid, Teena Marie, Kenny Rogers, Donna Summers, Barry White, Meat Loaf, the Eagles, Metallica, Oscar de la Hoya, Luther Vandross, Toni Braxton, Beck, Bone Thugs-N-Harmony, the Bellamy Brothers, 'N Sync, Bush, New Edition, the Goo Goo Dolls, TLC, Dr. Dre, Blondie, the heirs of Buddy Holly, Blink-182, and various others. Id. at 5.

Two of the most publicized cases, involving Dixie Chicks and Courtney Love, focused national attention on the Seven Year Statute—the artists battled their labels over undelivered albums and payments of royalties. Baumgartner, supra note 18, at 81. Both cases challenged the "legality of many provisions of record contracts in that most artists have little or no negotiation power, and that the contracts are onerous, unconscionable, a restraint of trade, and are even criminal." See Holland, Performers Give Testimony, supra note 9, at 4. In both cases, the parties agreed to settle before going to trial. Baumgartner, supra note 18, at 81. A settlement is typical for lawsuits between an artist and her record company for several reasons. One reason is that artist attorneys have no desire to change the climate created by unfair contracts and unhappy clients. Another is that companies would rather settle a complaint than be involved in lengthy litigation. See, e.g., Holland, Performers Give Testimony, supra note 9; Philips & Morain, Company Town; Measure on Music Contracts Planned; Entertainment: State Senator Says He'll Challenge Statute that Ties Recording Artists to Years-Long Contracts, L.A. TIMES, Oct. 19, 2001, available at LEXIS News Library, USPAPR file.

\(^{135}\) See Cappello & Thielemann, supra note 24, at 16 (citing United States v. Kozinski, 487 U.S. 931, 942-43 (1988)).

\(^{136}\) Philips, Record Label Chorus, supra note 1.
IV. EVOLUTION OF THE MUSIC INDUSTRY AND RECORDING AGREEMENTS

A. 2000: Digital Distribution

Well, there’s a lot of smart people at the music companies. The problem is, they’re not technology people... And so when the Internet came along, and Napster came along, they didn’t know what to make of it. A lot of these folks didn’t use computers—weren’t on e-mail; didn’t really know what Napster was for a few years. They were pretty doggone slow to react. Matter of fact, they still haven’t really reacted, in many ways.137

In 1999, an eighteen year-old college dropout, Shawn Fanning, developed an idea that drove the music industry mad.138 Fanning and “an Internet chat-room friend, founded Napster, a peer-to-peer file sharing service that enabled its users to trade and share music files for free over the Internet.”139 At the same time, major record labels experienced an economic downturn.140 The number of units shipped in the United States decreased by about ten percent from 2000 to 2001, which led to a decrease in sales of about $600 million.141 This was also the first time the recording industry experienced a decline in CD sales since 1994—units shipped decreased by

139 Id. at 93. Even though the Ninth Circuit determined that Napster violated existing copyright law and Napster consequently shut down, various other file-sharing websites emerged, such as Morpheus, Grokster and Kazaa. See Schorr, supra note 6, at 77-78. On June 27, 2005, the Supreme Court unanimously ruled that file-sharing companies, such as Grokster and Morpheus, can be held liable when promoting theft of copyrighted materials. While this decision was a “win” for the record labels, analysts predict the ruling will have little impact on the availability of illegally downloaded music and movies. See Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd., 545 U.S. 913 (2005); Sarah Rodman, And the Beat Goes On . . . Analysts See Little Impact of Court’s Downloading Ruling, BOSTON HERALD, June 28, 2005, available at 2005 WLNR 10175860.
140 Schorr, supra note 6, at 68. (“Major record labels [were] floundering for their economic survival.”). See also id. at 72-73 (“The major labels are experiencing an economic downturn. The number of recordings shipped in the United States from record companies to retail outlets. . . fell 10.3% in 2001, and more than 15% over the last two years. . . . Globally, the value of the international music market plunged 5%, and unit sales dropped by 6.5% in 2001. Industry insiders estimate that between 5,000 and 10,000 music industry employees have been laid off, and many established recording artists have been discharged by their labels.” (footnotes omitted)).
seven percent and dollar sales decreased by two percent.142 Record label executives blamed the poor record sales on increased online piracy through file-sharing websites.143 They fought vigorously to conquer the Internet by suing the online competition for appropriation of their copyrighted music and by creating their own subscription services.144

As the industry began to change drastically, standard provisions in recording agreements changed as well, but not as one might suspect. Ten years prior, after the CD was introduced, “any record company with a library suddenly became a ‘cash cow.’”145 Labels were in the mode of “spend big to sell big,” and recording agreements began to reflect this growing wealth.146 A new artist typically received an advance of $175,000 to $300,000, whereas a mid-level recording artist may have received an advance of up to $600,000, twice of what an artist in the late eighties would receive.147 The advance for a top-selling artist could rise to more than $1,500,000, over $1 million more than thirteen years prior.148 Labels insisted on a total of five to seven albums over the course of a deal, instead of the eight to ten options they used to require twenty years before.149 A new artist that entered into a recording agreement in 2000 typically received a royalty of anywhere between

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142 Id.
143 Schorr, supra note 6, at 73. “The music industry had never experienced a decline of this magnitude.” Steal This Song; Go Ahead and Burn That MP3. The Music Biz Will Thank You Later, SCENE ENT. WKLY., Nov. 19, 2003, available at 2003 WLNR 13301184 [hereinafter Steal This Song].
144 Schorr, supra note 6, at 75-76.
146 Id. (“With an eye cast more toward marketshare to impress shareholders than toward artist development to attract musicians, the industry moved to a model in which only bigger was better. That paved the way for free-spending on hype and marketing that focused on only the most commercial of recordings.”). Record labels say they are still suffering from a spate of expensive deals negotiated during the middle and late 1990s. Philips, Record Label Chorus, supra note 1.
147 PASSMAN, 5th ed., supra note 12, at 93. See also supra note 89 and accompanying text. In the fifth edition of his book, Donald Passman distinguishes artists as follows: New Artist: an artist that has never signed a record deal, or an artist that has been signed but never sold over 250,000 albums per release; Midlevel Artist: an artist whose last album sold in the 750,000 to 1,500,000 range; Superstar: sales from 2,500,000 and up. PASSMAN, 5th ed., supra note 12, at 87. These sales criteria are much larger than those in the eighties, and reflect the success that the industry experienced during the nineties with the advent of the CD. See supra note 89.
148 PASSMAN, 5th ed., supra note 12, at 93. See also supra note 90 and accompanying text.
149 PASSMAN, 5th ed., supra note 12, at 93. See also supra notes 86-87 and accompanying text.
thirteen to sixteen percent of the suggested retail list price, a
definite improvement from the eleven to thirteen percent he
used to receive years ago.\footnote{Passman, 5th ed., supra note 12, at 93. See also supra note 94 and accompanying text.}

While the terms of the newer agreements may have
appeared more favorable to the artist, labels actually added to
the oppression of artists by introducing new provisions to make
up for the losses they were experiencing after the introduction
of digital downloads. One such provision was the packaging
royalty deduction, which provided for deductions of up to
twenty-five percent off the artist’s royalty to pay for label
development of digital electronic transmissions, future digital
downloads, upkeep of Websites, and expanding label Internet
presence.\footnote{Holland, Performers Give Testimony, supra note 9.} In addition, the labels were able to maintain new
technology royalty deductions of up to twenty-five percent. In
the eighties, labels justified these deductions for the
development of CDs.\footnote{Id.} After the introduction of online
distribution, labels defended the deductions to make up for the
costs involved in such new configurations as digital compact
cassette, DVD-Audio, and audiophile records.\footnote{Id. Essentially, “the modernization of product formats and manufacturing
processes [was] at least partly charged against artists’ recoupment accounts.” Id.} In effect, these
provisions procured the artist’s money for the label.\footnote{For example, if a new artist received a royalty of fourteen percent, an
eighty-five percent rate on CDs (new technology deduction), a three percent producer,
recording costs of $300,000, and tour support of $50,000, his or her royalty for sales of
500,000 albums looked something like this:

\[
\begin{array}{ll}
\text{Suggested Retail Price} & 18.98 \\
\text{Less: Packaging (25\%)} & -4.74 \\
\text{Royalty Base} & 14.24 \\
\text{Royalty Rate (14\%, less 3\% for the producer [11\%] x}
\text{85\% for CD [9.35\%])} & \times 9.35\% \\
\text{Royalty} & 1.33 \\
\text{Royalty x 500,000 units} & \times 500,000 \\
\text{\hspace{1cm}} & 665,000 \\
\text{Less 15\% “free goods factor”} & -99,750 \\
\text{\hspace{1cm}} & 565,250 \\
\text{Less: Recording Costs} & -300,000 \\
\end{array}
\]
With the label receiving a greater share of revenues by reducing the artist's royalty, the record companies' arguments in defense of section 2855(b) became even less valid. In 1987, recording industry lobbyists told lawmakers that labels did not earn a profit on their successful artists until the fourth album, and therefore they would be severely injured if the artist did not deliver the remaining three albums. This argument may have had some validity twenty years ago, when the recording industry was based on development. Back then, labels nurtured their artists and focused on developing long-term successes. According to then-deputy president of EMI Recorded Music, Roy Lott, it was not until artists Kenny G. and Sarah McLachlan were on their fourth albums and into the fifth year of their contracts that they started to experience success.

By the beginning of the century, however, labels had shifted their focus to creating immediate superstars. If an artist's record did not immediately succeed, the record company did not exercise its option and it dropped the artist. Labels could no longer claim that the reason they needed to be exempted from the Seven Year Statute was because they needed to “develop” the artist. Nonetheless, the record companies continued to operate under the protection of subsection (b). As a result, an artist being sued for breach of contract would be liable to the label for an even larger amount of damages since lost profits would include these monies that rightfully belonged to the artist but that the label now claimed.

<table>
<thead>
<tr>
<th>Less: 50% of independent promotion</th>
<th>-100,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less: 50% of video costs</td>
<td>-75,000</td>
</tr>
<tr>
<td>Less: tour support</td>
<td>-50,000</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$40,250</strong></td>
</tr>
</tbody>
</table>

Calculations adapted from PASSMAN, 5th ed., supra note 12, at 98.

155 See supra notes 73-75 and accompanying text.
156 See Philips, Lawmakers Take Aim, supra note 73.
157 Hearings: 2001, supra note 70 (statement of Michael Greene, President & CEO, Grammy’s, discussing the differences in relationships between artists and labels in the 1980’s and today, and drawing attention to the fact that artists used to be developed and nurtured by the labels whereas today using the word “relationship” may be completely inappropriate, given the lack of its existence).
158 Id.
159 See Newman, supra note 9.
160 Hearings: 2001, supra note 70 (testimony of Ann Chaitovitz, Director of Sound Recordings, AFTRA).
As labels soon realized that digital distribution was here to stay, they quickly found novel ways to secure for themselves a larger share of the artist’s profits.

B. 2005: Expanding the Rights of Labels in the Music Industry

Shawn Fanning turned twenty-five in late November of this year, and it’s been a very long seven years since he wrote a little computer program that let him trade electronic music files with his dorm mates. He called it Napster, and it quickly grew into an Internet phenomenon, not to mention the music industry’s bête noire until the courts shut it down four years ago.

Now the spotlight is turning back to Mr. Fanning, this time as a symbol of how big business and the disruptive force of the Internet just might find a way to get along. By year-end, Grokster, a new file sharing service will appear—this one sanctioned by the record industry because it will use technology that requires file-swappers to pay for copyrighted material.161

In the few years since the introduction of digital distribution, the music companies have finally caught on. They are starting to embrace the idea that peer-to-peer file-sharing services can be reconstituted as legal sales outlets.162 Album sales, however, are still not what they used to be. Sales are thirty percent below their level the year Napster was let loose, and ten times as many songs are illegally downloaded from file sharing services as are bought from paid services like Apple’s iTunes.163

Nonetheless, labels have started to accept the new business models presented by innovative media such as downloads, subscriptions, and ringtones.164 As the Web quickly replaces traditional forms of music distribution, label executives and artist managers are frequently at odds over how to slice up these new “money pies.”165 Labels are fighting to


162 Id. (“Apple Computer and other companies have built thriving, unquestionably legal music-downloading businesses.”).

163 Id.


165 Id. Ringtones are a good example. Bernie Lawrence-Watkins, Esq. describes a ringtone as:
obtain the largest possible portion of the revenues attributed to digital downloads, video downloads, ringtones, and ringbacks.\textsuperscript{166}

In addition to these novel revenue streams, labels are exploiting and expanding their traditional areas of exclusivity to include areas that used to belong to the artists: videogames, film, and TV.\textsuperscript{167} Labels are trying to muscle their way into all these additional revenue streams by adding non-negotiable provisions to the standard recording agreements that require artists to share these ancillary revenues with the label.\textsuperscript{168} Record companies are even requiring currently signed artists to accept amendments to their existing agreements that grant the label the exclusive rights to these new media.\textsuperscript{169} Fred Davis, a prominent music entertainment attorney, points out that:

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Dennis M., \textit{7 Questions with Bernie Lawrence-Watkins, Esq.; A Backstage Pass to the Music Industry}, ATLANTA TRIB., July 1, 2005, \textit{available at} 2005 WLNR 14596030. When ringtones first arrived on the cell phone market, artists and their managers ignored them, doubting any real revenue could come from cell phone rings. Bruno, \textit{Video Booms Online, supra} note 164. Now that the industry is worth $3 billion globally, some artists feel that ringtones should yield a licensing rate of 50\%, instead of what most get: a royalty rate, generally 10\%-20\%. See Bruno, \textit{Video Booms Online, supra} note 164; Lawrence-Watkins, \textit{supra} note 165. Analysts predict that this is a market that will continue to grow. As full-track ringtone downloads stabilize around a $1.50 price point, the lucrative realtone (ringtones that sound more like online digital music downloads because of the vocals and the improved voice quality) market currently charges around $3 to $3.50. \textit{The Specialist Role of the Aggregators, MUSIC Wk., Sept. 4, 2005, available at} 2005 WLNR 14921366. See also Bruno, \textit{Video Booms Online, supra} note 164.

\textsuperscript{166} Artists typically receive a thirteen percent royalty on record sales before any royalty deductions, which then leaves the artist with a royalty of around nine percent. See \textit{supra} Part III.A. With digital downloads, artists receive an even smaller eleven percent royalty, based on the standard 99 cent price before any deductions. Bruno, \textit{Video Booms Online, supra} note 164.

In addition to digital downloads, labels are claiming a stake in online video download receipts. In mid-October of this year, Apple announced that it would expand its à la carte model to sell music videos. \textit{Id.} Some labels have started charging for access to their video libraries on America Online and Yahoo. \textit{Id.} These sites have shown explosive growth in video demand online—Yahoo streamed 3 billion music videos in 2004, and now averages about 350 million music videos per month. \textit{Id.} Labels now charge about $1.40 per video, and pay the artists a royalty percentage. \textit{Id.} Artists and their lawyers contend that the video sales should be counted as a license instead of a royalty, which would increase the artist share to fifty percent of the fee. \textit{Id.}

\textsuperscript{167} Sloane, \textit{supra} note 30.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} Personal experience/interviews subject to confidentiality.
Right now the issue of distribution of digital income isn't on the radar of most artists. However, when you combine the projected income in 2006 from ringtones, digital downloads, subscriptions and video income, it's going to become an ever-increasing portion of artist revenue. The battle lines need to be formed right now.\footnote{Bruno, Video Booms Online, supra note 164.}

Record companies defend these new exclusive rights by arguing that they are not trying to control an artist's ability to exploit her music in other formats, they only want to share in the income derived from an artist's activities in other media.\footnote{Sloane, supra note 30.} Agreements used to require only that artists promise not to make records for anyone else.\footnote{Id. See also notes 101-02 and accompanying text.} Activities in other media—TV, webcasting, or film—were untouched, and the artist was able to profit from those activities, owing nothing to the record company as long as the recordings were not part of a motion picture soundtrack.\footnote{Sloane, supra note 30.} Under the new deal terms, however, a recording artist may not, without record company approval, and presumably, financial involvement, appear in a TV show, webcast, or motion picture unless the role is completely unrelated to the artist's endeavors as a musician.\footnote{Id.} These new agreements only add to the unconscionability of the artists' situation because artists have lost control over the ability to convert their musical fame into other financial opportunities.\footnote{Id. ("[R]ecord companies are trying to secure a bigger piece of the artist's pie without paying or adding anything extra.").}

As one example of today's revised agreements, EMI recently signed an agreement with the rap-metal band Korn, which gives EMI a stake in almost every dollar the band will earn worldwide over at least the next five years.\footnote{Duhigg, supra note 33.} EMI will pay the four-member band an estimated $15 million upfront—more than twice what the band might expect from a traditional recording contract. In return, EMI will get more than twenty-five percent of the band's publishing, merchandising, and touring revenue, as well as profits from the group's albums.\footnote{Id.} Artist managers and attorneys are concerned about these deals that appear to favor the artists, because in reality, they deprive the artists of a substantial part of their income.\footnote{Id.}
maintain that musicians rely on concerts and licensing contracts for as much as seventy percent of their income.\footnote{179} It used to be that recording artists could “earn millions of dollars from concerts, commercial endorsements, merchandising, music publishing and acting deals, none of which they share[d] with their labels.”\footnote{180} These new agreements render the application of section 2855(b) even more disastrous for the artist than ever before.

V. \textbf{Argument to Repeal Section 2855(b)}

A. \textit{Application of Section 2855(b) to the Music Industry Today}

As labels transform themselves from vendors of physical goods to licensors of digital media, label executives, artist managers, and attorneys will continue to fight over how to slice up ancillary revenues.\footnote{181} Given their command of the entire recorded music industry, it is hardly surprising that the record labels are quickly gaining control over new revenue streams as well as traditional revenue channels that once belonged solely to the artist.\footnote{182} Even if the record companies were to compensate the artists fairly, the issue remains that in the past artists typically relied on these activities as financial opportunities that were untouched by the label.\footnote{183}

Under this new contract model, the artists have even more reason for dissension as the legal effects of applying section 2855(b) are revealed.\footnote{184} Under the lost profits theory, it used to be that a record company would be entitled to recover the expected profits on the additional albums that the artist had not yet delivered.\footnote{185} Although subsection (b) provides for damages for phonorecords,\footnote{186} which at the passing of the amendment only existed in the form of vinyl, cassettes, and

\footnotesize
\begin{itemize}
\item \footnote{179} Id.
\item \footnote{180} Philips, Record Label Chorus, supra note 1.
\item \footnote{182} \textit{See supra} Part IV.B.
\item \footnote{183} \textit{See supra} notes 136, 178-80 and accompanying text.
\item \footnote{184} \textit{See supra} note 11 and accompanying text.
\item \footnote{185} Id.
\item \footnote{186} \textit{See} CAL. LAB. CODE § 2855 (West 2005).
\end{itemize}
CDs,187 U.S. copyright law defines phonorecords as sounds fixed in any method that existed in 1976 or that were later developed.188 Therefore, under today’s recording agreements, a label recovering for breach of contract will also claim the new, additional, and rapidly growing revenue streams that fit within the definition of phonorecords as damages.

This problem is aggravated by the nature of today’s industry. With the push for one-hit wonders and instant successes, labels may be bringing in more revenue on a new artist within the first few months of an album release due to ringtones, ringbacks, and video download sales than they used to make on a successful artist after two or three albums.189 Because the labels contend that an artist’s future worth is based on past profits,190 after just one semi-successful album and additional sales through supplemental revenue streams, a label may be able to claim millions of dollars in damages.

While the application of section 2855(b) was plainly unfair when it was passed, at least an artist being sued for breach of contract back then could rely on other financial opportunities such as film, TV, and licensing.191 Today, however, an artist is not only liable for a practically unlimited amount of potential lost profits, but she has also lost the opportunity to exploit and expand on her creative works. Therefore the artist is left penniless. Faced with such bleak prospects, an artist is left in a situation whereby she is subject


188 17 U.S.C. § 101 (2000). U.S. Copyright law defines “phonorecords” as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Id.

189 Record Biz Taking Hits on All Sides, VARIETY, June 27, 2005, available at 2005 WLN 11655954. PricewaterhouseCoopers predicts that consumer music spending will rise 8.3% between 2004 and 2009, and “at least 6% of that increase will be created by purchases of digital downloads and mobile music.” Id. See also supra note 170 and accompanying text (quotation of Fred Davis, projecting the ever-increasing amount of income that ringtones, digital downloads, subscriptions and videos will bring in).

190 See supra Part II.C.

191 See supra notes 136 and 175 and accompanying text.
to unconscionable agreements that impose involuntary servitude.

B. Unconscionability and Involuntary Servitude in Music Contracts Today: An Analysis

The California legislature originally enacted the Seven Year Statute to protect against involuntary servitude in the form of unconscionable agreements. Within the last twenty years, courts have been more willing to apply the doctrine of unconscionability to protect contracting parties in the entertainment industry from harsh and oppressive terms in contracts. The doctrine has yet to be applied to the duration of a recording agreement. In determining whether a contract is unconscionable, courts will look for the presence of procedural unconscionability, which exists when one party lacks meaningful choice in entering a contract or negotiating its terms, and substantive unconscionability, which exists when the terms are unreasonably favorable to the other party. Some courts require a showing that the contract was both procedurally and substantively unconscionable when made. However, some courts have held that “substantive unconscionability may be sufficient in itself even though procedural unconscionability is not.” Other courts have indicated that a sliding scale applies.

In determining whether a contract is unconscionable, and thus unenforceable under law, California courts apply a sliding scale test. The more substantively oppressive a contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is

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192 See supra Part II.A.
193 Anorga, supra note 8, at 747 (“An increasing amount of cases involving the entertainment industry have been litigated within the last twenty years, and courts have appeared more willing to apply the doctrine of unconscionability to protect contracting parties from harsh and oppressive terms in contracts.”).
194 See id. at 759-63 (discussing whether the lengths of standardized music contracts would be considered unconscionable by a court in California).
196 8 WILLISTON & LORD, supra note 42, § 18:10.
197 Id.
198 Prince, supra note 195, at 472.
199 Ting v. AT&T, 319 F.3d 1126, 1128, 1148 (9th Cir. 2003).
unenforceable, and vice versa.\textsuperscript{200} Even though record companies have traditionally taken advantage of artists’ ignorance, inexperience, lack of involvement, and lower social status,\textsuperscript{201} a musician signing a contract with a major record label is probably represented by a competent individual (e.g., manager, agent, or attorney).\textsuperscript{202} Therefore, a court is unlikely to find much evidence of procedural unconscionability in a recording agreement.

On the other hand, a court may hold that same agreement to be full of provisions that fit the definition of substantive unconscionability.\textsuperscript{203} The various contract clauses that deal with duration, ownership of recordings, recoupment of advances, and artist royalties are inherently unfair,\textsuperscript{204} especially in light of the free agency status that other creative artists enjoy under the Seven Year Statute.\textsuperscript{205} Instead of protecting recording artists from unconscionable agreements in the same way it does for film actors and athletes, the Seven Year Statute only further exposes musicians by allowing labels to keep an artist under contract for well beyond the statutory limit, a most unfavorable result for the artist.\textsuperscript{206} Country singer LeAnn Rimes, for example, signed a recording deal when she was twelve years old, agreeing to deliver twenty-one records in seven years.\textsuperscript{207} Rimes has pointed out that she will probably be working under the contract until she turns thirty-five because the standard schedule of recording, touring, and promotion, makes it practically impossible for an artist to deliver an album a year.\textsuperscript{208} As a result, she can never leave her label.

As the court in \textit{De Haviland} pointed out, there are “innumerable reasons” why signing with a new label after a reasonable period of time may be to a recording artist’s

\begin{thebibliography}{99}
\bibitem{200} Id. at 1148.
\bibitem{201} Van Beveren, \textit{supra} note 39, at 381-82 (quoting Gee v. CBS, Inc., 471 F. Supp. 600 (E.D. Pa. 1979)).
\bibitem{202} Anorga, \textit{supra} note 8, at 756.
\bibitem{203} Id.
\bibitem{204} See \textit{supra} Part III.A.; Anorga, \textit{supra} note 8, at 772.
\bibitem{205} See Anorga, \textit{supra} note 8 (discussing why musicians think their contracts are unconscionable); Love Cross Complaint, \textit{supra} note 13, at 2; Marlowe, \textit{supra} note 49 (“This statute is unconstitutional because it singles out the record industry. These contracts are unconscionable, signed by entry-level artists who mostly have no power.” (quoting music attorney Don Engel)); \textit{Courtney Love Sues}, \textit{supra} note 103 (referring to Courtney Love’s cross complaint).
\bibitem{206} Cappello & Thielemann, \textit{supra} note 24, at 19.
\bibitem{207} Sharp, \textit{supra} note 6.
\bibitem{208} Id.
\end{thebibliography}
advantage. The court stated, “[a]s one grows more experienced and skillful, there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation.”

Every artist engaged in rendering personal services enjoys the equitable compensation and creative freedom provided by the Seven Year Statute, except for contemporary music artists.

There is little difference between recording agreements, such as LeAnn Rimes’, and the contracts the California legislature was trying to prohibit when it passed the Seven Year Statute. The threat of damages an artist faces under subsection (b), however, creates exactly the opposite result. It essentially forces recording artists into involuntary servitude. By seeking excessive damages in a suit against an artist, the recording company is able to use the threat of enormous, lost profit damages to force an artist to produce the remaining albums even if doing so will require the artist to perform beyond seven years. Knowing that she will be liable for millions of dollars, the artist will have no choice but to work.

Any artist who attempts to avoid involuntary servitude by breaching her recording agreement is faced with a lack of alternate revenue streams upon which artists before her could rely. This makes involuntary servitude inescapable because the artist—now liable for profits from ringtones, ringbacks, and video downloads in addition to record sales, and no longer in control of these supplementary revenues—will have even less of a choice but to work or be subject to legal sanction because of the potential for exaggerated damages. As recording artist Don Henley said even before the new agreements, “We aren’t free to compete in the marketplace. We’re talking about . . . indentured servitude.” Only by repealing the amendment can the legislature preclude a result that forces the artist into involuntary servitude.

210 Id.
211 Cappello & Thielemann, supra note 24, at 16.
212 Baumgartner, supra note 18, at 79-80.
213 Cappello & Thielemann, supra note 24, at 16.
214 Id.
215 Marlowe, supra note 49.
C. **Repealing Section 2855(b)**

Section 2855(b) permits record labels to take part in practices that conflict with the doctrines of unconscionability and involuntary servitude. By allowing the labels to sue for breach of long-term recording agreements, section 2855(b) assists in the creation of unconscionable duration periods and helps force the artist into involuntary servitude with the threat of damages. Record companies with vast resources may continue to press for settlement in important cases they fear they may lose to keep these issues safe from judicial review. For these reasons, the California legislature should repeal subsection 2855(b).

Of course, an artist should not be able to just walk away from a contractual agreement—it would be disastrous for a company to lose the millions it invested in a new artist.\(^{216}\) This is not what artists are asking for; they are simply asking that they be treated like every other creative artist that is subject to the Seven Year Statute. Recording artists and their supporters argue that the television and film industries are similar to the recording industry in that they all require large financial investment in projects.\(^{217}\) Contrary to the film industry, however, the record industry then holds a recording artist, unlike any other creative artist, liable for future profits that may cover the span of fourteen or more years,\(^{218}\) twice the limit imposed by the statute.\(^{219}\)

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\(^{216}\) Cook, *supra* note 37, at 43. One spokesperson for the RIAA argued that:

> Artists can’t just get a pass on this issue. There is not going to be sympathy for them when they take multimillion-dollar advances from the companies and then just walk away before they fulfill the obligations in their contracts. Somebody has got to come up with the money to cover damages that the companies incur.

\(^{217}\) Philips, *Lawmakers Take Aim*, *supra* note 73. Some label executives go so far as to suggest that a change in the law would “jeopardize the record company’s ability to earn profits from its agreements and run a viable business with successful California-based artists.” Holland, *Performers Give Testimony*, *supra* note 9. History has proven to the contrary. After the holding in *De Haviland v. Warner Bros. Pictures*, 153 P.2d 983 (Cal. Dist. Ct. App. 1944), and the demise of the studio system in the film industry, the industry actually got bigger. The “economic freedom for creative people is just good business.” *Courtney Love Sues*, *supra* note 103 (quoting A. Barry Cappello).

\(^{218}\) *Hearings: 2001, supra* note 70 (“[T]here is nothing unique about the pre-production costs associated with the phonorecord industry. Artists working in other fields, such as film… also often require substantial advances, investment and promotion of the artist over the course of several years and several projects . . . .”) (testimony of Anne Chaitowitz, Director of Sound Recordings, AFTRA).

\(^{219}\) Holland, *Performers Give Testimony*, *supra* note 9. Anne Chaitowitz, pointed out that the “film industry’s companies have lived with the seven-year law with
If the California legislature repeals subsection (b), recording artists would be able to enjoy the same rights as all other creative artists. There would be a reasonable opportunity for them to receive fair-market compensation for their services, which is one of the major policy reasons behind the Seven Year Statute. This same law which has created oppression over recording artists has created immense opportunities for other creative artists, including film actors and athletes. Free agency has resulted in enormous wealth for these individuals, and the film and sports industries have prospered even as employee salaries have risen in accordance with true market value. More than ever before, recording artists, who have lost control to convert their creative works into other financial opportunities and who are subject to unconscionable recording agreements, need the protections of section 2855(a). Repealing the amendment is the only way to uphold the original purpose behind the Seven Year Statute.

VI. CONCLUSION

The laws here are still evolving (and will be for years), as they try mightily to adapt themselves to new technologies that arrive hourly. And any time you have a concept created in 1909 being applied to things that weren’t even conceived at the time, you create a healthy fund to put lawyers’ children through college.

So, where’s the good news? Well, we’re learning there’s still a very strong desire for music. We just haven’t figured out how to harness it for the forces of good instead of evil.

no such amendment for nearly two decades [and], ‘They haven’t gone anywhere, have they?’” Id. (her response to suggestions that if the law changed, record companies might not only sign fewer artists in California, but might also move to another state).

Both artists and their attorneys point out the differences in the treatment of recording artists and that of all other creative artists. Don Henley asked, “How can everybody else be protected but us?” Philips, Lawmakers Take Aim, supra note 73. A. Barry Cappello, Courtney Love’s attorney, argued that, “We’re really just trying to follow the trend of the law and create the same kind of business opportunities for the musicians and record companies that the end of the studio system created for the film business and that free agency created in baseball.” See Courtney Love Sues, supra note 103.

Cappello & Thielemann, supra note 24, at 19.

Id.

See supra Part II.A.

Cappello & Thielemann, supra note 24, at 19.

Id.

The California legislature enacted the Seven Year Statute to protect against unconscionable agreements that impose involuntary servitude. The record industry’s efforts to avoid a law under which an artist could walk away from an agreement after seven years led to the creation of subsection (b). By allowing the record label to sue an artist for breach of an agreement, the amendment effectively permits record companies to operate in ways that are contrary to the purpose of the Seven Year Statute.

Faced with the threat of millions of dollars of lost profits damages, back then, an artist essentially had no choice but to work or be subject to legal sanction. At least an artist that breached a recording agreement twenty years ago could rely on other financial opportunities, such as TV, film, and licensing, for a substantial portion of income. This is no longer true in today’s music world where record labels demand to share in these ancillary sources of revenue. The new agreements, which grant the label exclusivity over new and traditional methods of distribution, provide an even stronger reason why recording artists should be protected by section 2855(a).

Nonetheless, record labels still enjoy the protections of subsection (b). As a result, artists who wish to leave their record labels to seek better terms will be liable for a greater amount of damages and will not be able to rely on ancillary revenue streams as alternative sources of income. In effect, unconscionability and involuntary servitude are more prevalent than ever before.

For these reasons, the California legislature should repeal section 2855(b). Only then will recording artists be able to enjoy the same rights that all other creative artists enjoy under the protection of the statute. Only then will the Seven Year Statute be able to return to its original purpose of protecting one’s natural liberty.

Tracy C. Gardner†

† J.D. candidate, 2008, Brooklyn Law School.
Preserving the Border Search Doctrine in a Digital World

REPRODUCING ELECTRONIC EVIDENCE AT THE BORDER

I. INTRODUCTION

On September 23, 1997, a man arrived with his family at John F. Kennedy International Airport in New York ("JFK") en route to his suburban home in Arlington, Texas.1 The traveler, Wadih El-Hage, was detained by U.S. Customs officials2 who proceeded to search his luggage and photocopy materials found therein before returning his belongings and


2 In March 2003, the United States Customs Service was transferred from Treasury Department control to the newly created Department of Homeland Security ("DHS"). The Future is Now, U.S. CUSTOMS TODAY (U.S. Customs Serv., Washington, D.C.), Feb. 2003, available at http://www.cbp.gov/xp/CustomsToday/2003/February/future.xml. The Service, renamed the Bureau of Customs and Border Protection ("CBP"), joined twenty-two federal agencies under the new department including the Federal Emergency Management Agency, the Transportation Security Administration, the U.S. Coast Guard, and the U.S. Secret Service. CBP is a consolidation of the former U.S. Customs Service, the U.S. Border Patrol, the Immigration and Naturalization Service, and the Animal and Plant Health Inspection Service. The agency currently functions under the Border and Transportation Security directorate within Homeland Security and shares responsibilities with two sister agencies: Immigration and Customs Enforcement ("ICE") and U.S. Citizenship and Immigration Services ("USCIS"). CBP is largely responsible for preventing the import and export of contraband while facilitating the flow of legitimate trade and travel; ICE operates as the largest investigative arm of Homeland Security; and USCIS is responsible for the administration of immigration and naturalization adjudication functions. DHS, Department Subcomponents and Agencies, http://www.dhs.gov/dhspublic/display?theme=9 (last visited Aug. 30, 2006).

Homeland Security governs over 170,000 workers and is the third largest employer in the executive branch following the Defense Department and the Department of Veterans Affairs. Philip Shenon, Threats and Responses: The Reorganization Plan; Establishing New Agency is Expected to Take Years and Could Divert It from Mission, N.Y. TIMES, Nov. 20, 2002, at A14.

Throughout this note, Customs and Border Protection officers will be referred to as both "Customs officials" and "CBP officials" since earlier case law retains the former terminology.
allowing him to continue his journey.\textsuperscript{3} El-Hage was later named one of fifteen defendants charged with 267 discrete criminal offenses in connection with the 1998 bombings of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.\textsuperscript{4} El-Hage’s effort in a later criminal proceeding to suppress the photocopied evidence as “fruit of the poisonous tree”\textsuperscript{5} was denied by the Southern District Court of New York.\textsuperscript{6} The Court rejected his claim that the JFK search was a violation of the Fourth Amendment, thus tainting the evidence obtained.\textsuperscript{7} The Court concluded that not only was the initial search valid, but the mass reproduction of his documents was constitutionally permissible.\textsuperscript{8}

For illustrative purposes, imagine the individual searched is not an alleged member of an international terrorist network, but simply the occasional traveler returning home from a popular vacation spot such as Mexico or Jamaica.\textsuperscript{9} Customs and Border Protection (CBP) officers do not search the papers he or she may be carrying in his or her briefcase or pocketbook. Instead, they search a BlackBerry\textsuperscript{10} containing

\begin{footnotesize}
\begin{enumerate}
\item Bin Laden, 2001 WL 30061, at *2.


El Hage, a naturalized U.S. citizen, is believed to have been one of Osama bin Laden's top aides. See Zill, supra note 1. Allegedly bin Laden's personal secretary, El Hage maintains that he only assisted the al Qaeda leader in his legitimate business affairs which included a tannery, farms, a construction firm, a transport business, and two investment companies. Id.

\item See generally Wong Sun v. United States, 371 U.S. 471 (1963) (establishing the "fruit of the poisonous tree" doctrine, which states that underlying police misconduct that violates the Fourth Amendment may taint evidence obtained by law enforcement, thus making it inadmissible).

\item Bin Laden, 2001 WL 30061, at *3-4.
\item Id. at *4.
\item Id. at *4 n.7.
\item See infra note 240 and accompanying text.
\item A BlackBerry is a hand-held, wireless internet device manufactured by the Canadian company Research in Motion. See BlackBerry, http://www.blackberry.com (last visited Oct. 20, 2006). With an estimated 200 million users in the United States, the BlackBerry plays a critical role in the operation of the nation's leading industries
\end{enumerate}
\end{footnotesize}
months worth of personal communications and business related emails, or an iPod with over 20,000 personal photographs as well as an organizer and address book. The officers then proceed to download and copy the electronically stored information before returning the device and allowing the passenger to continue his or her trip home. This scenario gives rise to privacy concerns not likely to be encountered during a traditional inspection of paper documents. The quantity and quality of personal materials that can be stored in a personal digital assistant (PDA) or laptop computer appears to make the search and duplication of digital information substantially more invasive.

The hypothetical inspection described above seems excessive and unjustified, however, this note will demonstrate that it is not. CBP’s authority to inspect laptop computers or electronic hand-held devices and to subsequently reproduce files contained therein is not only constitutionally permissible but essential for the effective policing of our international border. In the digital era, the advent of the mobile electronics market has given individuals the ability to conceal incriminating evidence effortlessly—information that may be needed for the successful prosecution of hundreds of different federal criminal offenses. CBP must be able to respond to this threat.

The Supreme Court has recently indicated that objects such as vehicles may be searched at the border without reasonable suspicion. A similar approach has been used to validate the suspicionless border search of computers and computer disks, holding that the inspection of these devices may be equated with the examination of traditional carry-on items. Additionally, CBP has the authority to photocopy paper documents such as letters, address and date books, and

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11 See infra Part V.A.
12 Id.
13 In addition to its own regulations, CBP is responsible for enforcing over 400 laws on behalf of over forty federal agencies. CBP, CBP Cargo Examinations, http://cbp.gov/xp/cgov/border_security/port_activities/cargo_examinations.xml (last visited July 31, 2006).
15 See, e.g., United States v. Ickes, 393 F.3d 501, 504 (4th Cir. 2005) (upholding the border search of laptop computers as reasonable inspection of cargo).
receipts examined during routine searches. Only the reproduction of those materials is subject to a standard of reasonable suspicion; the initial inspection is not. This note will argue that the authority to reproduce paper material, when read in light of recent decisions concerning inanimate objects and electronic equipment, must be extended to allow for the reproduction of digital information stored in laptops, flash drives, memory sticks, and PDAs during a border search. Despite heightened privacy concerns regarding the volume of personal communications that may be stored within computers and hand-held devices, this note will demonstrate that the extension of this authority is critical to the maintenance of border integrity and the security of our nation in an increasingly digitalized world. The appropriate solution to address these privacy concerns is not to restrict CBP border search authority or the ability to reproduce evidence found during an inspection. Instead, the Agency must adopt a policy of non-retention and non-dissemination when the replicated evidence is deemed no longer to have evidentiary, prosecutorial, or investigative value. This proposal, coupled with the inherent limits of CBP enforcement powers, will be more than sufficient to ensure that border inspection authority is not eroded while simultaneously protecting the privacy interests of those international travelers who have not violated federal law.

Part II of this note will provide an overview of the Fourth Amendment’s prohibition of unreasonable searches and seizures and explain how this constitutional protection is

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18 Customs officers are in a unique law enforcement position. While they do not have general police powers, officers do have the opportunity “to look for evidence of . . . wrongdoing [and to present such evidence] obtained during a valid border search to criminal prosecutors.” Jon Adams, Rights at United States Borders, 19 BYU J. PUB. L. 353, 366-67 (2005). However, the evidence is still subject to exclusionary rules if it was obtained through CBP misconduct. Id. at 367. See infra Part IV.B for further discussion of the limits on CBP officers’ powers.


20 See infra Part V.D.

21 U.S. CONST. amend. IV.
inapplicable at the United States international border or its functional equivalent.\textsuperscript{22} This section will explain the traditional distinctions between various types of border searches and the suspicion-less standard adopted by the Supreme Court regarding the search of personal property.\textsuperscript{23} Part III will examine the ability of CBP officials to search laptop computers and diskettes under this framework.\textsuperscript{24} Part IV will examine the government’s authority established by \textit{United States v. Fortna}\textsuperscript{25} not only to search personal property but to photocopy paper material as well.\textsuperscript{26} This section will explore the scope of the \textit{Fortna} decision as well as the limits placed on the government’s ability to copy,\textsuperscript{27} retain, and disseminate such material.\textsuperscript{28} Part IV will conclude by applying the \textit{Fortna} holding to electronically stored information. This section will explain that current case law regarding photocopying, when correctly read together with the recent decisions concerning laptop searches, creates the ability to reproduce electronic files under a standard of reasonable suspicion. Part V will demonstrate the critical need for this enhanced authority and refute several arguments to the contrary. Section A will address the unique nature of electronic devices, namely the storage capacity that raises privacy concerns for travelers and presents a unique law enforcement challenge to Customs. Section B will address the

\textsuperscript{22} An example of what is deemed the functional equivalent of the international border would be an airport serving as the final destination for a nonstop international flight. \textit{United States v. Gaviria}, 805 F.2d 1108, 1111 (2d Cir. 1986). A functional equivalent may also be at a point marking the confluence of two or more roads extending from the actual border. \textit{Almeida-Sanchez v. United States}, 413 U.S. 266, 272-75 (1973) (holding a search conducted twenty-five miles from the United States border did not occur at the functional equivalent despite the fact that it was a highway route commonly used by undocumented noncitizens).


\textsuperscript{24} \textit{See, e.g.}, \textit{United States v. Ickes}, 393 F.3d 501 (4th Cir. 2005) (holding that laptop computers are “cargo” within the meaning of searchable items under 19 U.S.C. § 1581(a) (2000)).

\textsuperscript{25} 796 F.2d 724 (5th Cir. 1986).

\textsuperscript{26} This authority includes the inspection and reproduction of both outbound and inbound materials sent through shipping services not accompanying a passenger traveling internationally. \textit{See United States v. Seljan}, 328 F. Supp. 2d 1077, 1082 (C.D. Cal. 2004).

\textsuperscript{27} \textit{See People v. LePera}, 611 N.Y.S.2d 394, 395-96 (App. Div. 1994) (holding that the copying of materials during a border search is limited to the laws customs officials may enforce).

\textsuperscript{28} \textit{See, e.g.}, \textit{Heidy v. U.S. Customs Serv.}, 681 F. Supp. 1445, 1449-50 (C.D. Cal. 1988) (holding that photocopies of non-seditious material obtained during a valid border search were not to be retained by law enforcement agencies); \textit{see also infra} Part V.D.
fact that despite concerns regarding the disclosure of personal information, there is no reasonable expectation of privacy in the border context. Section C will examine the devastating consequences of the failure to apply the Fortna holding to digital information. Finally, Section D will conclude by emphasizing that existing protections and the implementation of a non-retention policy adequately serve the interests of both CBP and international travelers.

II. THE BORDER SEARCH DOCTRINE

A. An Exception to the Fourth Amendment

The Fourth Amendment guarantees that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.29

This protection was created largely as a response to the English and colonial era law enforcement practice of entering private homes and conducting invasive searches for criminal evidence without probable cause.30 By including this safeguard in the Bill of Rights, the drafters wished to ensure that such intrusive, unreasonable violations of legitimate privacy expectations31 did not occur in the United States unless certain preliminary requirements were met.32 The Fourth Amendment mandates that a warrant be issued based on probable cause

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29 U.S. CONST. amend. IV.
30 See Payton v. New York, 445 U.S. 573, 583 (1980) (“It is familiar history that indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.” (citing Boyd v. United States, 116 U.S. 616, 625 (1886)); see also Orin S. Kerr, Searches and Seizures in a Digital World, 119 HARV. L. REV. 531, 536 (2005).
31 A search occurs when an expectation of privacy that society considers reasonable is infringed. Laura Hill, Note, To Squeeze or Not to Squeeze?: A Different Perspective, 37 TULSA L. REV. 425, 426 (2001) (discussing the Supreme Court’s “no squeeze” rule as applied to law enforcement officers’ ability to search luggage on buses).
32 See Kerr, supra note 30, at 536.
prior to commencing the search. The warrant must not only describe the place to be searched but also the person or things to be seized. The unreasonable search of a person’s home remains the principal evil against which the Fourth Amendment is directed. The government may enter one’s personal abode to search and seize possessions only if it has obtained a warrant or an exception applies to the particular situation. However, this protection is not an absolute constitutional right. Its application necessarily hinges on the reasonableness of an individual’s expectation of privacy in a given situation.

At the United States border or its functional equivalent, there is no reasonable expectation of privacy; an exception to the Fourth Amendment applies. Historically, the Executive branch and specifically the U.S. Customs Service have enjoyed plenary power at the border. There exists a “longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ [and have] a history as old as the Fourth Amendment itself.”

33 See Payton, 445 U.S. at 584 (“As it was ultimately adopted . . . the [Fourth] Amendment . . . require[s] that warrants be particular and supported by probable cause.”); Ybarra v. Illinois, 444 U.S. 85, 92 (1979) (“The Fourth amendment directs that ‘no Warrants shall issue but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized.’” (quoting U.S. CONST. amend IV)); see also Kerr, supra note 30, at 536.

34 Ybarra, 444 U.S. at 92 (citing U.S. CONST. amend IV).


36 See Kerr, supra note 30, at 536.

37 “[S]econd searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted) (holding that a person may reasonably rely on the protections of the Fourth Amendment when he or she enters a public telephone booth to have a private conversation).

38 Id. at 361 (Harlan, J., concurring).


40 Customs officials may board vessels and search any “vehicle, beast, or person” suspected of illegally bringing goods into the United States, 19 U.S.C. § 482 (2000), and further, CBP officers may inspect the baggage of all persons arriving in the United States, 19 U.S.C. § 1496 (2000). Other federal officials may be authorized to conduct border searches as well. See, e.g., 14 U.S.C. § 89(a) (2000) (permitting Coast Guard officials to make inspections, searches, and seizures on the high seas and all other waters within U.S. jurisdiction); United States v. Victoria-Peguero, 920 F.2d 77 (1st Cir. 1990) (holding that a Puerto Rican drug unit was authorized under 19 U.S.C. § 1401(i) (2000) to make customs seizures).

41 United States v. Ramsey, 431 U.S. 606, 619 (1977). The first customs statute, Act of July 31, 1789, c. 5, 1 Stat. 29, was passed by the same Congress that
United States v. Montoya de Hernandez, the Supreme Court explained the justification for this broad authority, citing the inherent right of an independent, sovereign nation to protect itself by examining the people and articles moving in or out of the country. The Court upheld the authority of Customs to detain a suspected cocaine smuggler and emphasized that searching people and their affects is critical national security. At the international border, the federal government’s obligations to collect duties and its protectionist interest in preventing the entry of stolen goods and controlled substances is at its “zenith.” The sovereign’s compelling security interests must be balanced against the Fourth Amendment’s protections and the privacy rights of arriving or departing individuals and their personal property. At the border, the scales clearly tip in the government’s favor.

B. The Distinction between Routine and Non-Routine Border Searches

Within the border search context, inspections have typically been characterized as either suspicion-less and routine, or physically invasive and non-routine. In order to conduct routine border searches, Customs inspectors do not present a proposal for the Fourth Amendment to state legislatures less than two months later. Id. at 616. This statute distinguished those searches which take place in the interior and require a warrant upon probable cause from those which are required at the border to enforce customs laws and duties, giving Customs nearly plenary power at the border. Id. at 616-17.

As this Act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as ‘unreasonable,’ and they are not embraced within the prohibition of the amendment.

Id. at 617 (quoting Boyd v. United States, 116 U.S. 616, 623 (1886)). Thus, the notion that border searches are exempt from Fourth Amendment requirements is well established and has long been embraced by the Supreme Court. Id.

42 Montoya de Hernandez, 473 U.S. at 538.
43 Id.
44 Ramsey, 431 U.S. at 618 (quoting Carroll v. United States, 267 U.S. 132, 153-54 (1925)).
45 Montoya de Hernandez, 473 U.S. at 538 (citing United States v. Mendenhall, 446 U.S. 544 (1980) (Powell, J., concurring)).
47 See United States v. Berisha, 925 F.2d 791, 794-95 (5th Cir. 1991) (holding that the border search exception to the Fourth Amendment applies equally to persons departing from the United States).
48 Montoya de Hernandez, 473 U.S. at 539-40.
49 See id. at 538-41.
need to produce a warrant, show probable cause, or even possess reasonable suspicion. Accordingly, CBP officers may search carry-on bags and checked luggage, conduct canine sniffs or pat-downs, and even disassemble the gas tank on a vehicle without an independent trigger for the search. Non-routine searches on the other hand, are characterized by a more physically intrusive nature and typically involve procedures such as strip searches, body cavity searches, involuntary x-rays, and physical detention. These inspections implicate the Fourth

50 Id. at 538. See also United States v. Singh, 415 F.3d 288, 293 (2d Cir. 2005) (explaining that routine searches at the border are viewed as reasonable per se requiring neither a warrant nor probable cause).

Traditionally, the classification of a border search depended on the degree of invasion. In the context of property searches, courts are generally unwilling to find a sufficient degree of intrusiveness to raise a search to the level of non-routine, thus requiring reasonable suspicion. See, e.g., United States v. Villamonte-Marquez, 462 U.S. 579, 592-93 (1983) (holding that boats in inland waters with access to the sea may be stopped and boarded without suspicion); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (holding that vehicles may be stopped at check points near the border without any standard of suspicion and such an inspection may be categorized as routine); United States v. Cortez-Rocha, 394 F.3d 1115 (9th Cir.) (affirming the validity of a border search that required the cutting open of vehicle's tire), cert. denied, 126 S. Ct. 105 (2005); United States v. Myers, 127 F. App'x 251, 252-53 (9th Cir. 2005) (holding that the drilling of a small hole into a the bed of a truck was not destructive and not did it affect the vehicle's operation; reasonable suspicion was not required).

51 A number of circuit courts have held pat-downs to be part of a routine, suspicionless border search. See e.g., Bradley v. United States, 299 F.3d 197, 203 (3d Cir. 2002); United States v. Beras, 183 F.3d 22, 26 (1st Cir. 1999); United States v. Gonzalez-Rineon, 36 F.3d 859, 864 (9th Cir. 1994); United States v. Carreon, 872 F.2d 1436, 1442 (10th Cir. 1989); United States v. Oyekan, 786 F.2d 832, 835 (8th Cir. 1986). Canine sniffs are also considered routine. See United States v. Cedano-Arellano, 332 F.3d 568 (9th Cir. 2003).

52 Tabbaa v. Chertoff, No. 05-CV-582S, 2005 WL 3531828, at *11 (W.D.N.Y. Dec. 22, 2005) (stating that fingerprinting and photographing may be part of “a minimally invasive routine search” and that “fingerprinting is a tool used by the government to discharge its duty of verifying the identity and admissibility of those who present themselves for admission to the United States”).

53 Independent circumstances which may arouse an agent’s suspicions include: excessive nervousness, unusual conduct, traveling to or from a narcotics source country, tips from informants, inadequate luggage, loose-fitting clothing, contradictory answers, lack of employment, claim of self employment, or airline tickets paid for in cash. See Adams, supra note 18, at 364-65 (exploring the scope of the border search doctrine and its value).

54 See United States v. Flores-Montano, 541 U.S. 149, 155 (2004) (holding that the disassembly and reassembly of a vehicle’s fuel tank was routine); United States v. Chaudry, 424 F.3d 1051, 1051 (9th Cir. 2005) (affirming that the drilling of a small hole in the bed of a pick up truck to search for contraband did not require reasonable suspicion), cert. denied, 126 S. Ct. 1803 (2006); United States v. Hernandez, 424 F.3d 1056, 1057 (9th Cir. 2005) (affirming that removal of vehicle door panels with screw driver was routine search, reasonable suspicion not required).

55 See Montoya de Hernandez, 473 U.S. at 541 & n.4 (holding that the twenty-seven hour detention of a Colombian national suspected of alimentary canal smuggling
Amendment and may be subject to a reasonable suspicion standard. In *Montoya de Hernandez*, the Supreme Court clarified the distinction between the two types of searches and determined that the monitored detention of a Colombian national suspected of alimentary canal smuggling required only the reasonable suspicion of Customs inspectors.

The Court explained that CBP officers must be held to a higher standard of suspicion for physically invasive searches and those resulting in detention. However, the Court also emphasized that demanding anything more than reasonable suspicion is impracticable. Illegal behavior at the border, such as internal narcotics smuggling, will rarely produce external symptoms. Federal violations undetectable by outward, physical signs may range from the possession and transportation of child pornography to evidence of participation in a drug trafficking conspiracy. Direct evidence of such violations may also be concealed in laptop computers or

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56 *Montoya de Hernandez*, 473 U.S. at 541.
57 Id. at 541-42.
58 Id. at 542.
59 Id. at 541. Frisks or strip searches will not uncover alimentary canal smuggling and detention to confirm suspicions or dispel them is an option preferable to releasing the suspect into the interior with contraband. Id. at 543-44.
61 18 U.S.C. § 2252A(a)(5)(B) (2000) makes it unlawful for anyone to "knowingly possess[] any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer." Such offense is punishable by fine, and an offender may be imprisoned for a maximum term of twenty years. See 18 U.S.C. § 2252A(b).
62 21 U.S.C. § 841(a) (2000) makes it unlawful for any person knowingly or intentionally "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." Persons convicted of conspiracy or attempt of section 841 are "subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2000).
PDAs. Thus, reasonable suspicion is often the most officers will be able to demonstrate; anything else is simply unworkable in practice. Demanding compliance with a higher standard of suspicion would allow for widespread evasion of federal law. In light of the compelling government interests in protecting its territorial borders and the inability of Customs officials to show probable cause, imposing a higher burden on CBP would vitiate the purpose of the border search doctrine.

C. The Flores-Montano Approach

While the routine/non-routine distinction may remain important to the validity of physically invasive border searches, the Supreme Court has recently rejected the notion that “complex balancing tests” be used to characterize Customs inspections, at least in the context of vehicles. In United States v. Flores-Montano, the Court held that the disassembly of a vehicle’s gas tank was a routine border search and individualized suspicion was not required. The decision overruled nearly thirty years of case law imposing a reasonable suspicion standard on such actions. Customs officers had stopped a station wagon attempting to enter the United States at the Otay Mesa Port of Entry in southern California.

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63 See Montoya de Hernandez, 473 U.S. at 543.
64 The reasonable suspicion standard fits well within this border search context, effectively balancing private interests against the compelling governmental interest in stopping smuggling at the border. Id. at 541-42.

Related to non-routine border inspections at the international border or its functional equivalent is the extended border search which occurs near the border and is constitutionally permissible if the following three-prong test is met: (1) there is a reasonable certainty that a border crossing has occurred; (2) there is a reasonable certainty that no change in condition of the luggage has occurred since the crossing; and (3) there is a reasonable suspicion that criminal activity has occurred. See United States v. Caminos, 770 F.2d 361, 364 (3d Cir. 1985). In United States v. Yang, the court held that the search of a defendant at another airport terminal after the individual had passed through Customs was lawful under the extended border search doctrine, since the three requirements explained above had been met, and officers had already discovered a significant amount of drugs on his traveling companion. 286 F.3d 940, 943, 945, 949 (7th Cir. 2002). See also United States v. Espinoza-Seanez, 862 F.2d 526, 531 (5th Cir. 1988); United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1421, 1423 (9th Cir. 1984) (holding search was valid under the extended border search doctrine despite the fact that it occurred several hours and over one-thousand miles from the defendant’s border crossing).

66 Id. at 155.
67 Id. at 151 (reversing United States v. Molina-Tarazon, 279 F.3d 709 (9th Cir. 2002)).
68 Id. at 150. "The terms 'port' and 'port of entry' refer to any place designated by Executive Order of the President, by order of the Secretary of the
part of a secondary inspection, CBP disassembled the vehicle’s fuel tank where officers found more than eighty-one pounds of marijuana.69 The Court emphasized that the dignity and privacy interests that mandate a certain level of suspicion to legitimize the search of one’s person are not implicated in the search of a car.70 The Ninth Circuit has affirmed that the routine/non-routine characterization is inapplicable to the inspection of objects, and is generally an issue only when the search is invasive to one’s person.71 Currently, the search of an object violates the Fourth Amendment only if the inspection was conducted in a “particularly offensive manner.”72 This standard permits Customs officials to thoroughly examine and even physically alter the object’s composition, so long as the search is not unnecessarily destructive.73

III. COMPUTERS AND DISKETTES ARE SEARCHABLE CARGO

The Flores-Montano standard distinguishing the search of objects from that of people is critical to expand CBP’s authority to examine laptop computers and diskettes. Current case law supports the ability of Customs to perform not only a superficial search (ensuring the device itself is not a threat) but also to conduct a closer inspection during which an agent may

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69 Flores-Montano, 541 U.S. at 150-51.
70 Id. at 152. See also Tabbaa v. Chertoff, No. 05-CV-582S, 2005 WL 3531828, at *11 (W.D.N.Y. Dec. 22, 2005) (explaining that routine, suspicionless searches include stops to examine “personal effects”).
71 United States v. Chaudhry, 424 F.3d 1051, 1054 (9th Cir. 2005) (explaining that the Supreme Court in Flores-Montano specifically limited the distinction between “routine” and “non-routine” searches to those of one’s person).
72 Flores-Montano, 541 U.S. at 154 n.2 (quoting United States v. Ramsey, 431 U.S. 606, 618 n.13 (1977)).
73 Id. at 156 (“[W]e conclude that the Government’s authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle’s fuel tank. While it may be true that some searches of property as so destructive as to require a different result, this was not one of them.”). In Chaudhry, the Ninth Circuit similarly held that the drilling of a 5/16 inch hole in the bed of a pickup truck was not destructive enough to characterize the border search as non-routine. 424 F.3d at 1053 (citing Flores-Montano, 541 U.S. at 156). The court did leave open the possibility that a border search of an object might be so destructive as to require reasonable suspicion but declined to express an opinion regarding what that threshold might be. Id. at 1054.
browse material stored in the computer’s hard drive or view the contents of accompanying disks.\textsuperscript{74}

In \textit{United States v. Irving}, a district court denied a defendant’s motion to suppress evidence retrieved from computer diskettes during a border search; this denial was affirmed by the Second Circuit.\textsuperscript{75} Although the Circuit Court declined to address whether or not the search of the diskettes was routine, the Court found no error with the district court’s determination of the issue.\textsuperscript{76} In May of 1998, Stefan Irving arrived at the Dallas-Fort Worth Airport on a flight from Mexico City.\textsuperscript{77} He was questioned by Customs officials who proceeded to inspect his luggage, develop a roll of film, and view the contents of several computer diskettes.\textsuperscript{78} The items contained numerous images of child pornography.\textsuperscript{79} The Second Circuit affirmed the defendant’s convictions under federal law,\textsuperscript{80} as well as the denial of Irving’s motion to suppress the evidence obtained during the airport search.\textsuperscript{81} The Circuit Court determined that the CBP officers in this particular situation were acting under a reasonable suspicion.\textsuperscript{82}

\textsuperscript{74} See \textit{United States v. Irving}, 452 F.3d 110 (2d Cir. 2006); \textit{United States v. Ickes}, 393 F.3d 501 (4th Cir. 2005); \textit{United States v. Roberts}, 86 F. Supp. 2d 678, 688 (S.D. Tex. 2000) (denying defendant’s motion to suppress evidence retrieved from his computer during an outbound border search; although in this case defendant consented to the search, the inspection of his “computer would have been a routine export search, valid under the Fourth Amendment”).

\textsuperscript{75} \textit{Irving}, 452 F.3d at 122-23.

\textsuperscript{76} \textit{Id.} at 123-24. \textit{See also} \textit{United States v. Irving}, No. S3 03 CR.0633(LAK), 2003 WL 22127913, at *5 (S.D.N.Y. Sept. 15, 2003) (explaining that since personal computers may be equated with closed containers, “the agents were entitled to inspect the contents of the diskettes even absent reasonable suspicion”), \textit{reh’g granted}, 452 F.3d 110 (2d Cir. 2006).

\textsuperscript{77} \textit{Irving}, 452 F.3d at 115.

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} \textit{Id.} Stefan Irving was “a former chief pediatrician for the Middletown, New York School district.” \textit{Id.} at 114. His license was revoked after he was convicted of attempted sexual abuse in the first degree of a minor. \textit{Id.} Thirteen years later, Irving became the target as part of a “nationwide investigation of individuals suspected of traveling to Mexico for the purpose of engaging in sexual acts with children.” \textit{Id.} Irving was stopped when he was traveling home from a visit to the Castillo Vista del Mar in Acapulco, Mexico, “a guest house that served as a place where men from the United States could have sexual relations with [young] boys.” \textit{Irving}, 452 F.3d at 114.

\textsuperscript{80} \textit{Id.} Irving was convicted of unlawfully traveling outside of the United States for the purpose of engaging in sexual relations with minors in violation of 18 U.S.C. §§ 2241(c), 2423(b) (2000), and receiving and possessing pornographic images of children in violation of 18 U.S.C. § 2252A(a)(2)(B), (a)(5)(B). \textit{Id.}

\textsuperscript{81} \textit{Id.} at 122-23.

\textsuperscript{82} \textit{Id.} at 124. Irving was a convicted pedophile; he had traveled to Mexico to visit what he called an “orphanage,” and his luggage contained what appeared to be children’s drawings. \textit{Id.}
However, the significant portion of the opinion is that which fails to find error with the trial court’s affirmation that the defendant’s computer could be searched without suspicion.\textsuperscript{83} The district court equated the device with an ordinary closed container or a locked piece of luggage for inspection purposes—the inspection of which “is the paradigmatic routine border search.”\textsuperscript{84}

The Fourth Circuit has explicitly affirmed CBP authority to inspect personal computers and view the contents of accompanying diskettes in \textit{United States v. Ickes}.\textsuperscript{85} Defendant John Ickes was stopped at the United States-Canada border for a routine inspection when Customs officials discovered drug paraphernalia and a photo album containing pornographic images of children.\textsuperscript{86} CBP officers proceeded to examine Ickes’s personal laptop computer as well as approximately seventy-five diskettes, all of which contained child pornography.\textsuperscript{87} While the officers in this particular instance were operating under a reasonable suspicion triggered by the photo-album,\textsuperscript{88} the court reiterated Customs’ ability to search personal computers without such suspicion and emphasized the broad, statutory language from which CBP derives much of its authority.\textsuperscript{89} Specifically, the court noted the

\begin{footnotesize}
\textsuperscript{83} Id.
\textsuperscript{84} See \textit{United States v. Irving}, No. S3 03 CR.0633(LAK), 2003 WL 22127913, at *5 (S.D.N.Y. Sept. 15, 2003) (quoting \textit{United States v. Roberts}, 86 F. Supp. 2d 678, 689 (S.D. Tex. 2000)). The trial court in \textit{Irving} cited several cases supporting the “comparison of personal notebook computers to closed containers for the purpose of the Fourth Amendment analysis.” \textit{Id.} See also, e.g., \textit{United States v. Runyan}, 275 F.3d 449, 458 (5th Cir. 2001) (assuming that computer disks are containers and that standards governing closed container searches apply); \textit{United States v. Al-Marri}, 203 F. Supp. 2d 535, 541 (S.D.N.Y. 2002) (“Courts have uniformly agreed that computers should be treated as if they were closed containers.”); \textit{United States v. Barth}, 26 F. Supp. 2d 929, 936 (W.D. Tex. 1998) (finding that “the Fourth Amendment protection of closed computer files and hard drives is similar to the protection it affords a person's closed containers and closed personal effects”).

The \textit{Irving} court concluded that the “agents were entitled to inspect the contents of the diskettes even absent reasonable suspicion... [A]ny other decision effectively would allow individuals to render graphic contraband... largely immune to border search simply by scanning images onto a computer disk before arriving at the border.” \textit{Irving}, 2003 WL 22127913, at *5.

\textsuperscript{85} 393 F.3d 501, 505 (4th Cir. 2005).
\textsuperscript{86} Id. at 502-03.
\textsuperscript{87} Id. at 503.

\textsuperscript{88} “[Ickes] told a U.S. Customs Inspector that he was returning from vacation. The inspector, however, was puzzled... because Ickes's van appeared to contain ‘everything he owned.’” \textit{Id.} at 502.

\textsuperscript{89} \textit{Id.} at 503-04 (quoting 19 U.S.C. § 1581(a) (2000)).
\end{footnotesize}
embracive term “cargo”90 and the repeated use of “any.”91 A reading of the plain language combined with the historical pedigree of the government’s plenary power at the border negated any statutory interpretation that would exclude electronic devices from the scope of Customs authority.92 In denying Ickes’s motion to suppress the evidence obtained during the search, the court flatly rejected the argument that computers and computer disks are excluded from the contemplated reach of 19 U.S.C. § 1581(a).93 Congress clearly intended broad application of the statute and did not need to explicitly include electronic equipment.94

Perhaps even more importantly, the Fourth Circuit concluded that the personal, expressive nature of information capable of storage on a computer or disk is irrelevant to CBP’s search authority.95 The court noted the “staggering” ramifications for national security that would result from an exemption for electronic information, that such logic would create a sanctuary for terrorist plans which are inherently expressive.96 Officers would also be faced with the impossible task of distinguishing personal files from non-expressive material, creating costly, time consuming legal dilemmas not meant to occur during a border search.97 Creating an exception at the border for computer files would undermine the very

90 “Cargo” means “goods transported by a vessel, airplane, or vehicle.” BLACK’S LAW DICTIONARY 226 (8th ed. 2004).
91 See Ickes, 393 F.3d at 504. The U.S.C. provides that:

Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area . . . , or at any other authorized place . . . and examine . . . documents and papers and examine, inspect, and search . . . every part thereof and any person, trunk, package, or cargo on board . . . .

19 U.S.C. § 1581(a) (2000) (emphasis added). The language of the present statute is virtually identical to that of the customs statute passed by the first congress. See supra note 41.
92 Ickes, 393 F.3d at 504-06. The court also relied on the Supreme Court’s decision in United States v. Flores-Montano, 541 U.S. 149 (2004), as an indication that border search authority should be as broad as possible within constitutional bounds. Ickes, 383 F.3d at 505.
93 Ickes, 383 F.3d at 504.
94 Id.
95 Id. at 506.
96 Id. See also United States v. Irving, No. S3 03 CR.0633(LAK), 2003 WL 22127913, at *5 (S.D.N.Y. Sept. 15, 2003).
97 Ickes, 383 F.3d at 506.
foundation of the border search doctrine and negate its effectiveness.98

The notion that a laptop computer is the equivalent of a closed-container for Fourth Amendment purposes would seem equally applicable to hand-held electronic devices and PDAs. PDAs and other hand-held wireless communication devices are nearly identical to laptops in both function and storage capacity.99 Applying the Flores-Montano methodology to these objects, CBP clearly has the authority to examine the contents of such electronic “cargo” during a border inspection, regardless of the presence of an independent trigger providing reasonable suspicion.100 Thus, according to present case law, the logical conclusion appears to be that CBP has authority to search a traveler's iPod, BlackBerry, Palm Pilot, or flash drive without reasonable suspicion.

IV. THE AUTHORITY TO PHOTOCOPY PAPER MATERIALS AT THE BORDER

Directly associated with CBP's authority to search all cargo crossing the border101 is the government's ability to photocopy or reproduce material found during inspection.102 Material replicated during a border search often proves to be critical evidence in a later criminal prosecution.103 The authority to copy paper materials has been uniformly upheld since the 1985 Fifth Circuit decision in United States v. Fortna.104 In Fortna, the court established that the photocopying of papers tending to prove the defendant's participation in a drug trafficking conspiracy was constitutionally valid.105 Fortna's progeny have continued to affirm the validity of this holding, demonstrated as recently as 2001 in the successful prosecution of one of Osama bin Laden's

98 Id.
99 See infra Part V.A.
103 United States v. Schoor, 597 F.2d 1303, 1306 (9th Cir.1979) ("[C]ustoms officials were themselves entitled to seize . . . documents, . . . having been notified that [the documents] were the instrumentalities of a crime involving the illegal importation of [narcotics].").
104 796 F.2d 724 (5th Cir. 1986).
105 Id. at 738-39.
Additionally, this authority has been held applicable to outbound packages not carried on one’s person while traveling.107 However, limitations on the ability to copy paper material have also been established.108 Ultimately, *Fortna* and its progeny must be read in light of the recent circuit court decisions in *Irving* and *Ickes*. CBP must be allowed to not only search electronic devices but also to copy electronic material stored therein, subjecting only the reproduction of digital evidence to a reasonable suspicion standard.

A. United States v. Fortna

In *Fortna*, the Fifth Circuit held, *inter alia*, that Customs officers may photocopy what they believe to be incriminating evidence during a validly executed border inspection.109 On April 15, 1985, George Sharer arrived at the Dallas-Fort Worth International Airport on a flight from Mexico City.110 Customs officials found several documents of interest in his carry-on luggage which they proceeded to read closely and photocopy.111 These documents included a map of northern Mexico indicating airstrip locations, two airline tickets to Bogotá, Colombia, and a note that read “‘Pick up pilot in Miami.’”112 Sharer and three other men were later convicted of conspiracy to import cocaine.113 The Fifth Circuit denied Sharer’s motion to suppress the evidence photocopied during the airport inspection.114 The court first stated that “[t]he search [of] Sharer’s personal belongings . . . was clearly justified because he was crossing [the United States] border.”115 The court further explained that since Sharer could have no legitimate expectation of privacy in this context, he could not reasonably believe that his documents could be shielded from

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106 See discussion supra Part I.
109 *Fortna*, 796 F.2d at 738-39.
110 Id. at 738.
111 Id.
112 Id. The originals were promptly returned to the travelers. Id.
113 Id. at 727.
114 Id. at 739.
115 *Fortna*, 796 F.2d at 738.
customs officials during inspection.\textsuperscript{116} Nothing more was needed to justify the photocopying of the materials.\textsuperscript{117} The reproduction of the evidence “merely memorialized the agents’ observations and provided a means to verify any subsequent recounting of them.”\textsuperscript{118} The Fifth Circuit concluded that as long as the initial inspection is valid and the photocopying is done in “good faith” and to further a “legitimate governmental purpose[,”] no constitutional rights are violated.\textsuperscript{119}

The authority to copy paper at the border has been consistently upheld.\textsuperscript{120} In \textit{United States v. Soto-Teran}, the Eastern District Court of New York adhered to the holding of \textit{Fortna} and rejected a claim that the reproduction of a personal letter by Customs violated the privacy rights of both the letter’s carrier and the addressee.\textsuperscript{121} Defendant Nelson Soto-Teran was stopped by the Customs Service for a routine inspection after he arrived at the Miami International Airport on a flight from Cali, Colombia.\textsuperscript{122} During questioning, Soto appeared nervous; his “hands were shaking, sweat appeared on his brow, and he would not make eye contact.”\textsuperscript{123} Officers proceeded to take Soto to a secondary inspection area where they found a sealed letter in his briefcase, which they carefully read and photocopied.\textsuperscript{124} After returning the letter, the officers searched Soto’s wallet and telephone book, copying various pieces of paper indicating involvement in narcotics smuggling.\textsuperscript{125} Less than one month later, Soto was arrested and indicted on substantive charges relating to the mass importation and distribution of cocaine.\textsuperscript{126}

\textsuperscript{116} Id.
\textsuperscript{117} See id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 738-39.
\textsuperscript{121} United States v. Soto-Teran, 44 F. Supp. 2d 185, 191-92 (E.D.N.Y. 1996), aff’d, 159 F.3d 1349 (2d Cir. 1998).
\textsuperscript{122} Id. at 188.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 188-89.
\textsuperscript{125} Id. at 189.
\textsuperscript{126} Id. at 187, 189.
His motion to suppress the photocopied evidence obtained during the border search was denied. The court described the “unlimited discretion” of customs officials to search packages and the necessarily broad authority to inspect locked luggage and personal belongings. The court concluded that a reasonable suspicion standard should apply when CBP officers photocopy personal documents. In rejecting the argument of the letter’s addressee that her First Amendment rights were violated, the court emphasized the fact that neither a letter’s carrier nor addressee may legitimately expect privacy at the border. Based on the holdings of Fortna and Soto-Teran, the photocopying of materials during a border search is clearly permissible and requires nothing more than reasonable suspicion. This authority violates neither the Fourth Amendment’s protections nor the privacy interests of travelers.

CBP officers’ ability to inspect and photocopy personal documents also applies to material entering and exiting the country via commercial carriers. In United States v. Seljan, a district court denied a motion to suppress evidence copied during the search of three outbound FedEx packages at the international border’s functional equivalent. In Seljan, the defendant was suspected of using an interstate facility to entice a minor by sending sexually explicit material to an eight year old girl in the Philippines. First, the district court determined that the officers were acting under statutory authority to interdict the export of unreported currency when they opened the first FedEx package. Upon opening the first package and discovering evidence indicating the defendant’s sexual involvement with a child, the officers were acting under

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127 Soto-Teran, 44 F. Supp. 2d at 187 (citations omitted).
128 Id. at 190-91.
129 Factors giving rise to reasonable suspicion included the suspect’s excessive nervousness and origination of flight from Colombia, a known source country for drugs. Id. at 188. See also United States v. Charleus, 871 F.2d 265, 269 (2d Cir. 1989) (citing “whether the suspect’s flight originated at a known source of drugs” as influencing the possibility of reasonable suspicion).
130 Soto-Teran, 44 F. Supp. 2d at 191.
131 Id. at 192-93. The valid inspection did not “chill[]” addressee’s First Amendment rights. Id. at 193. “[T]he Supreme Court [has] implicitly approved border searches of articles [and] containers.” Id. (citing United States v. Ramsey, 431 U.S. 606, 623 (1977)).
133 Id. at 1086.
134 Id. at 1084. See 18 U.S.C. § 2422(b) (2000) (prohibiting the use of an interstate facility to entice a minor).
135 Seljan, 328 F. Supp. 2d at 1079 (citing 31 U.S.C. § 5316 (2000)).
reasonable suspicion when they opened the following two packages and photocopied their contents.\textsuperscript{136} The court concluded that CBP officials properly acted in furtherance of a legitimate government purpose: the preservation of evidence.\textsuperscript{137}

B. Limits on the Scope of Fortna

The ability to photocopy or reproduce information found during a border search is not absolute. This authority is subject to several limitations regarding the scope of CBP law enforcement as well as the ability to retain and disseminate personal information.\textsuperscript{138} While CBP is responsible for the collection of duties,\textsuperscript{139} the Agency must also enforce over four hundred laws on behalf of forty federal agencies—namely restrictions designed to protect Americans from dangerous and illegal goods.\textsuperscript{140} Despite this immense responsibility, CBP officers are nonetheless restricted and do not possess the general investigative or enforcement authority of state police.\textsuperscript{141} In \textit{People v. LePera}, a New York court emphasized this point by suppressing photocopied gambling records obtained during a search at the United States-Canada border.\textsuperscript{142} The court clarified that while the search of the defendant’s vehicle and subsequent photocopying of his papers would be valid if officers suspected a violation of federal gambling laws,\textsuperscript{143} the same could not hold true for the commission of an offense defined only in the New York Penal Code.\textsuperscript{144} The court emphasized that

\begin{itemize}
  \item \textsuperscript{136} Id. at 1084. In the first of the three Federal Express packages searched by Customs, letters were found in which defendant requested pictures of the girl. \textit{Id.} Officers has reason to suspect that defendant was violating 18 U.S.C. § 2422(b), and therefore, the search of the other two packages was proper. \textit{Id.}
  \item \textsuperscript{137} Id. at 1085. Cf. \textit{United States v. Cardona}, 769 F.2d 625, 629-30 (9th Cir. 1985) (holding that Customs official could present evidence regarding his observations, but the photocopies obtained during inspection must be suppressed, since the contents of the FedEx package were not subject to seizure).
  \item \textsuperscript{139} CBP collects more than $81 million dollars in revenue each day. \textit{See} CPB, A Day in the Life of U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/toolbox/about/accomplish/day.xml [hereinafter CPB, A Day in the Life] (last visited Sept. 15, 2006).
  \item \textsuperscript{140} \textit{See} CPB, CBP Cargo Examinations, http://cbp.gov/xp/cgov/border_security/port_activities/cargo_examinations.xml (last visited Sept. 13, 2006).
  \item \textsuperscript{141} \textit{LePera}, 611 N.Y.S.2d at 397.
  \item \textsuperscript{142} Id. at 397-98. New York State makes the possession of gambling records a crime. \textit{N.Y. PENAL LAW} § 225.20 (McKinney 2000).
  \item \textsuperscript{143} \textit{See} 18 U.S.C. § 1955 (2000) (prohibiting illegal gambling businesses).
  \item \textsuperscript{144} \textit{LePera}, 611 N.Y.S.2d at 397-98.
\end{itemize}
federal regulations explicitly limit CBP by confining property seizures to situations in which a “Customs officer . . . believe[s] that any law or regulation enforced by the Customs Service has been violated.”\footnote{Id. at 397 (quoting 19 C.F.R. § 162.21(a) (2006)).}

Additionally, courts have limited the Bureau’s ability to retain and share photocopied evidence with other law enforcement agencies.\footnote{See Heidy v. U.S. Customs Serv., 681 F. Supp. 1445, 1453 (C.D. Cal. 1988).} In \textit{Heidy v. United States Customs Service}, a district court in California announced that a Customs practice of keeping photocopied evidence and records of non-violation of federal law was constitutionally impermissible.\footnote{Id.} The plaintiffs in \textit{Heidy} were United States citizens re-entering the country from Nicaragua.\footnote{Id. at 1446.} During inspection, Customs officials searched and photocopied all papers carried by the individuals to ensure that the travelers were not importing seditious material.\footnote{Id. at 1446-47.} With the Federal Bureau of Investigation’s (FBI) assistance, Customs made permanent records consisting of the identity of each person from whom material was seized and a final determination regarding the legality of the documents.\footnote{Heidy, 681 F. Supp. at 1446-47.} Although the written material was found not to violate federal law, the copies and records were nonetheless retained by both Customs and the FBI.\footnote{Id. at 1447.} The individuals feared that government’s possession of these records would subject them to future inquiries upon reentry.\footnote{Id. at 1448.} The court acknowledged Customs authority to review and copy written material during a border search, but ordered the destruction of records of non-violation.\footnote{Id. at 1448, 1453.} Specifically, the Service was to: (1) return any originals to the owner, (2) destroy all copies and records reflecting individual identity, and (3) refuse dissemination to any federal agency not willing to comply with Customs policies.\footnote{Id. at 1453.}
While CBP maintains broad authority under the border search doctrine to examine and photocopy materials found during inspection, this authority is limited. The limits regarding Customs enforcement power and the retention of copied evidence are adequate protections for those traveling across the United States border with paper documents. These protections are equally effective in the digital context. Thus, CBP must be able to reproduce electronic information under the same principles established in *Fortna* and *Soto-Teran*.

C. Reproduction of Digital Information under the *Fortna* Principle

The authority established by *Fortna* and its progeny to copy written materials during a border inspection may logically be applied to digitally stored information as well. The authority to browse the contents of a traveler's PDA or laptop would be useless if CBP were unable to obtain a hard copy of incriminating files found therein. The ability to view but not to duplicate electronically stored files would allow travelers to delete material implicating involvement in a federal criminal offense during or moments after a search.

First, the Fourth Amendment’s protections are inapplicable in the border search context.\textsuperscript{155} Second, one must apply the new *Flores-Montano* method, since computers and hand-held electronic devices are inanimate objects, thus making the routine/non-routine distinction irrelevant.\textsuperscript{156} CBP may examine these items as it would any other form of cargo, without reasonable suspicion. Finally, since there is no constitutional impediment to photocopying paper material examined during a search, the *Fortna* authority to reproduce evidence must be applied to electronic information as well. The reproduction of all digitally stored information must be permitted when reasonable suspicion is present. While the medium has changed, the logic has not. Electronically stored documents should receive no more protection than material in the analog world.

\textsuperscript{155} See supra Part II.A.

\textsuperscript{156} See supra Part II.C.
V. THE NEED TO APPLY FORTNA TO DIGITAL INFORMATION

The application of the border search exception and the principle of Fortna to electronic devices and the digital information contained therein is vital to the protection of our nation and the integrity of our border. Customs officials must be able to search all laptops and PDAs that enter the U.S. and reproduce information contained therein, memorializing their observations should subsequent verification of them prove necessary in a criminal prosecution.\textsuperscript{157} Portable electronic devices, laptop computers, and disks are unique in both the quantity and nature of personal information these objects may contain. However, one may not reasonably entertain an expectation of privacy while crossing the international border.\textsuperscript{158} While travelers may disapprove of the government’s authority to browse vast amounts of personal communications and emails, the consequences of creating an exemption for such material far outweigh individual privacy concerns. Creating a sanctuary at the border for digital information would cripple Customs in the fight against terrorism, narcotics trafficking, illegal money transfers, and child pornographers. Existing protections and the adoption of a new CBP policy providing for the destruction of copied materials are adequate safeguards.

A. The Unique Obstacle Presented by Digital Information

We are in the midst of an information revolution . . . . Digital technology enables the preservation of the minutia of our everyday comings and goings, of our likes and dislikes, of who we are and what we own . . . small details . . . are now preserved forever in the digital minds of computers.\textsuperscript{159}

Laptop computers, PDAs, flash drives, and myriad other hand-held devices that have proliferated in recent years present a unique security obstacle for CBP as well as privacy concerns for the international traveler. The mobile electronics market has grown dramatically in the last decade and the storage capacity of these machines presents issues not previously encountered in the border search context. Typically, the amount of personal belongings and paper documents an individual may carry while traveling is limited by both space

\textsuperscript{157} See United States v. Fortna, 796 F.2d 724, 738 (5th Cir. 1986).
\textsuperscript{158} See supra Part V.B.
\textsuperscript{159} DANIEL SOLOVE, THE DIGITAL PERSON 1 (2004).
and weight considerations. However, computer hard drives and PDAs present their owners with the opportunity to carry more information in their carry-on luggage than one might contemplate transporting in analog form. For example, computer hard drives sold in 2005 have a storage capacity of around eighty gigabytes. This is "roughly equivalent to forty million pages of text - about the amount of information contained in the books on one floor of a typical academic library." As computers become smaller, lighter, and generally more compact, travelers may be able to carry nearly sixty gigabytes of hard drive space on a machine weighing less than three pounds. In addition, USB flash drives, the modern equivalent of floppy disks, are typically no larger than a stick of gum and may contain up to two gigabytes of storage, maintaining data for nearly ten years.

While PDAs are not equipped with the same vast amount of storage space, they come close. The BlackBerry, one of the most popular wireless communication devices on the market, comes equipped with anywhere from sixteen to sixty-four megabytes of storage depending on the model.

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160 Generally, travelers are limited to two pieces of luggage which must be checked and can weigh anywhere from fifty to seventy pounds depending on class and the destination of the flight; one carry-on item is typically allowed but is not to exceed forty pounds in weight. See American Airlines, Baggage Allowance, http://www.aa.com/content/travelInformation/baggage/baggageAllowance.jhtml (last visited Aug. 28, 2006); Delta Skyteam, Baggage Allowance on Flights, http://www.delta.com/traveling_checkin/baggage/baggage_allowance/index.jsp (last visited Aug. 28, 2006); US Airways, Baggage Policies, http://www.usairways.com/awa/content/traveltools/baggage/baggagepolicies.aspx (last visited Aug. 31, 2006).

161 A gigabyte is "[a] unit of information equal to one billion . . . bytes or one thousand megabytes." Webster's Online Dictionary, Gigabyte, http://www.websters-online-dictionary.org/definition/gigabyte (last visited Sept. 13, 2006). A byte holds the equivalent of a single character, such as a letter, dollar sign, or decimal point. Webster's Online Dictionary, Byte, http://www.websters-online-dictionary.org/definition/byte (last visited Aug. 28, 2006).

162 See Kerr, supra note 30, at 542. The amount of storage space available on computer hard drives "tend[s] to double about every two years." Id.


165 The BlackBerry is manufactured by Canadian company Research in Motion. See Research in Motion Homepage, http://www.rim.com (last visited Sept. 13, 2006).

166 For example, the 7280 model contains sixteen megabytes of memory while the new Pearl 8100 model contains sixty-four and accepts microSD cards that are capable of expanding that capacity. See BlackBerry, http://www.discoverblackberry.com/devices/ (last visited Oct. 4, 2006).
all of that space was used for text communications, a sixty-four-megabyte BlackBerry would theoretically permit a traveler to carry the equivalent of 32,000 pages of text, sixty-four thick books, or over 60,000 emails in their purse or coat pocket. These machines generally include a personal organizer containing an address book, calendar, memo pad, and task list, as well as Yahoo! Instant Messenger. Apple Computer’s ubiquitous iPod is also growing in terms of memory and storage capacity. Software enhancements make the digital music player more akin to a PDA since the device may also be used as an external hard drive for the backup and transportation of files. As of September 2006, the most recent version of the iPod can accommodate videos, 25,000 personal photos, and contains a calendar and address book. In addition to information intentionally downloaded or entered onto the device by the user, many operating systems and programs store information about how and when the device has been used, including information about the user’s interest, habits, and online activity—all of this unknown to the user himself.

Clearly the international traveler of the twenty-first century has the ability to carry a warehouse of personal information in a comparatively miniscule amount of space. This, however, is not reason to restrict CBP’s authority but
reason to expand it. The storage capabilities of electronic devices and the vast quantity of information such machines may contain demand this result.\(^\text{174}\) The advent of new technology and the increased digitalization of personal information presents CBP with a unique obstacle in the inspection and reproduction of potentially valuable evidence. Admittedly, the amount of information that may be stored on these devices is a legitimate concern for travelers and merits a consideration the role of the Fourth Amendment, its protection of a person’s “papers,” and implicit constitutional protections of information privacy.\(^\text{175}\) However, the following sections will demonstrate that the absence of reasonable expectations of privacy at the border combined with the practical consequences of allowing such an exemption for electronic data demand the application of \textit{Fortna} to current technology. The preservation of electronic evidence is necessary for the efficient protection of our borders and the enforcement of federal law. Existing protections established under \textit{Fortna} and its progeny combined with a policy of non-retention and non-dissemination is enough to preserve the interests of those crossing the border.

\textbf{B. Information Privacy Concerns are Inapplicable at the Border}

Although absent from the text of the Constitution and lacking a uniform definition, privacy may be interpreted as the control over information about ourselves and its communication to others.\(^\text{176}\) In \textit{Griswold v. Connecticut}, the Supreme Court identified an implicit constitutional right to privacy.\(^\text{177}\) The Court invalidated a Connecticut law banning the use of contraceptives and identified zones in which the confidential relationships of citizens are protected from governmental intrusion.\(^\text{178}\) Later, this definition was expanded to encompass information privacy as well.\(^\text{179}\) The Supreme

\begin{itemize}
\item \(^\text{174}\) See United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005).
\item \(^\text{175}\) See Adams, supra note 18, at 371.
\item \(^\text{177}\) 381 U.S. 479, 485 (1965).
\item \(^\text{178}\) Id. at 485. See also Solove, supra note 159, at 64.
\item \(^\text{179}\) Whalen v. Roe, 429 U.S. 589, 599 (1977) (upholding New York state law requiring records to be kept of prescriptions involving addictive substances but identifying information privacy as a constitutionally protected). See also Solove, supra note 159, at 65.
\end{itemize}
Court identified “the individual interest in avoiding disclosure of personal matters” as constitutionally protected.\textsuperscript{180} It is this interest in avoiding the disclosure of personal information that is implicated in the border search of electronic devices and the reproduction of digital information.\textsuperscript{181}

The Supreme Court has interpreted the Constitution to protect personal information from disclosure; however, the expectation of that privacy is neither reasonable nor applicable at the border.\textsuperscript{182} In his concurring opinion in \textit{Katz v. United States}, Justice Harlan explained the notion of a reasonable expectation of privacy and set forth a two-part inquiry to guide Fourth Amendment analyses for determining the validity of a search.\textsuperscript{183} The first question is whether the individual manifested a subjective expectation of privacy in the object of the challenged search.\textsuperscript{184} The second inquiry is whether society is willing to recognize that privacy expectation as reasonable.\textsuperscript{185} While it remains true that the Fourth Amendment protects people and not places, the amount of privacy afforded and that which may reasonably be expected inevitably depends on place.\textsuperscript{186} While privacy expectations at home are correctly at their highest, the same does not hold true at the border, where one may not reasonably expect to be free from unwarranted searches and seizures.\textsuperscript{187} Thus to be protected under the two-}

\begin{footnotesize}
\begin{enumerate}
\item Whalen, 429 U.S. at 599-600 (footnote omitted).
\item 389 U.S. 347, 360 (1967) (Harlan, J., concurring). \textit{See also} 1 \textit{JOHN WESLEY HALL, SEARCH AND SEIZURE} 58-59 (3d ed. 2000).
\item \textit{Katz}, 389 U.S. at 360 (Harlan, J., concurring).
\item \textit{Id.} (Harlan, J., concurring).
\item \textit{Id.} at 351; \textit{see also INFORMATION PRIVACY LAW, supra} note 176, at 585.
\item For cases upholding the highest expectation of privacy in the home, see Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that although “the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home”); Silverman v. United States, 365 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).
\item For cases illustrating the lowered expectations at the border, see United States v. Montoya de Hernandez, 473 U.S. 531, 539 (1985); Carroll v. United States 267 U.S. 132, 134-35 (1925) (upholding constitutionality of search and seizure of defendant’s vehicle; affirming conviction for violation of the National Prohibition Act). “Customs officers are granted power by Congress to search persons and property... [This authority] may be said to be a right which the Government
pronged *Katz* test, an individual must (1) “exhibit an actual (subjective) expectation of privacy” in his or her laptop or PDA, and (2) “that expectation [must] be one that society is prepared to recognize as ‘reasonable.’”\(^{188}\) In the context of the United States border, the inquiry fails. “[A] port of entry is not a traveler’s home;” expectations of privacy are significantly lessened when balanced with the government’s compelling interests at the border.\(^{189}\)

Privacy is in constant tension with security interests and law enforcement’s ability to prevent criminal activity.\(^{190}\) However, “[t]he . . . line between an [impermissible] search . . . and an appropriate law enforcement practice [clearly depends on] a person[s] . . . reasonable expectation of privacy in the object of the search.”\(^{191}\) The compelling security interests in the border context far outweigh the information privacy interests a traveler may reasonably expect to have,\(^ {192}\) especially in the context of personal objects.\(^ {193}\) Privacy expectations for the information contained in electronic devices are simply unreasonable and the consequences of such immunity would be enormous.

### C. Consequences of an Exemption for Electronic Devices

Establishing immunity for digital information at the border would result in a federal agency unable to adapt to modern methods of criminal evasion, thus rendering the enforcement powers of CBP meaningless. Such an exception would prevent the effective policing of our borders with the most striking consequences evident in the battle against terror, drugs, the illegal flow of money, and the protection of minors from sexual exploitation.

\(^{188}\) *Katz*, 389 U.S. at 361 (Harlan, J., concurring); HALL, supra note 183, at 58-59.

\(^{189}\) United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971) (explaining that one’s “right to be let alone” prevents neither the search of luggage nor the seizure of illegal materials when possession of them is discovered during such a search).

\(^{190}\) INFORMATION PRIVACY LAW, supra note 176, at 275.

\(^{191}\) See 2 HALL, supra note 183, at 426 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

\(^{192}\) See discussion supra Part II.

As the Fourth Circuit emphasizes in *United States v. Ickes*, the national security ramifications of an exemption for digital information would be “staggering.”194 Efforts to prevent another terrorist attack on United States soil have been dubbed the War on Terror.195 This offensive has been launched against an elusive, amorphous target with a scale of activity unlike anything previously seen.196 The fight against terrorism at the border proves to be one of the government’s toughest obstacles. For example, CBP seizing over ninety percent of contraband in the form of controlled substances or child pornography would be considered an unparalleled law enforcement success.197 The same line of thinking does not apply in the context of terrorism.198 Allowing less than “10 percent of terrorists or materials for major terrorist acts” across the border could result in a catastrophic national disaster.199 Customs must not only prevent the physical entry of lethal toxins and infectious agents but also intercept terrorist communications and uncover plans and conspiracies prior to an attack.200 Immunity for electronically stored information from search and replication would create an enormous loophole for individuals planning an attack on U.S. nationals.

The assumption that al Qaeda does not use e-mail has been deemed erroneous by the FBI.201 The fact has been established that terrorists use information technology for a variety of purposes, including the planning of attacks, fund raising, communication, and the dissemination of propaganda.202 As the rest of the world has turned to laptops and wireless communication devices for the storage of personal information, it appears terrorists have as well. During the

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194 393 F.3d 501, 506 (4th Cir. 2005).
195 Jonathan P. Caulkins et al., *Lessons of the “War” on Drugs for the “War” on Terrorism*, in *COUNTERING TERRORISM* 73, 73 (Arnold M. Howitt & Robyn L. Pangi eds., 2003).
196 Id. at 73-74.
197 Id. at 83-84.
198 Id.
199 Id.
200 Id. at 75, 83.
investigation of the 1993 World Trade Center bombing in New York, officials found detailed plans to destroy U.S. bound airliners in encrypted files on the suicide bomber's laptop. In 2004, a raid on a home in Pakistan uncovered a “treasure trove’ of information” contained on laptop computers and disks indicating al Qaeda’s resolve to commit more attacks on United States soil. As the court in Ickes reminds us—this type of material is inherently personal and expressive. However, creating a sanctuary for such communications because of privacy concerns would undermine the compelling reasons that lie at the heart of the border search doctrine. Failure to apply the border search doctrine and the Fortna holding to the digital medium would cripple “America’s frontline” in the war on terror.

The impact would be equally enormous on America’s other prominent battle, the War on Drugs. The seizure of controlled substances accounts for a large portion of CBP activity. The ability of Customs to effectively counter the inbound flow of narcotics depends on the government’s authority to search not only for physical contraband but for

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203 Id.
204 Al-Qaeda in America: The Terror Plot, TIME, Aug. 16, 2004, at 28. On July 24, 2004, a raid on the Pakistani home of an al Qaeda leader “uncovered three laptop[s] . . . and 51 . . . discs” containing “500 photographs of potential targets inside the U.S., . . . detailed analyses of the vulnerabilities to a terrorist attack of several of them and communications among some of the most wanted terrorists in the world. . . . [T]he surveillance data on the hard drives [was] at least three years old.” Id.
205 See United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005).
206 Id.

In the early 1970s, President Richard Nixon declared a war on drugs and called for an aggressive attack on the country’s “public enemy number one.” STEVEN WISOTSKY, BREAKING THE IMPASSE IN THE WAR ON DRUGS 3 (1986) (citing EDWARD J. EPSTEIN, AGENCY OF FEAR 178 (1977)). Nixon created the Drug Enforcement Administration (“DEA”) and greatly expanded the federal government’s involvement in the effort to disrupt the importation of controlled substances across our border. Id. at 249-51.

evidence of trafficking conspiracies as well.\textsuperscript{210} \textit{Fortna} provides a classic example of the type of evidence that must be obtained and reproduced for use in criminal prosecutions.\textsuperscript{211} As terrorists have turned to computer storage, there is no reason to believe that narco-traffickers would not do the same. Uploading maps, travel itineraries, and personal communications to a BlackBerry would be far safer and more efficient than carrying the same information in the bulkier, more readily searchable paper form.\textsuperscript{212} Digital information is also easier to delete moments before a Customs inspection. Under \textit{Iches} and \textit{Irving}, CBP would be able to view this information but not reproduce it. \textit{Fortna} must be extended to resolve this problem. Officers must be permitted to memorialize their observations and provide a means to verify a subsequent recounting of them, thus preventing traffickers from destroying incriminating evidence with the push of a button.\textsuperscript{213} Exempting electronic data from replication or, alternatively, requiring a higher standard of suspicion for reproduction, would prevent Customs from obtaining evidence needed to convict those trafficking in deadly narcotics for personal profit.\textsuperscript{214}

Immunity from search and reproduction for electronic information would also prevent CBP from stemming the illegal cross-border transfer of money used to fund terrorist organizations and drug cartels and to launder tainted proceeds.\textsuperscript{215} Customs must not only prevent the flow of illegal contraband and watch for terrorist communications, but the Agency is also responsible for monitoring the illegal flow of...
tainted profits and funds used to support terrorist networks. CBP works with several other agencies to enforce the prohibition of unlicensed money-transfer businesses and the carrying of currency in excess of $10,000 into or out of the country without reporting the sum to the federal government. Terrorists and drug traffickers have used both of these methods “to finance their operations,” capitalizing on underground banking methods “as old as the Silk Road.” These individuals rely heavily on an informal money transfer system that operates on the fringes of global banking: the hawala. 

Hawalas are underground banks that allow large sums of money to be transferred from establishments such as convenience stores to destinations all over the world.

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217 18 U.S.C. § 1960 (making it unlawful for one to “knowingly conduct[], control[], manage[], supervise[], direct[], or own[] all or part of an unlicensed money transmitting business” and subjecting a violator to fines and/or a prison sentence of not more than five years).


219 See Freedman, supra note 215.

220 See id.

221 Hawalas—meaning “trust” or “exchange” in Arabic—originated on the Indian subcontinent as a way for merchants to avoid being robbed as they traveled. Id. An individual wishing to send money abroad will visit the operator of a hawala, a hawalader, here in the U.S. The hawalader will accept the money and a password which will serve as the only way to identify the sender. The hawalader will then contact his colleague in the destination country, telling his or her partner the amount to pay the recipient and the password that will be used. The sender then tells the recipient where to go and what code to use. The money is picked up, and the two hawaladers settle the debt at a later time. Id. The identity of the sender, recipient, and the purpose for which the money will be used is rarely known by the informal bankers; at the very least this information is never recorded on paper. Id. See also Alan Beattie, Informal Foreign Cash Transfers Cheaper, Says Study, FIN. TIMES (London), Apr. 1, 2005, at 5. Nearly 20,000 hawalas operate in the United States. Freedman, supra note 215. In 2004, it is estimated that nearly thirty-five percent of the $150 billion in global transfers flowed through hawalas. Id.

Another money transfer concern for both CBP and ICE is the “black-market peso exchange,” a complex money laundering system used extensively by participants in the Colombian narcotics trade. Lowell Bergman, U.S. Companies Tangled in Web of Drug Dollars, N.Y. TIMES, Oct. 10, 2000, at A1. The system involves
system leaves no paper trail from which one may identify the sender, the receiver, or the purpose for which the funds will be used.\textsuperscript{222} Obtaining evidence of participation in a \textit{hawala} is difficult and has been a major source of frustration for federal law enforcement.\textsuperscript{223} Preventing the search and replication of electronic data would allow the concealment of the already sparse evidence that may be used to demonstrate participation in such illegal money transfers.\textsuperscript{224} Communications indicating involvement in unlicensed remittance systems, international money laundering schemes, and plans to smuggle large amounts of currency might be viewed by CBP under existing case law, but failing to apply \textit{Fortna} would render that authority meaningless. Without a way to duplicate hard evidence, currency smugglers and illegal money remitters will take advantage of a \textit{Fortna} exemption for electronically stored data. Customs will be greatly hindered in its ability to shutdown the pipelines that finance terrorism and those that not only support drug cartels but cleanse their profits.\textsuperscript{225}

Finally, the consequences of creating an exemption for digital information from search and reproduction at the border would nullify CBP’s authority to enforce laws protecting minors from sexual exploitation.\textsuperscript{226} The federal government successfully apprehends and prosecutes a large number of child pornographers and international sex tourists based on evidence CBP obtains during border searches.\textsuperscript{227} The ability to seize pornographic images of minors in paper form is not questioned and Customs has even done so outside the border search

\textsuperscript{222} See Freedman, \textit{supra} note 215.

\textsuperscript{223} See \textit{id.}

\textsuperscript{224} See \textit{id.}

\textsuperscript{225} See Lichtblau, \textit{supra} note 216.


context.228 But creating a sanctuary for digital information would undermine significant advances made in the fight against the sexual exploitation of minors. Immunizing from replication the files contained in laptops, disks, PDAs, and memory cards would severely debilitate CBP in the effort to stop participants in and operators of the sex tourism industry.

The advantage of allowing CBP to access computer and PDA hard drives and subsequently to reproduce information stored therein is clear. Access to all electronic devices containing personal communications and images is vital to combat terrorism, narcotics trafficking, illegal money transfers, and child pornography. In order to fully utilize its law enforcement authority, Customs must be able to reproduce evidence indicating the violation of federal law, or attempt or conspiracy to do the same. Reasonable suspicion is the most realistic standard to be applied, not to the initial search of the object in question, but only to the duplication of material contained therein.229 Given the clandestine nature of smuggling violations and the millions of passengers processed by CBP on a daily basis, a higher standard of suspicion is impracticable.230

D. Existing Protections and a New CBP Policy

Existing protections imposed by case law, the federal government’s finite resources, and the oath taken by CBP employees to uphold the Constitution effectively, limit the ability of Customs to search and copy electronic material. These protections, combined with the adoption of an Agency-wide non-retention policy for copied information, adequately safeguard the privacy interests of international travelers.

First, case law has imposed a variety of restrictions on the border search doctrine that serve to protect the interests of travelers entering and leaving the United States.231 While the initial search of cargo may be conducted without suspicion, the copying of the information is subject to a higher standard.232

228 United States v. Spence, 397 F.3d 1280, 1282-85 (10th Cir. 2005) (denying defendant’s motion to suppress evidence of child pornography seized by Customs officials).
229 See supra Part II.C.
230 Customs processes over one million inbound persons each day. CBP, A Day in the Life, supra note 139.
231 See discussion supra Part IV.B.
Similarly, the downloading, copying, or scanning of digital information would have to be supported by an agent's reasonable suspicion. Second, CBP officers do not have general police powers. Customs officials may determine if goods are being unlawfully imported because the importer has failed to pay the appropriate duties on the items or because the goods are themselves contraband. Officers may enforce immigration laws and ensure that those noncitizens presenting themselves for entry are admissible and have the appropriate travel documents, entry visas, or passports. However, if seized by Customs, evidence indicating the violation of state law will be suppressed in later proceedings.

Third, the federal government has limited resources and although CBP possesses the authority to inspect everyone and everything crossing the border, in reality, they cannot. As a practical matter, computer or PDA searches could not possibly be conducted for the 1.1 million individuals the Agency must process on a daily basis. Faced with these limitations, Customs must reserve secondary inspection time for those situations in which independent circumstances indicate the need for a more intrusive search. The search and seizure of electronic evidence is most likely to occur when the traveler’s unusual conduct or the presence of other incriminating items in their possession suggests the need for an agent to browse a


236 LePera, 611 N.Y.S.2d at 398.


Customs often conducts more extensive secondary inspections for individuals who appear nervous or apprehensive and who have recently traveled to or are arriving from a narcotics source country. See, e.g., Kaniff v. United States, 351 F.3d 780, 782 (7th Cir. 2003) (identifying Jamaica as a narcotics source country); United States v. Ghemisola, 225 F.3d 753, 755 (D.C. Cir. 2000) (identifying Cambodia as a narcotics source country); United States v. Cardenas, 9 F.3d 1139, 1153 (5th Cir. 1993) (identifying Nigeria as a known narcotics source country); United States v. Collins, 764 F.2d 647, 649 (9th Cir. 1985) (identifying Brazil as a narcotics source country).

238 CBP, A Day in the Life, supra note 139.

239 United States v. Ickes, 393 F.3d 501, 507 (4th Cir. 2005).
computer hard drive or the contents of a BlackBerry.  

In order to maximize limited resources, Customs utilizes the Interagency Border Inspection System (IBIS) to help determine which arriving individuals are potentially non-compliant and should be targeted for secondary inspection. The efficient use of CBP time means that extensive, secondary inspections must be reserved for the appropriate occasions. An individual search of all laptops, palm pilots, and memory sticks followed by the duplication of all digitally stored information is neither realistic nor resourceful.

Additionally, the men and women who protect our borders have “sworn to uphold the Constitution.” As the Ninth circuit noted in United States v. Cortez-Rocha, these officers are not “cyborgs” set out to destroy private property and violate the privacy interest of travelers. Officers are trained, experienced professionals who may be counted on to carry out their responsibilities in an “intelligent and respectful” manner. Justice Breyer echoed similar sentiments in his concurring opinion in United States v. Flores-Montano, stating that the Agency retains records of invasive searches and the reasons such inspections are conducted. This process should eliminate many concerns regarding abuse of the border authority during processing. CBP officers are obligated to conduct border searches for a proper, good faith governmental

240 Id. (noting that officers did not inspect the defendant’s computer until they had discovered drug paraphernalia and photographs/video of child pornography).

241 CBP, Authority to Search, supra note 237. IBIS is part of the Treasury Enforcement Communications System (TECS) and is utilized by regulatory and law enforcement personnel from the FBI, the DEA, the Bureau of Alcohol, Tobacco, and Firearms and Explosives (“ATF”), the Internal Revenue Service (“IRS”), the U.S. Coast Guard, and the U.S. Secret Service. Id. The system “provides the law enforcement community with . . . files of common interest . . . and keeps track of information on suspected individuals, businesses, vehicles, aircraft, and vessels.” Id. CBP is similarly alerted when a warrant for the arrest of an inbound passenger has been issued via the Advance Passenger Information System (APIS). Id.

242 United States v. Cortez-Rocha, 383 F.3d 1093, 1097 (9th Cir. 2004) (inserting additional material supporting the constitutionality of the border search), cert. denied, 126 S. Ct. 105 (2005), amended by 394 F.3d 1115 (9th Cir. 2005).

243 Id.

244 Id. CBP provides for such situations. If a traveler feels a search was not conducted in a professional manner, he or she may ask to speak with a Customs supervisor who is available twenty-four hours a day either at the Customs facility or by telephone. Why U.S. Customs Conducts Examinations, http://www.ncbuy.com/travel/articles.html?Id=10648 (last visited Sept. 15, 2006).


246 See id.
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purpose “and . . . do not waste time on dead-end adventures.” Any search conducted in bad faith is invalid, and any evidence obtained from a tainted inspection will be suppressed and subsequently unavailable to federal prosecutors. This good faith duty combined with limited federal resources will ensure that CBP authority to search and duplicate personal, electronically stored information is not abused.

Finally, the implementation of an Agency-wide policy similar to that mandated in *Heidy v. United States* will serve as an additional element of protection for individuals who have personal information copied by Customs but who have not violated federal law. When material in paper or electronic form is searched and reproduced, Customs must be able to retain those copies until it becomes evident that the material “no longer has any evidentiary, prosecutory, or investigative value.” This enables the Agency to retain information that may lead to the successful prosecution of drug traffickers, pedophiles, or perhaps the foiling of a terrorist plot. However, once a determination is made that the evidence has no law enforcement value, the copies must be destroyed. Detailed records of a non-violation describing the nature of the search and identifying the individual from whom the information was seized must not be maintained in a federal database. Further, Customs must not share photocopied or reproductions of electronic files with other law enforcement agencies unless those agencies agree to abide by CBP’s policy of non-retention. This will allay fears that records will be maintained and used to target individuals during future border crossings, thus inhibiting travel. The adoption and application of a *Heidy* policy will allow CBP to effectively police our borders and enforce federal law while shielding travelers from an experience like that of Franz Kafka’s

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247 *Cortez-Rocha*, 383 F.3d at 1097.


249 681 F. Supp. 1445 (C.D. Cal. 1988). While the court order in *Heidy* was binding on the former U.S. Customs Service regarding the enforcement of 19 U.S.C. § 1305 (2000), which prohibits the importation of subversive material, the order is not currently binding on CBP as a new agency. Neither CBP nor the Department of Homeland Security currently has a policy addressing the maintenance of reproductions of electronic evidence.


251 *Id.* at 1453.

252 *Id.*

253 See, e.g., *id.* at 1148 & n.8.
character Joseph K.\textsuperscript{254}—knowing large amounts of personal information is in the hands of the government, but having no way to determine precisely what that information is, or for what purpose the material will be used.\textsuperscript{255}

VI. CONCLUSION

The border search exception to the Fourth Amendment must be preserved in our increasingly digitized world.\textsuperscript{256} Customs authority to conduct unwarranted and often suspicionless searches remains as critical to national security today as it was in the late eighteenth century when Congress passed the first customs.\textsuperscript{257} At the border, where our protectionist interest is “at its zenith,”\textsuperscript{258} immunity for electronic evidence from search and seizure would be disastrous.

Customs has the authority to search all persons and items crossing the border; this is undisputed.\textsuperscript{259} This necessarily includes laptop computers, as explained in *Ickes*.\textsuperscript{260} PDAs, memory cards, and other wireless communication devices are nearly identical to conventional laptop computers in terms of function and hard drive capabilities, differing only in size and portability. The similarities in form and function mandate the extension of the *Ickes* holdings to all portable electronic items.

The Agency’s authority to copy paper evidence indicating the violation of federal, Customs-enforced law is also well settled and appropriately subjected only to a standard of

\textsuperscript{254} Joseph K. is the protagonist of Franz Kafka’s 1925 novel, *The Trial*. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 Stan. L. Rev 1393, 1419-21 (2001). Joseph awakes one morning to find officials in his apartment. *Id.* He is arrested for reasons never revealed and subjected to judicial process by a court that has created a massive collection of data about his personal life that “pass[es] on to the highest Courts, being referred to the lower ones again . . . . No document is ever lost, the Court never forgets anything. One day—quite unexpectedly—some Judge will take up the documents and look at them attentively . . . [a]nd the case begins all over again.” *Id.* at 1420 (quoting FRANZ KAFKA, THE TRIAL (Willa & Edwin Muir trans., 1937)). See also *Doe v. Se. Penn. Transp. Auth.*, 72 F.3d 1133, 1135-37 (3d Cir. 1995) (describing plaintiff’s fear that records of his HIV status maintained in employer’s database would subject him to discrimination).

\textsuperscript{255} *SOLOVE*, supra note 159, at 67.

\textsuperscript{256} See supra Part V.A.

\textsuperscript{257} See supra note 41.

\textsuperscript{258} United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

\textsuperscript{259} See supra Part II.

\textsuperscript{260} See supra Part III.
reasonable suspicion. This authority must also be extended to modern, portable electronic devices and the large amount of information these objects may store. While the sheer volume of personal materials that can be contained in a BlackBerry or palm pilot merits special consideration, the fact remains that one may not reasonably expect privacy at the border. The medium has changed, but the logic of Fortna remains valid.

Existing protections coupled with a policy of non-retention adequately protect individual privacy interests. If the Agency duplicates electronically stored information during a search and later determines that the individual from whom information was seized has not and is not conspiring to violate federal law, all copies will be destroyed. The Agency would further refuse dissemination to other federal agencies unless compliance with this policy was secured.

Customs and Border Protection has a daunting role in the law enforcement sector and the enormous responsibility of policing thousands of miles of land and coastline. Failure to extend the border search doctrine and the principles of Fortna to all portable hand-held wireless devices and accompanying disks and memory sticks would severely handicap a federal law enforcement agency that plays a vital role in the protection of our country.

Kelly A. Gilmore†

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261 See supra Part IV.
† J.D. candidate, 2007, Brooklyn Law School.