

Confrontation at Sentencing

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ABSTRACT

In modern criminal prosecutions, the determination of guilt is often little more than a formality. It sets the stage for the main event: sentencing. Sentencing, in turn, is driven by facts about both the offense and the offender. Years of imprisonment (or even life and death) may hinge on those facts, making it imperative to determine them reliably. Yet courts routinely reject defendants' requests to employ confrontation and cross-examination—the Constitution's prescribed methods of ensuring reliability. That practice rests on a simple premise: The Sixth Amendment's Confrontation Clause does not apply to sentencing.

Taking a textual, historical, and structural approach, this Article challenges that premise. The conventional wisdom lacks a footing in the language of the Sixth Amendment, is not supported by historical practice, and departs from the adversarial truth-finding process at the foundation of American criminal procedure. Moreover, it seems to have arisen almost entirely by accident. Properly understood, the Confrontation Clause's protections are not limited to the unusual case where guilt is contested; they exert their influence even on the determination of the proper punishment.

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INTRODUCTION

Courts often refer to trial as the “main event” of the criminal process.¹ But in the era of “the vanishing criminal jury trial,” sentencing—not trial—takes center stage.² At sentencing, facts (about both the offense and the offender) play pivotal roles.³ Sometimes, they do so as a matter of law, such as when the range of permissible sentences hinges on the facts of the offense.⁴ Other times, they influence the sentencer’s exercise of discretion. For example, the federal sentencing statute mandates consideration of “the nature and circumstances of the offense and the history and characteristics of the defendant.”⁵

Because these facts can make the difference between a noncustodial sentence and years of imprisonment—or even between life and death—it is desirable that they be determined reliably.⁶ As far as it can be helped, the criminal process ought not fix punishments based on “misinformation of constitutional magnitude.”⁷ Typically, the Constitution guarantees reliability through “procedural rather than . . . substantive guarantee[s].”⁸ Perhaps most notably, the Confrontation Clause guarantees a defendant “the right . . . to be confronted with the witnesses

¹ E.g., *Shoop v. Twyford*, 596 U.S. 811, 819 (2022) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

² Robert J. Conrad Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 101–04 (2018).

³ See David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267, 268 (2005) (“Real-offense sentencing information can concern the offense or the offender.”).

⁴ See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1099–101 (2001).

⁵ 18 U.S.C. § 3553(a)(1).

⁶ See Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORN. L. REV. 299, 300 (1994) (“To accomplish this goal, factual determinations must be accurate.”); Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 234 (2014) (arguing that “it may be more important to enforce confrontation rights at sentencing than to require that sentencing facts be proven beyond a reasonable doubt”).

⁷ *United States v. Tucker*, 404 U.S. 443, 447 (1972).

⁸ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

against him.”⁹ To ensure reliability, this provision prescribes a “particular manner” of assessing reliability: “the crucible of cross-examination,”¹⁰ a mechanism that “has often been called the ‘greatest legal engine ever invented for the discovery of truth.’”¹¹ Yet despite the importance of reliable factual determinations to fixing an appropriate sentence, the conventional view is that the Confrontation Clause does not apply to sentencing.¹²

This Article challenges that conventional view. It is not the first to argue that the Confrontation Clause applies to sentencing¹³—or at least, to some sentencings.¹⁴ However, it provides something missing from previous analyses: a thorough review of the relevant textual, historical, and structural considerations.¹⁵ For some, such considerations are determinative, and the utility of such an analysis is obvious.¹⁶ For others, such considerations are not wholly irrelevant but require some additional reason to pay them mind in a particular case.¹⁷ That reason is readily supplied by the Supreme Court’s Confrontation Clause jurisprudence, which for more than two decades has put textual, historical, and structural considerations at the fore.¹⁸ As Justice Breyer explained,

⁹ U.S. CONST. amend. VI.

¹⁰ *Crawford*, 541 U.S. at 61.

¹¹ Jonathan Clow, Note, *Throwing a Toy Wrench in the “Greatest Legal Engine”*: *Child Witnesses and the Confrontation Clause*, 92 WASH. U. L. REV. 793, 793 (2015) (quoting 5 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1367 (James H. Chadbourn ed., rev. ed. 1974)).

¹² See Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 53 n.24 (2011) (observing that “courts consistently refuse to recognize a right to confrontation at sentencing”).

¹³ See, e.g., Evan D. Bernick, *Fourteenth Amendment Confrontation*, 51 HOFSTRA L. REV. 1, 73–75 (2022); Shaakirrah R. Sanders, *The Value of Confrontation as a Felony Sentencing Right*, 25 WIDENER L.J. 103, 104 (2016); Shaakirrah R. Sanders, *Unbranding Confrontation as Only a Trial Right*, 65 HASTINGS L.J. 1257, 1261 (2014); Shaakirrah R. Sanders, *Making the Right Call for Confrontation at Felony Sentencing*, 47 U. MICH. J.L. REFORM 791, 794 (2014); Amanda Harris, Note, *Surpassing Sentencing: The Controversial Next Step in Confrontation Clause Jurisprudence*, 64 FLA. L. REV. 1447, 1450 (2012); Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1881 (1992).

¹⁴ See, e.g., John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1972–75 (2005); Penny J. White, “He Said,” “She Said,” and Issues of Life and Death: *The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 392 (2007).

¹⁵ Cf. Harris, *supra* note 13, at 1477 (“[C]ourts have largely ignored both history and textualism.”).

¹⁶ See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1813 (2008) (“For those who agree, as a first-order matter, that this is the correct way to read the Constitution, no more methodological justification needs to be produced.”).

¹⁷ See *id.* at 1813–14.

¹⁸ See *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004) (“The Constitution’s text does not alone resolve this case. . . . We must therefore turn to the historical background of the Clause to understand its meaning.”); Josiah Rutledge, *With Great (Writ) Power Comes Great (Writ) Responsibility: A Modified Teague Framework for State Courts*, 59 CRIM. L. BULL. 480, 510–11 (2023) (“[T]he

the Confrontation Clause must be “[v]iewed in light of its traditional purposes.”¹⁹ Under *Crawford v. Washington*²⁰ and its progeny, the textual, historical, and structural modalities merge with the doctrinal.²¹ This Article thus provides an important contribution to the existing literature, tying previous scholars’ largely prudential concerns to the Clause’s analytical framework.

It is perhaps not surprising that this gap has thus far remained unfilled. This analysis faces two significant difficulties. First, the Confrontation Clause itself “comes to us on faded parchment,” as Justice Harlan famously remarked.²² Second, modern sentencing proceedings are a “post-constitutional” development.²³ The problem here is thus a classic “old law meets new technology” problem, albeit one in which the “technology” is procedural rather than scientific.

Despite these challenges, this Article shows that textual, historical, and structural clues point toward extending the same confrontation rights to sentencing-phase defendants as to their guilt-phase counterparts. Part I takes a close look at the Sixth Amendment’s text. It shows that none of the key phrases in the Confrontation Clause— “[i]n all criminal prosecutions,” “the accused,” and “the witnesses against him”²⁴—provide a textual hook for a distinction between trial and sentencing. It also suggests, based on the Sixth Amendment’s sentence structure, a broader schema for determining which Sixth Amendment rights apply at sentencing, and which do not. Part II then dives into historical practice. Though, as is so often the case, history lacks a smoking gun, the best historical analogues provide further support for the applicability of the Clause at sentencing.

Part III then takes a step back, viewing the Confrontation Clause through the lens of the Sixth Amendment’s broad structure. In that structure, the Clause combines with the rights to counsel and compulsory process to preserve a distinctly adversarial mode of criminal procedure—one that is most naturally viewed as rising or falling as a whole. Finally, Part IV pauses to consider why, given the evidence discussed in the first three Parts, the conventional view ever took hold in the first

Court in *Crawford v. Washington* relied heavily on founding-era history to remodel Confrontation Clause jurisprudence.”).

¹⁹ *Lilly v. Virginia*, 527 U.S. 116, 141 (1999) (Breyer, J., concurring).

²⁰ 541 U.S. 36 (2004).

²¹ See Harris, *supra* note 13, at 1449 (“[T]he history of the Confrontation Clause must guide one’s understanding of the Clause’s meaning and scope. Why? The answer is simple: because the Supreme Court said so.”). See generally PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (identifying the six modalities of constitutional argument: historical, textual, structural, doctrinal, ethical, and prudential).

²² *California v. Green*, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring).

²³ Douglass, *supra* note 14, at 2016.

²⁴ U.S. CONST. amend. VI.

place. It concludes that lower courts misread the Supreme Court’s decisions in *Williams v. New York*²⁵ and *Williams v. Oklahoma*²⁶—neither of which addresses the question.

I. SIXTH AMENDMENT TEXT

As relevant here, the Sixth Amendment’s text provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”²⁷ This text “limits the scope of the [confrontation] right in three significant ways.”²⁸ First, it specifies “*when* the right may be asserted”—namely, “[i]n all criminal prosecutions.”²⁹ Second, it “provides ‘*who* may assert the right’”—namely, “the accused.”³⁰ Finally, it spells out “*what* the right guarantees”³¹—in this case, the accused’s “right . . . to be confronted with the witnesses against him.”³² This Part takes each limitation in turn.

A. “In All Criminal Prosecutions”

The Confrontation Clause’s first textual limitation is that it—like its Sixth Amendment neighbors—applies only in a “criminal prosecution[.]”³³ There are at least three distinct subquestions one could ask

²⁵ 337 U.S. 241 (1949).

²⁶ 358 U.S. 576 (1959).

²⁷ U.S. CONST. amend. VI. In its entirety, the Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

²⁸ *United States v. Haymond*, 588 U.S. 634, 669 (2019) (Alito, J., dissenting); *see also* *Rothgery v. Gillespie County*, 554 U.S. 191, 214 (2008) (Alito, J., concurring) (“The Amendment thus defines the scope of the right to counsel in three ways”). Although Justice Alito’s opinions in *Haymond* and *Rothgery* discuss the Jury Clause and the Counsel Clause, respectively, their tripartite analysis is equally applicable to the Confrontation Clause.

²⁹ *Haymond*, 588 U.S. at 669 (Alito, J., dissenting) (quoting *Rothgery*, 554 U.S. at 214 (Alito, J., concurring)).

³⁰ *Id.* (quoting *Rothgery*, 554 U.S. at 214 (Alito, J., concurring)).

³¹ *Id.* (quoting *Rothgery*, 554 U.S. at 214 (Alito, J., concurring)).

³² U.S. CONST. amend. VI.

³³ *Id.* Though the Amendment refers categorically to “all criminal prosecutions,” *id.* (emphasis added), the Court has imposed restrictions limiting various rights to only certain cases. *See, e.g.,* *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968) (holding that the right to a jury trial does not apply to cases where the maximum sentence is six months’ imprisonment or less); *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (limiting the right to appointed counsel to cases where “actual imprisonment” is imposed). For originalist critiques of these restrictions, *see* Andrea Roth, *The Embarrassing Sixth Amendment*, 112 CALIF. L. REV. 55, 71–88 (2024) [hereinafter Roth,

about this limitation. First, what counts as a *criminal* prosecution? Though drawing the line between civil and criminal can be difficult,³⁴ the thornier issues here need not detain us—for our purposes, it is sufficient to note the early understanding that the term “includes all suits of the government, the end and design of which is the pun[ish]ment of the accused.”³⁵ Because sentencing is, by definition, a “determination of the penalty for a crime,” it clearly satisfies this requirement.³⁶

Next, when does a criminal prosecution *begin*? In the right-to-counsel context, this question has produced a fulsome jurisprudence,³⁷ as well as at least two originalist judicial opinions.³⁸ Though portions of the analysis below are relevant to that question—and draw on or respond to the aforementioned originalist opinions—it is sufficient here to note that whenever a criminal prosecution begins, it surely has begun by the time a conviction has been obtained and the sentencing process is underway.

Embarrassing]; Andrea Roth, *The Lost Right to Jury Trial in “All” Criminal Prosecutions*, 72 DUKE L.J. 599, 635–61 (2022).

In any case, the Court has imposed no such restrictions on the Confrontation Clause. *See* Roth, *Embarrassing*, *supra*, at 78 (“[N]o authority in the history of the nation, as far as I have been able to discern, has suggested that a criminal defendant could be denied the right[] to confrontation . . . simply because the offense is petty or the punishment is not incarceration.”); *Argersinger v. Hamlin*, 407 U.S. 25, 28 (1972) (“We have never limited these rights[—i.e., confrontation and compulsory process—]to felonies or to lesser but serious offenses.”). Instead, it has insisted that the Clause “admit[s] ‘only those exceptions established at the time of the founding.’” *Hemphill v. New York*, 595 U.S. 140, 151 (2022) (quoting *Crawford v. Washington*, 541 U.S. 36, 54 (2004)); *see also* *Giles v. California*, 554 U.S. 353, 377 (2008) (“We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.”).

³⁴ *See, e.g.*, *Ellingburg v. United States*, 146 S. Ct. 564, 572–78 (2026) (Thomas, J., concurring) (discussing whether laws are civil or criminal for purposes of the Ex Post Facto Clauses); *Hudson v. United States*, 522 U.S. 93, 99 (1997) (describing the process for determining whether a penalty is civil or criminal for purposes of the Fifth Amendment’s Double Jeopardy Clause).

³⁵ *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 74 (1820); *see also* Roth, *Embarrassing*, *supra* note 33, at 77 (“[S]tate ‘criminal prosecutions’ fitting this original public understanding would at least include any formally charged offense prosecuted by a criminal prosecutor in criminal court and ending in a finding of ‘guilt’ and a criminal conviction.”); *Ex parte Burr*, 4 F. Cas. 791, 796 (C.C.D.C. 1823) (No. 2186) (rejecting argument that a disbarment proceeding was a criminal prosecution within the meaning of the Sixth Amendment on the ground that “[t]he object of the present proceeding” was not “to punish the offender by fine and imprisonment” but rather “to purify the bar”).

³⁶ *Sentencing*, BLACK’S LAW DICTIONARY (12th ed. 2024).

³⁷ *See generally* WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 3 CRIMINAL PROCEDURE § 11.2(b) (4th ed. 2015) (noting case law developing “critical stage” analysis for triggering Sixth Amendment right to appointed counsel).

³⁸ *See* *Turner v. United States*, 885 F.3d 949, 955–66 (6th Cir. 2018) (Bush, J., concurring dubitante); *Rothgery v. Gillespie County*, 554 U.S. 191, 218–25 (2008) (Thomas, J., dissenting). In an opinion joined by Justice Scalia, Chief Justice Roberts described Justice Thomas’s *Rothgery* dissent as “compelling” but thought the case was controlled by *stare decisis*. *Rothgery*, 554 U.S. at 213 (Roberts, C.J., concurring).

That leaves the question at issue here: When does a criminal prosecution *end*?³⁹ As one constitutional historian indicated, at the Founding, this depended on the outcome.⁴⁰ When there was an acquittal, the prosecution ended when “a verdict of ‘Not guilty’ ha[d] cleared the defendant of the charge.”⁴¹ When there was a conviction, by contrast, the prosecution ended “when sentence ha[d] been pronounced.”⁴² Accordingly, at least eight Justices have agreed that “founding-era prosecutions traditionally ended at final judgment”⁴³—that is, *after* sentencing.

The Founding-era dictionaries do not provide a clear indication on this point, but they are, at a minimum, consistent with this conclusion.⁴⁴ None of the four leading legal dictionaries of the era define prosecution.⁴⁵ Some of the definitions in the leading general English dictionaries refer to the legal process, but not in ways that help ascertain when the prosecution ends. Three define a prosecution as a “suit against a man in a criminal cause.”⁴⁶ Others define prosecution as “a process at law,”⁴⁷ a “criminal or civil suit,”⁴⁸ a “law-suit for some offence,”⁴⁹ or a “suit

³⁹ See Harris, *supra* note 13, at 1467 (“[T]he notion that sentencing is not part of all ‘criminal prosecutions’ may very well be at the heart of the confrontation at sentencing debate.”).

⁴⁰ See FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 54 (1951).

⁴¹ *Id.*

⁴² *Id.*; see also *Baxter v. New Eng. Marine Ins. Co.*, 6 Mass. (6 Tyng) 277, 290 (1810) (describing “[t]he pernicious consequences of *concluding a criminal prosecution* by such a *sentence*” (emphasis added)).

⁴³ *United States v. Haymond*, 588 U.S. 634, 647 (2019) (plurality opinion) (Gorsuch, J., joined by Ginsburg, Sotomayor & Kagan, JJ.); see also *id.* at 672 (Alito, J., dissenting, joined by Roberts, C.J., and Thomas & Kavanaugh, JJ.).

⁴⁴ See *id.* at 671 (Alito, J., dissenting) (citing Founding-era dictionaries in support of claim about “the early understanding that a ‘prosecution’ concludes when a court enters final judgment”).

⁴⁵ See 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 252 (London, A. Strahan & W. Woodfall 1792); THOMAS POTTS, A COMPENDIOUS LAW DICTIONARY 502 (London, T. Ostell 1803); 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, S. Crowder & J. Coote 1765); GILES JACOB, A NEW LAW-DICTIONARY (London, H. Woodfall & W. Strahan 8th ed. 1762). This list of dictionaries is borrowed from Judge Bush’s *Turner* concurrence, with slight differences in editions based on availability. See *Turner v. United States*, 885 F.3d 949, 959 nn.6–7 (6th Cir. 2018) (Bush, J., concurring dubitante).

⁴⁶ *Prosecution*, JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY (London, G.G.J. and J. Robinson & T. Cadell 1791); *Prosecution*, THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, C. Dilby 2d ed. 1789); *Prosecution*, 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan et al. 4th ed. 1773).

⁴⁷ *Prosecution*, 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London, Edward and Charles Dilly & R. Baldwin 1775).

⁴⁸ *Prosecution*, PERRY’S ROYAL STANDARD ENGLISH DICTIONARY (Worcester, Mass., Isaiah Thomas 1st Am. ed. 1788).

⁴⁹ *Prosecution*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (London, Richard Ware 3d ed. 1740).

against a person in law.”⁵⁰ The most helpful definition is found in Noah Webster’s *An American Dictionary of the English Language*—a dictionary that features prominently in *Crawford*.⁵¹ After giving a definition similar to those discussed above,⁵² it adds another:

The institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, *and pursuing them to final judgment*; as prosecutions of the crown or of the state by the attorney or solicitor general. Prosecutions may be by presentment, information or indictment.⁵³

As the italicized language suggests, this definition supports the conclusion that prosecutions continued to final judgment.

A look at the definitions of “prosecute”—the verb that “prosecution” nominalizes—yields similar results. The leading legal dictionaries again do not define the term,⁵⁴ and most of the general English dictionaries give generic definitions, such as “to pursue by law, to sue criminally,” that do not suggest a particular end point.⁵⁵ And once again, Webster provides one similar definition⁵⁶ and one more useful one. He notes that in criminal cases, “*prosecute* signifies to *begin* and to *continue* a suit.”⁵⁷ Unlike Webster’s definition of “prosecution,” this definition does not point toward a particular end point. Nevertheless, it suggests a feature that is, as we shall see, also present in the word “prosecution”: It can be used either to refer to initiating the case or to carrying it on.

⁵⁰ *Prosecution*, JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (London, J.F. & C. Rivington et al. New ed. 1792).

⁵¹ See *Crawford v. Washington*, 541 U.S. 36, 51 (2004). For a discussion of Justice Scalia’s choice to cite this dictionary, see Enrique Schaerer, *Proving the Constitution: Burdens of Proof and the Confrontation Clause*, 55 U. RICH. L. REV. 491, 539–41 (2021).

⁵² *Prosecution*, 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York City, S. Converse 1828) (“The institution and carrying on of a suit in a court of law or equity, to obtain some right, or to redress and punish some wrong.”).

⁵³ *Id.* (emphasis added).

⁵⁴ See sources cited *supra* note 45.

⁵⁵ *Prosecute*, WALKER, *supra* note 46; *Prosecute*, SHERIDAN, *supra* note 46; *Prosecute*, 2 JOHNSON, *supra* note 46; see also *Prosecute*, BARCLAY, *supra* note 50 (“In Law, to sue criminally; to pursue legally.”); *Prosecute*, DYCHE & PARDON, *supra* note 49 (“[T]o push forward, or vigorously carry on any business or affair whatever, particularly suing a person in the courts of law, either as a debtor or felon, &c.”); *Prosecute*, 2 ASH, *supra* note 47 (“[T]o proceed against by legal measures; to sue at law.”).

⁵⁶ See *Prosecute*, 2 WEBSTER, *supra* note 52 (“To seek to obtain by legal process; as, to *prosecute* a right in a court of law.”).

⁵⁷ *Id.*

That leads us to Blackstone, “whose works constituted the pre-eminent authority on English law for the founding generation.”⁵⁸ Before addressing what Blackstone’s *Commentaries* have to say, however, it is worth responding to Judge Bush’s decision to “intentionally omit[]” Blackstone from his own originalist analysis.⁵⁹ Although he acknowledges that “Blackstone is a useful source of insight into eighteenth-century English legal practice, which greatly influenced the Framers’ understanding of the common law,” Judge Bush notes that English common law lacked a right to counsel.⁶⁰ He thus observes, relying on Justice Thomas, that “‘the Sixth Amendment was designed to abolish’ rather than reify” many aspects of English common law practice.⁶¹ Therefore, he declines to “rely on Blackstone’s *Commentaries* as probative evidence of the Founding-era understanding of ‘accused’ and ‘criminal prosecution’ as those words constrain the Sixth Amendment right to counsel.”⁶²

Two responses are in order. First, some of this objection’s force is limited to the right to counsel and does not extend to other Sixth Amendment rights. That is because the right to counsel was far and away the most innovative portion of the Sixth Amendment. Justice Story praised the Counsel Clause for “mak[ing] matter of constitutional right[] what the common law had left in a most imperfect and questionable state”⁶³ but thought most of the other clauses—including the Confrontation Clause—merely “follow[ed] out the established course of the common law.”⁶⁴ Although Justice Story may have overstated the matter,⁶⁵ the American right to confrontation no doubt has a closer kinship with the English common law than does the American right to counsel.

In fairness to Judge Bush, the same language—“[i]n all criminal prosecutions, the accused”—constrains every Sixth Amendment right.⁶⁶ Thus, if Blackstone leads modern interpreters astray as to the meaning of this language for one provision, he leads them astray for all. That argument runs into the second response to Judge Bush’s objection:

⁵⁸ *Alden v. Maine*, 527 U.S. 706, 715 (1999); see also AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 520 n.7 (2012) (collecting “representative references” to Blackstone during the Philadelphia Convention and ratification debates).

⁵⁹ *Turner v. United States*, 885 F.3d 949, 964 n.24 (6th Cir. 2018) (Bush, J., concurring dubitante).

⁶⁰ *Id.*

⁶¹ *Id.* (quoting *Luis v. United States*, 578 U.S. 5, 28 (2016) (Thomas, J., concurring in the judgment)).

⁶² *Id.*

⁶³ 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1788, at 655 (Boston, Hilliard, Grey & Co. 1st ed. 1833).

⁶⁴ *Id.* § 1785, at 622.

⁶⁵ See *infra* Section III.A.

⁶⁶ See U.S. CONST. amend. VI.

His objection applies only to relying on Blackstone for a report of Founding-era law and not to relying on Blackstone for the meaning of legal terminology. When relying on Blackstone's reports of law, one must not only believe that he is accurate, but also that the law he describes is the law the Framers adopted. But when asking Blackstone to serve merely a "dictionary" function, one need only trust that he used legal terms in their ordinary legal sense—a much easier inference.⁶⁷ Although the Framers no doubt intended to abandon some of the rules of law Blackstone described, there is no indication that they intended to, or would have been able to, abrogate the vocabulary he employed. Let us therefore take Justice Thomas's suggestion—in his own discussion of when a prosecution begins—that "[t]here is no better place to begin than with Blackstone."⁶⁸

Although Justice Thomas is correct about Blackstone's value to the inquiry, he is mistaken in his interpretation of Blackstone's use of "prosecution." Justice Thomas relies heavily on Blackstone's use of "prosecution" to refer to a particular portion of a criminal proceeding wherein the formal charging document is filed.⁶⁹ In describing "the regular and ordinary method of proceeding in the courts of criminal jurisdiction," Blackstone broke the criminal process into twelve steps, with one following another "in a progressive order."⁷⁰ The third step—which immediately followed "[c]ommitment[] and bail" and immediately preceded "[p]rocess"—he titled "[p]rosecution."⁷¹ After discussing Blackstone's chapter on this step at length, Justice Thomas concludes that "'[p]rosecution,' as Blackstone used the term, referred to 'instituting a criminal suit,' by filing a formal charging document . . . upon which the defendant was to be tried in a court with power to punish the alleged offense."⁷² In Justice Thomas's view, this was the meaning enshrined in the Sixth Amendment.⁷³

To be sure, Blackstone *did* use the term that way. Justice Thomas errs, however, in suggesting that Blackstone used this meaning of

⁶⁷ See Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 21–22 (2013) ("Blackstone's *Commentaries* may thus be understood as, in a sense, something of a topical concordance or glossary of the common and specialized legal meanings of certain terms—in essence performing a dictionary function better even than would a contemporaneous dictionary.").

⁶⁸ *Rothgery v. Gillespie County*, 554 U.S. 191, 219 (2008) (Thomas, J., dissenting).

⁶⁹ See *id.* at 220.

⁷⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES *289.

⁷¹ *Id.* The "twelve general heads" were, in order, "1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and it's incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it's consequences; 10. Reversal of judgment; 11. Reprieve, or pardon; [and] 12. Execution." *Id.* Blackstone dedicated a chapter of his *Commentaries* to each step. See *id.* at *289–406.

⁷² *Rothgery*, 554 U.S. at 221 (Thomas, J., dissenting) (citation omitted) (quoting 4 BLACKSTONE, *supra* note 70, at *309).

⁷³ See *id.* at 223.

“prosecution” to the exclusion of others. He claims that “Blackstone did not describe the entire criminal process as a ‘prosecution,’ but rather listed prosecution as the third step in a list of successive stages.”⁷⁴ In truth, Blackstone used the term in reference *both* to the criminal process as a whole and to the third step in that process. Several times in his discussion, he refers to “stages” of prosecution.⁷⁵ At various points, he uses the phrases “stage of the prosecution” or “stage of criminal prosecution” to refer to other of his twelve steps, including process,⁷⁶ arraignment,⁷⁷ and judgment,⁷⁸ as well as more broadly to “other stages of prosecution.”⁷⁹ Tellingly, he refers to arraignment—the fifth of his “general heads” of the criminal process—as “the fifth stage of criminal prosecution,”⁸⁰ implying that each of the preceding steps is likewise a “stage of criminal prosecution.”

By using “prosecution” in both senses, Blackstone reinforces what Webster said: “Prosecution” can refer to both the commencing and the continuing of a criminal case.⁸¹ In other words, “prosecution” had both a narrow meaning—the bringing of formal charges—and a broader meaning. Therefore, we must turn to context to determine which meaning the Sixth Amendment employs.⁸² That context makes clear that the broader meaning is correct, rather than the narrow meaning suggested by Justice Thomas. Recall that Blackstone’s stages move “in a progressive order,” with each stage beginning only after its predecessor concludes.⁸³ Thus, a “prosecution” in the narrow sense concludes well before trial.⁸⁴ Of course, everyone in 1791 would have understood Sixth Amendment rights to apply at trial—indeed, some by their terms apply *only* at trial.⁸⁵ And they would have had that understanding precisely because of the broader meaning of “prosecution.” Thus, “prosecution” as employed in the Sixth Amendment cannot have had the narrow

⁷⁴ *Id.* at 220.

⁷⁵ See 4 BLACKSTONE, *supra* note 70, at *320 (“[D]uring which stage of the prosecution it is, that writs of *certiorari facias* are usually had”); *id.* at *321 (“At this stage of the prosecution also it is, that indictments found by the grand jury against a peer must . . . be certified and transmitted into the court of parliament”); *id.* at *322 (“[H]e is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.”); *id.* at *337 (“[A]s the title of pardons is applicable to other stages of prosecution”); *id.* at *375 (“We are now to consider the next stage of criminal prosecution, . . . which is that of *judgment*.”).

⁷⁶ *Id.* at *320–21.

⁷⁷ *Id.* at *322.

⁷⁸ *Id.* at *375.

⁷⁹ *Id.* at *337.

⁸⁰ *Id.* at *322.

⁸¹ See *supra* text accompanying notes 52–53, 56–57.

⁸² See ANTONIN SCALIA, A MATTER OF INTERPRETATION 37 (Amy Gutmann ed., New ed. 2018).

⁸³ 4 BLACKSTONE, *supra* note 70, at *289.

⁸⁴ See *id.* (listing “Prosecution” as the third stage and “Trial” as the seventh).

⁸⁵ See *infra* Section I.D.

meaning, leaving only the broader meaning as a possibility. That conclusion is reinforced by the first Federal Crimes Act⁸⁶—passed by the First Congress while the Sixth Amendment was being ratified—which uses the broader meaning.⁸⁷

Examining the scope of this more inclusive meaning provides further support for the observation that a “prosecution” continued until final judgment. Blackstone refers to the ninth step in the process as “[j]udgment.”⁸⁸ Several things occurred at this stage. For one, the defendant had several avenues to avoid judgment being entered, including motions in arrest of judgment, pardon, and benefit of clergy.⁸⁹ Even when judgment was entered, the proper sentence had to be decided—a decision that sometimes involved judicial discretion.⁹⁰ Finally, once these issues were settled, the court would “pronounce that judgment, which the law hath annexed to the crime.”⁹¹ Crucially, Blackstone refers to this proceeding as a “stage of criminal prosecution.”⁹² Thus, a criminal prosecution continued “after trial and conviction [were] past.”⁹³

By contrast, when he discusses the last two stages of the process—reprieve or pardon, and execution—Blackstone changes his terminology. Instead of “stages of criminal prosecution,” he uses the phrases “stage of proceedings”⁹⁴ and “stage of criminal proceedings,”⁹⁵ respectively. This at least suggests that the end of a “criminal prosecution” occurs some time before these stages.⁹⁶ That leaves only the tenth stage—reversal of judgment—unaccounted for, and Blackstone uses neither term for that stage.⁹⁷

A final point in favor of interpreting “prosecution” broadly is that some state constitutions—namely, those of Massachusetts and New

⁸⁶ See Crimes Act of 1790, ch. 9, 1 Stat. 112.

⁸⁷ See *id.* § 29, 1 Stat. at 118–19 (giving treason defendants the right to “like process of the court . . . to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the *prosecution* against them” (emphasis added)).

⁸⁸ 4 BLACKSTONE, *supra* note 70, at *289.

⁸⁹ See *id.* at *381. Both motions in arrest of judgment and pardons are discussed in greater detail below. See *infra* Sections II.B–C.

⁹⁰ See 4 BLACKSTONE, *supra* note 70, at *377–79. This process is discussed in greater detail below. See *infra* Section II.A.

⁹¹ 4 BLACKSTONE, *supra* note 70, at *376.

⁹² *Id.* at *375.

⁹³ *Id.*

⁹⁴ *Id.* at *402 (reprieve and pardon).

⁹⁵ *Id.* at *406 (execution).

⁹⁶ Cf. Thomas R. Lee, Lawrence B. Solum, James C. Phillips & Jesse A. Egbert, *Corpus Linguistics and the Original Public Meaning of the Sixteenth Amendment*, 73 DUKE L.J. ONLINE 159, 178 (2024) (“If the ordinary words used to express a given meaning are not the words the Constitution uses, that can reinforce the conclusion that the Constitution’s text does not embrace that meaning.”).

⁹⁷ See 4 BLACKSTONE, *supra* note 70, at *390–93.

Hampshire—had confrontation clauses that contained neither a “prosecution” requirement nor any analogous limitation.⁹⁸ Although this fact might be used to justify an inference that these states’ confrontation clauses operated differently from those that, like the federal version, included this language,⁹⁹ it is not clear that is the proper inference. If that were so, one would expect to see contemporary commentators noting the difference. Instead, the Founding generation appeared to assume that the various formulations of the confrontation right were equivalent. This is most clear with regard to the various formulations of “witnesses against him.” For example, consider the report of the Pennsylvania ratifying convention’s Anti-Federalist minority.¹⁰⁰ They complained of the absence of a provision in the original Federal Constitution protecting the right “to be confronted with the accusers and witnesses.”¹⁰¹ On its face, the “accusers and witnesses” language might suggest a broader meaning than simply “witnesses.” The Pennsylvania Constitution, however, included only the seemingly narrower “witnesses” language.¹⁰² Yet these Anti-Federalists feared that the absence of a (seemingly broader) provision in the Federal Constitution would risk “surrendering up” one of the people’s “dearest rights.”¹⁰³ Faulting the Federal Constitution for not including the “accusers and witnesses” language while excusing the same omission in the Pennsylvania Constitution would make little sense unless the “witnesses” language was equivalent. Similarly, a delegate to the Massachusetts convention referenced a defendant’s rights “to meet his accuser face to face,” to “be allowed to confront the witnesses,” and to “have the advantage of cross-examination.”¹⁰⁴ If the variations were meaningful, this complaint would run into a similar problem; the Massachusetts Constitution protected only a defendant’s right “to meet the witnesses against him, face to face.”¹⁰⁵ Because the ratifying delegates attributed no significance to the variations on “witnesses against him,”

⁹⁸ See MASS. CONST. pt. I, art. XII (“And every subject shall have a right . . . to meet the witnesses against him, face to face . . .”); N.H. CONST. pt. I, art. XV (“[E]very subject shall have a right . . . to meet the witnesses against him face to face. . .”).

⁹⁹ See *Rothgery v. Gillespie County*, 554 U.S. 191, 222 (2008) (Thomas, J., dissenting) (“[I]t is significant that the Framers used the words ‘criminal prosecutions’ in the Sixth Amendment rather than some other formulation . . .”).

¹⁰⁰ *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 145 (Herbert J. Storing, ed., 1981) [hereinafter *Pennsylvania Minority*].

¹⁰¹ *Id.* at 151.

¹⁰² PA. CONST. of 1776, ch. I, art. IX.

¹⁰³ *Pennsylvania Minority*, *supra* note 100, at 150.

¹⁰⁴ Abraham Holmes, Speech During Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 30, 1788), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109, 110–11 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) [hereinafter *ELLIOT’S DEBATES*].

¹⁰⁵ MASS. CONST. pt. 1, art. XII.

it is reasonable—in the absence of evidence to the contrary—to suppose that they likewise attributed no significance to the variations on “criminal prosecutions.”

Given that “the end and design” of criminal prosecutions is “the pun[ish]ment of the accused,”¹⁰⁶ it makes perfect sense that a prosecution would not be complete until punishment is imposed and judgment entered. When searching Founding-era sources, that is precisely what one finds: “[F]ounding-era prosecutions traditionally ended at final judgment.”¹⁰⁷

B. “*The Accused*”

The next textual limitation is that the confrontation right belongs only to “the accused.”¹⁰⁸ On this point, the Supreme Court’s recent indications have been downright contradictory. In 2016, Justice Ginsburg proclaimed for a unanimous Court in *Betterman v. Montana*¹⁰⁹ that “[a]t the founding, ‘accused’ described a status preceding ‘convicted.’”¹¹⁰ Just three years later, however, Justice Gorsuch wrote for a four-Justice plurality in *United States v. Haymond*¹¹¹ that “the defendant remains an ‘accused’ . . . until a final sentence is imposed.”¹¹² Though disagreeing with the plurality’s application of that principle, Justice Alito—writing for his own four-Justice bloc—heartily endorsed that interpretation of “accused,” calling it “exactly right.”¹¹³ It may well be the case that the *Betterman* Court’s bottom-line holding was correct and the *Haymond* Court’s was mistaken,¹¹⁴ but the Justices had the better understanding of “accused” in *Haymond*.

The difficulty lies in using “accused” as a noun. It is more commonly used as a past-tense verb, e.g., “John *accused* Mike,” or as a verbal adjective, e.g., “the person *accused*.” For this reason, the dictionaries are of little help. Though two prominent early dictionaries define “accused,”

¹⁰⁶ *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 74 (1820).

¹⁰⁷ *United States v. Haymond*, 588 U.S. 634, 647 (2019) (plurality opinion).

¹⁰⁸ U.S. CONST. amend. VI.

¹⁰⁹ 578 U.S. 437 (2016).

¹¹⁰ *Id.* at 443.

¹¹¹ 588 U.S. 634 (2019) (plurality opinion).

¹¹² *Id.* at 647.

¹¹³ *Id.* at 675 (Alito, J., dissenting).

¹¹⁴ *Betterman* held that the Speedy Trial Clause does not apply to sentencing. *See* 578 U.S. at 439. This holding can be justified on another rationale that the Court mentioned: “[T]rial” meant a discrete episode after which judgment (*i.e.*, sentencing) would follow.” *Id.* at 443. That rationale is discussed below. *See infra* Section I.D. The *Haymond* plurality concluded that revocation of supervised release requires factfinding by a jury beyond a reasonable doubt. *See* 588 U.S. at 645 (plurality opinion). But Justice Alito argued persuasively that, although the Sixth Amendment’s protections extend until a sentence is imposed, a sentence is imposed at final judgment, not when supervised release is revoked. *See id.* at 674–75 (Alito, J., dissenting).

they define it only as a past participle, not as a noun.¹¹⁵ For the same reason, the *Betterman* Court's appeal to Blackstone—as support for the claim that “‘accused’ described a status preceding ‘convicted’”—falls short.¹¹⁶ In a parenthetical, Justice Ginsburg quotes a portion of Blackstone's chapter on arraignments as “commenting on [the] process in which ‘persons *accused* of felony . . . were tried . . . and *convicted*.’”¹¹⁷ The first hint that her analysis has gone awry is that it implies that “accused” was a status not only preceding “convicted,” but also preceding “tried.” Just as no one in 1791 would have understood a “criminal prosecution” to end before trial,¹¹⁸ no one would have thought that a trial could go on without an “accused.” Consider the full sentence from Blackstone:

For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, case, or record, (that hath yet been produced) previous to the reign of Edward I: but there are instances on record in the reign of Henry III, where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony.¹¹⁹

Given the sentence's length, Justice Ginsburg's decision not to quote it in full is no doubt understandable. But her excerpt obscures Blackstone's use of “convicted” not as a status of a formerly accused but as a thing that happens to a “person[] accused.”¹²⁰ That an “accused” could be tried and convicted would have surprised no one, as numerous antebellum sources attest.¹²¹

¹¹⁵ See *Accused*, 1 WEBSTER, *supra* note 52 (“Charged with a crime, by a legal process; charged with an offense; blamed.”); *Accused*, 1 ASH, *supra* note 47 (“Charged with a crime, censured.”).

¹¹⁶ *Betterman*, 578 U.S. at 443 (citing 4 BLACKSTONE, *supra* note 70, at *327).

¹¹⁷ *Id.* (quoting 4 BLACKSTONE, *supra* note 70, at *327) (emphasis and ellipses in *Betterman*; bracketed text this Author's).

¹¹⁸ See *supra* text accompanying note 85.

¹¹⁹ 4 BLACKSTONE, *supra* note 70, at *327.

¹²⁰ *Id.*

¹²¹ See, e.g., *State v. Paul*, 5 R.I. 185, 197 (1858) (“The record before us shows that the accused *was* tried and convicted of the offence charged against him”); *State v. Hannah*, 10 La. Ann. 131, 131 (1855) (enslaved party) (“The accused was tried and convicted of the crime of manslaughter”); *State v. Shaw*, 5 La. Ann. 342, 342 (1850) (“[T]he accused was tried and convicted upon his plea of not guilty.”); *State v. Bill*, 8 Rob. 527, 527 (La. 1844) (enslaved party) (“The accused was tried and convicted before the judge”); *Cobbs v. Fountaine*, 24 Va. (3 Rand.) 484, 488 (1825) (“An attorney might well be supposed to contract for his services, upon the terms that if the accused was tried and convicted before a given day, he would receive nothing for his services”); *State v. Connor*, 2 S.C.L. (2 Bay) 34, 36 (1796) (“[T]he accused person, found guilty of the offence”).

Even to the extent inferences can be drawn from the use of “accused” as a verb or a verbal adjective, they point toward that status extending past conviction. Take, for instance, a 1795 letter from Thomas Boylston Adams, the son of then–Vice President John Adams, to his cousin, William Cranch, who would go on to become a prominent federal judge and the Supreme Court’s second official reporter of decisions.¹²² Describing a group of Jacobins in revolutionary France who had been tried, convicted, and sentenced to transportation, Adams began to refer to them as “[t]he criminals,” but quickly corrected himself, concluding that “rather as an impartial observer [he] should say, the accused members.”¹²³ Although this letter described defendants in a French proceeding not governed by Anglo-American criminal procedure, it is striking for the self-consciousness with which Adams uses “accused” to refer to postverdict defendants. Similarly, in Maurice Margarot’s 1794 sedition trial in Edinburgh, a judge observed just before imposing sentence that the defendant “now stands convicted by the verdict of a most respectable jury of this country” but nevertheless remarked that the same defendant “*is accused*” of sedition.¹²⁴

Phrases like “the accused person” could also be used to refer to defendants between the time of the guilty verdict and the pronouncement of sentence. Consider this discussion in a 1796 decision of South Carolina’s Constitutional Court of Appeals:

But when a prosecution was so far advanced, as to establish the guilt of the party accused by a conviction of the jury, the probability of innocence no longer existed; on the contrary, the law would and ought to presume him guilty. The discretionary power of the court [to grant bail] then ceases, in all cases where infamous corporal punishment is or ought to be inflicted on *the accused person, found guilty of the offence*.¹²⁵

This excerpt reiterates that one can continue to be an “accused person” even after he is “found guilty of the offence.”¹²⁶ Just as importantly, it conclusively rebuts any suggestion that “accused” status is tied to the presumption of innocence.¹²⁷

¹²² Letter from Thomas Boylston Adams to William Cranch (Apr. 8, 1795), *reprinted in* 12 Q. PUBL’N HIST. & PHIL. SOC’Y OHIO 7 (1917).

¹²³ *Id.* at 8–9.

¹²⁴ Trial of Margarot (1794) 23 How. St. Tr. 603, 776 (Scot. HCJ) (emphasis added).

¹²⁵ *Connor*, 2 S.C.L. (2 Bay) at 36 (emphasis added).

¹²⁶ *Id.*

¹²⁷ Relatedly, Blackstone was emphatic that it was only “after *judgment*” and not “[a]fter conviction only” that the collateral consequences of a defendant’s conviction attach. 4 BLACKSTONE, *supra* note 70, at *380–81. Only at judgment did “both law and fact conspire to prove him completely guilty.” *Id.* at *381. Before then, “there is still in contemplation of law a possibility of his innocence.” *Id.*

Even the precise language of the Sixth Amendment—"the accused"—can refer to a postverdict, presentence defendant. In the 1798 novel *Wieland*,¹²⁸ for instance, Clara Wieland reads a description of her brother's murder trial during which, after "the verdict of guilty [was] reluctantly pronounced by the jury, . . . *the accused* [was] interrogated why sentence of death should not pass."¹²⁹ Whether used as a noun, as in the Sixth Amendment, or as another part of speech, "accused" could refer to a defendant who has been convicted but has not yet been sentenced.

The same is true of other words that often substituted for "the accused." This is clearest in the case of state constitutions, which unanimously used other terminology not susceptible to narrower interpretations, such as "every man,"¹³⁰ "a man,"¹³¹ or "every subject."¹³² Crucially, it is also true of another term—"the prisoner"—that was used interchangeably with "the accused" in the context of the federal Sixth Amendment. In his opinion for a unanimous Court in *Ex parte Burford*,¹³³ Chief Justice Marshall summarized the relevant Sixth Amendment provisions as follows: "[I]t is declared, that in all criminal prosecutions, the prisoner shall enjoy the right to be informed of the nature and cause of his accusation, and to be confronted with the witnesses against him."¹³⁴ Marshall's paraphrase tracks the amendment's text very closely. The only changes are (1) the elision of other provisions not relevant to his discussion, (2) the use of "his accusation" in lieu of "the accusation" in the Arraignment Clause, and (3) the use of "the prisoner" instead of "the accused."¹³⁵ This last change demonstrates that he viewed "the prisoner" and "the accused" as interchangeable in this context. And the use of "prisoner" to refer to "any felony defendant" was, as Professor Langbein reports, "incessant,"¹³⁶ even for postverdict defendants.¹³⁷

¹²⁸ CHARLES BROCKDEN BROWN, *WIELAND* (Philadelphia, David McKay 1889) (1798).

¹²⁹ *Id.* at 195 (second emphasis added).

¹³⁰ DEL. DECLARATION OF RIGHTS of 1776, § 14; MD. DECLARATION OF RIGHTS of 1776, para. 19; N.C. DECLARATION OF RIGHTS of 1776, § 7.

¹³¹ PA. CONST. of 1776, ch. I, para. IX; VA. DECLARATION OF RIGHTS of 1776, para. VIII; VT. CONST. of 1777, ch. I, para. X.

¹³² MASS. CONST. pt. I, art. XII; N.H. CONST. pt. I, art. XV.

¹³³ 7 U.S. (3 Cranch) 448 (1806).

¹³⁴ *Id.* at 452.

¹³⁵ *Id.*; U.S. CONST. amend. VI.

¹³⁶ JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 49 (A.W. Brian Simpson ed., 2003).

¹³⁷ See, e.g., *People v. Thompson*, 2 Johns. Cas. 342, 342 (N.Y. 1801) ("W. Morton, in behalf of the prisoner, now moved in arrest of judgment . . ."); *State v. Doan*, 2 Root 451, 451 (Conn. Super. Ct. 1796) ("After verdict of the jury finding the prisoner guilty, the counsel for the prisoner moved in arrest of judgment . . ."); *Commonwealth v. Proctor*, 3 Va. (1 Va. Cas.) 4, 5 (1791) ("The prisoner was found guilty by the jury, and he moved in arrest of judgment . . ."); *State v. Washington*, 1

One final clue that “accused” can refer to defendants throughout a criminal prosecution is hiding in plain sight: the word “the.” By using a definite article, the Framers employed a linguistic construction known as a “definite description.”¹³⁸ Though such constructions are known for the “considerable difficulty” they pose philosophers,¹³⁹ the same feature that troubles philosophers gives constitutional interpreters a significant clue: Definite descriptions “are said to presuppose the existence of a unique referent.”¹⁴⁰ In other words, in using the phrase “*the* accused,” the Framers presupposed that, wherever there was a “criminal prosecution,” there would also be an “accused.”¹⁴¹

That is consistent with ordinary usage. To borrow Bertrand Russell’s famous example, one would not typically say that “the King of France is bald,” because France has no king.¹⁴² One might, however, say that the President of France has dark hair—after all, France *does* have a president. This Article itself provides another example by repeatedly referring to “*the* Confrontation Clause.” That construction would make little sense if there were no such clause. And repeated invocation of “*the* Sixth Amendment” would raise more than a few eyebrows if the Constitution contained only five.

Now, if status as an “accused” exists throughout a criminal prosecution, one might wonder what work the word “accused” is doing. But rather than becoming surplusage, this language “provides *who* may assert the right.”¹⁴³ It makes clear, in other words, that the Sixth Amendment protects “rights of the accused and only the accused.”¹⁴⁴

S.C.L. (1 Bay) 120, 151 (1791) (“The prisoner being found guilty, has offered, in arrest of judgment, the following objections.”); *The King v. Parry* (1774) 168 Eng. Rep. 156, 156; 1 Leach 108, 108 (K.B.) (“The prisoners were found guilty, upon very clear evidence; but it was moved in arrest of judgment . . .”); 4 BLACKSTONE, *supra* note 70, at *375 (“For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is . . . asked by the court . . . why judgment should not be awarded against him.”).

¹³⁸ See G. Ostertag, *Descriptions, Definite and Indefinite: Philosophical Aspects*, in *ENCYCLOPEDIA OF LANGUAGE & LINGUISTICS* 465 (Keith Brown ed., 2d ed. 2006) (stating definite descriptions can take the form of the “definite article *the* concatenated with a nominal”).

¹³⁹ See Bertrand Russell, *On Denoting*, 14 MIND Q. REV. PSYCH. & PHIL. 479, 479 (1905).

¹⁴⁰ David I. Beaver, Bart Geurts & Kristie Denlinger, *Presupposition*, STAN. ENCYC. PHIL. (Jan. 7, 2021), <https://plato.stanford.edu/entries/presupposition/> [https://perma.cc/4B43-G7F6].

¹⁴¹ U.S. Const. amend. VI; cf. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 423 n.34 (2009) (describing, in the context of the Fourteenth Amendment Privileges or Immunities Clause, how “[t]he definite article ‘the’ implies that the thing referred to is a particular thing”).

¹⁴² Russell, *supra* note 139, at 483–84; cf. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (“It might be good English to say that the French Revolution ‘modified’ the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm.”).

¹⁴³ *Rothgery v. Gillespie County*, 554 U.S. 191, 214 (2008) (Alito, J., concurring); *United States v. Haymond*, 588 U.S. 634, 669 (2019) (Alito, J., dissenting).

¹⁴⁴ AKHIL REED AMAR, *THE BILL OF RIGHTS* 114 (1998).

This distinguishes the Sixth Amendment from the Fifth Amendment's criminal procedure provisions, which apply to any "person,"¹⁴⁵ and thus extend not only to the defendant but also, for instance, to witnesses.¹⁴⁶ It also distinguishes the Sixth Amendment from the jury and venue provisions in Article III.¹⁴⁷ Those provisions use "mandatory and structural" language,¹⁴⁸ while the Sixth Amendment protects rights that "the accused shall enjoy."¹⁴⁹ Finally—and relatedly—the language can be read to vest significant control in the defendant, as against his lawyer, over the exercise of these rights.¹⁵⁰ The rights belong to "the defendant, and not his lawyer."¹⁵¹ As a result, this section's conclusion—that "accused" does not contain a temporal limitation—does not make the phrase superfluous.

C. "Witnesses Against Him"

Having concluded the discussion of the limitations applicable to all Sixth Amendment rights, it is now time to turn to "the critical phrase within the [Confrontation] Clause": "witnesses against him."¹⁵² Although some parts of the analysis are specific to either "witnesses" or "against him," it is helpful to discuss them together.

Defining "witnesses" is notoriously difficult.¹⁵³ The most prominent definition, adopted in *Crawford*, defines "witnesses" as "those

¹⁴⁵ See U.S. CONST. amend. V ("No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any *person* be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .") (emphasis added)).

¹⁴⁶ See *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). To the extent the variation between this language in the Sixth Amendment and its counterpart language in analogous state provisions has any significance, it is likely an attempt to avoid this problem. See *supra* notes 130–32 and accompanying text.

¹⁴⁷ See U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

¹⁴⁸ AMAR, *supra* note 144, at 105.

¹⁴⁹ U.S. CONST. amend. VI. For a discussion of the significance of this distinction, see AMAR, *supra* note 144, at 81–118. Cf. *Callan v. Wilson*, 127 U.S. 540, 549 (1888) ("And we do not think that the [Sixth] [A]mendment was intended to supplant that part of the third article which relates to trial by jury.").

¹⁵⁰ See AMAR, *supra* note 144, at 114.

¹⁵¹ *Indiana v. Edwards*, 554 U.S. 164, 188 (2008) (Scalia, J., dissenting).

¹⁵² *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and concurring in the judgment).

¹⁵³ See Stephanos Bibas, *The Limits of Textualism in Interpreting the Confrontation Clause*, 37 HARV. J.L. & PUB. POL'Y 737, 738–41 (2014).

who ‘bear testimony.’”¹⁵⁴ Since *Crawford*, various versions of the “bear testimony” inquiry have arisen. In *Davis v. Washington*,¹⁵⁵ another Justice Scalia opinion, the Court adopted the so-called “primary purpose test,” under which a statement to police bears testimony if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”¹⁵⁶ Justice Thomas has sharply criticized the primary purpose test, which he views as unjustifiably broad.¹⁵⁷ Instead, he defines “testimony” as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”¹⁵⁸ Justice Gorsuch is also a critic, but he worries instead that the primary purpose test is an unjustified “limitation . . . on the confrontation right.”¹⁵⁹ He recently floated replacing the primary purpose test with, among other possibilities, an inquiry into whether a statement “explicitly or implicitly . . . relate[s] a factual assertion or disclose[s] information.”¹⁶⁰

Some candidate definitions reject the “bear testimony” analysis entirely. Then-Professor (now-Judge) Bibas identified three such definitions.¹⁶¹ First, “witness” could “mean[] only a person who actually testifies in court.”¹⁶² As Judge Bibas observed, Professor Wigmore and the second Justice Harlan both adopted this view,¹⁶³ and Justice Scalia identified one antebellum decision doing the same.¹⁶⁴ Justice Alito has also hinted at this view.¹⁶⁵ Second, “[w]itness’ could also be read in

¹⁵⁴ *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting *Witness*, 2 WEBSTER, *supra* note 52).

¹⁵⁵ 547 U.S. 813 (2006).

¹⁵⁶ *Id.* at 822.

¹⁵⁷ See, e.g., *Michigan v. Bryant*, 562 U.S. 344, 379 (2011) (Thomas, J., concurring in the judgment) (decrying “the primary-purpose test as ‘an exercise in fiction’ that is ‘disconnected from history’” (quoting *Davis*, 547 U.S. at 839, 838 (Thomas, J., concurring in the judgment in part and dissenting in part))).

¹⁵⁸ *Davis*, 547 U.S. at 836 (Thomas, J., concurring in the judgment in part and dissenting in part) (alteration in original) (quoting *Crawford*, 541 U.S. at 51).

¹⁵⁹ *Smith v. Arizona*, 602 U.S. 779, 806 (2024) (Gorsuch, J., concurring in part); see also *Franklin v. New York*, 145 S. Ct. 831, 836 (2025) (statement of Gorsuch, J., respecting the denial of certiorari) (suggesting that the court “may need to rethink” the primary purpose test because, among other things, “the Amendment established a presumption that prosecutors cannot use out-of-court statements against a defendant without an opportunity for cross-examination”).

¹⁶⁰ *Smith*, 602 U.S. at 806 (Gorsuch, J., concurring in part) (omission and alterations in original) (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988)).

¹⁶¹ See Bibas, *supra* note 153, at 738–39.

¹⁶² *Id.* at 738; see also *Crawford*, 541 U.S. at 42–43 (“One could plausibly read ‘witnesses against’ a defendant to mean those who actually testify at trial . . .”).

¹⁶³ See Bibas, *supra* note 153, at 738–39.

¹⁶⁴ See *Crawford*, 541 U.S. at 42–43 (citing *Woodsides v. State*, 3 Miss. (2 Howard) 655, 664–65 (1837)).

¹⁶⁵ See *Franklin v. New York*, 145 S. Ct. 831, 832 (2025) (statement of Alito, J., respecting the denial of certiorari).

the colloquial sense, as a person who sees the crime.”¹⁶⁶ As Judge Bibas noted, this is “the most common lay understanding of the term ‘witness,’” and is “more or less the position” taken by the *Bullcoming v. New Mexico*¹⁶⁷ and *Melendez-Diaz v. Massachusetts*¹⁶⁸ dissenters.¹⁶⁹ It was also put forward by counsel in an 1824 Massachusetts case, though the court never addressed it.¹⁷⁰ Finally, “‘witness’ could be read in the more technical legal sense of anybody whose statements are being used as evidence.”¹⁷¹ Relying on Justice Thomas’s interpretation of “witnesses” in the Fifth Amendment, Justice Gorsuch floated a slightly broader version of this definition, which would include “any ‘person who gives or furnishes evidence,’” even if the evidence is not a statement.¹⁷²

Deciding on the correct definition is necessary to flesh out the Confrontation Clause’s implications at sentencing but not necessary to determine its applicability. One core category of witnesses is common to all definitions: those who take the stand to testify to the events of the crime. Such testimony is not common at sentencing,¹⁷³ but neither is it unheard of.¹⁷⁴ And as long as at least *some* sentencing hearings feature “witnesses,” the absence of a witness is not a proper basis for holding the Clause categorically inapplicable.

That analysis assumes, of course, that there was no technical, sentencing-specific exception to the definition of “witnesses” in the Founding era. And indeed, no inkling of such a rule appears in the historical record—in fact, every indication is to the contrary.

First, those who gave evidence—including affidavits—in favor of post-trial motions were referred to as witnesses.¹⁷⁵ One particularly

¹⁶⁶ Bibas, *supra* note 153, at 739.

¹⁶⁷ 564 U.S. 647 (2011).

¹⁶⁸ 557 U.S. 305 (2009).

¹⁶⁹ Bibas, *supra* note 153, at 739 & n.16.

¹⁷⁰ See *In re Ross*, 19 Mass. (2 Pick.) 165, 179 (1824). Notably, though *Ross* was a state case, the lawyer argued based on the *federal* Sixth Amendment, not its state constitutional analogue—perhaps because *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), had not yet been decided. See Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 23–24, 24 n.92 (2007) (collecting examples of cases, including *Ross*, where counsel argued for application of the federal Bill of Rights in state courts); AMAR, *supra* note 144, at 145–56 (discussing the legal thought of “The *Barron* Contrarians”); cf. *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. 1820) (“I am, however, inclined to the opinion, that the [Fifth Amendment Double Jeopardy Clause] does extend to all judicial tribunals in the *United States*, whether constituted by the Congress of the *United States*, or the states individually.”).

¹⁷¹ Bibas, *supra* note 153, at 739.

¹⁷² *Smith v. Arizona*, 602 U.S. 779, 806 (2024) (Gorsuch, J., concurring in part) (quoting *United States v. Hubbell*, 530 U.S. 27, 49–50 (2000) (Thomas, J., concurring)).

¹⁷³ See *United States v. Edmondson*, 10 F. Supp. 2d 651, 655 (E.D. Tex. 1998) (“Rarely do witnesses appear at a sentencing hearing . . .”).

¹⁷⁴ See, e.g., *United States v. Garrard*, 83 F.3d 889, 890 (7th Cir. 1996).

¹⁷⁵ See, e.g., *The King v. Parry* (1774) 168 Eng. Rep. 156, 156–57; 1 Leach 108, 108 (K.B.) (“The prisoners were found guilty, upon very clear evidence; but it was moved in arrest of judgment, that

noteworthy case arose out of John Fries's treason conviction for his role in the rebellion that bears his name.¹⁷⁶ After his conviction, Fries moved for a new trial, claiming, among other things, that one juror had declared several times "[t]hat he was not safe at home for these people (meaning the insurgents)[,] that they ought all to be hung, and, particularly, that *Fries* must be hung."¹⁷⁷ The juror denied making statements particularly directed at Fries.¹⁷⁸ The report indicates, however, that he "was confronted with the *witnesses* who attested" to his statements, and he ultimately "appeared very incorrect in his recollection of facts."¹⁷⁹ Riding circuit, Justice Iredell accordingly voted to grant a new trial.¹⁸⁰

A remarkably similar—though less high-profile—case arose five years prior in South Carolina.¹⁸¹ This time, the motion was supported by an affidavit alleging that the jury foreman had, on the morning of trial, told the affiant "that he had come from home to hang every damned counterfeiting rascal, and that he was determined to hang [the defendant] at all events."¹⁸² The state opposed the motion on the ground that the affiant "was a man of a notorious bad character" who had been recently indicted for horse stealing.¹⁸³ The court, including Chief Justice Rutledge—one of the state's delegates to the Philadelphia Convention and a former associate Justice, and future Chief Justice, of the federal Supreme Court¹⁸⁴—referred to the affiant as a "witness" before deciding that, even if his credibility was in doubt, the court should "lean on the merciful side" and grant the motion for a new trial.¹⁸⁵ The court distinguished this case on the merits later that month, but not without again

[venue had been improper] To prepare for this objection, the prisoner's Counsel called two witnesses . . .").

¹⁷⁶ For historical accounts of Fries' Rebellion, see ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878*, at 69–77 (1988); WILLIAM W.H. DAVIS, *THE FRIES REBELLION 1798–99* (Arno Press & The N.Y. Times 1969) (1899); and John Adams, Proclamation Concerning the Insurrection in Pennsylvania (Mar. 12, 1799), *reprinted in* 9 *THE WORKS OF JOHN ADAMS* 174, 174–75 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854).

¹⁷⁷ *United States v. Fries*, 3 U.S. (3 Dall.) 515, 517, 9 F. Cas. 826, 918 (C.C.D. Pa. 1799) (No. 5126) (Iredell, Circuit Justice).

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* at 517 & n.* (emphasis added).

¹⁸⁰ *See id.* at 518. Judge Peters, the other presiding judge, thought Justice Iredell's decision was incorrect, but acquiesced to avoid delaying retrial. *See id.* at 518–19. On retrial, Fries was convicted and sentenced to hang, but President Adams pardoned him. *See* COAKLEY, *supra* note 176, at 76. Justice Chase's conduct during the retrial was one of the bases for his later impeachment. *See* *Case of Fries*, 9 F. Cas. 924, 934 (C.C.D. Pa. 1800) (No. 5127) (Chase, Circuit Justice).

¹⁸¹ *See* *State v. Hopkins*, 1 S.C.L. (1 Bay) 372 (1794).

¹⁸² *Id.* at 373.

¹⁸³ *Id.* at 374.

¹⁸⁴ *John Rutledge*, OYEZ, https://www.oyez.org/justices/john_rutledge [https://perma.cc/6A9W-MRZT] (last visited Jan. 21, 2026).

¹⁸⁵ *Hopkins*, 1 S.C.L. (1 Bay) at 373, 375. The defendant was acquitted at the second trial. *Id.* at 375.

referencing its duty to evaluate “the credibility of the *witnesses* brought forward in this manner.”¹⁸⁶

Second, the legal consequences of being a “witness” attached to those whose testimony was relevant only as aggravation or mitigation. In one 1796 case, a South Carolina court held that such testimony was inadmissible at trial and should instead be submitted to the judge at sentencing.¹⁸⁷ Nevertheless, the court was concerned about possible “failure[s] of justice” if witnesses did not attend sentencing, so it held that defendants were entitled to subpoenas “as a matter of right, to compel the attendance of *witnesses* on such occasions” to the same extent as for trial.¹⁸⁸ Not only did this court refer to sentencing witnesses as “witnesses,” but it also held that compulsory process rights—which are, like confrontation rights, tied to “witness” status¹⁸⁹—attached to such witnesses. Several antebellum cases also subjected witnesses to perjury prosecution for false testimony even where that testimony was only relevant to the punishment, rejecting arguments that the testimony was not material because it was not relevant to guilt.¹⁹⁰

The potential definitions of the word “witness,” its usage in connection with the criminal process, and the legal significance it carried for those who testified as to punishment make clear that sentencing proceedings sometimes feature “witnesses” within the meaning of the Sixth Amendment. That leaves only the question of whether the witnesses testify “against” the accused. The Supreme Court has sometimes used this language to permit testimony that would otherwise violate the Confrontation Clause,¹⁹¹ and it suggested obliquely in *Williams v. New York* that the probation officers at issue there “ha[d] not been trained to prosecute but to aid offenders.”¹⁹² Simply put, the “against” limitation must be taken seriously.

The key to understanding the “against” language lies in “[t]he contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause.”¹⁹³ Whereas the Confrontation Clause speaks of “witnesses against” the accused, the Compulsory

¹⁸⁶ *State v. Duestoe*, 1 S.C.L. (1 Bay) 377, 380 (1794) (emphasis added).

¹⁸⁷ *See State v. Smith*, 2 S.C.L. (2 Bay) 62, 62–63 (1796).

¹⁸⁸ *Id.* at 63 (emphasis added).

¹⁸⁹ *See* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining *witnesses* in his favor . . .” (emphasis added)). The South Carolina Constitution of the time did not contain a declaration of rights, so there is no text in the state constitution with which to compare. *See* S.C. CONST. of 1790.

¹⁹⁰ *See, e.g., Stephens v. State*, 31 Tenn. (1 Swan) 157, 158–59 (1851); *State v. Norris*, 9 N.H. 96, 100 (1837); *State v. Keenan*, 42 S.C.L. (8 Rich.) app. at 456, 458–59 (Ct. App. 1832).

¹⁹¹ *See, e.g., Samia v. United States*, 599 U.S. 635, 643–44 (2023).

¹⁹² 337 U.S. 241, 249–50 (1949). There is palpable irony, of course, in applying this logic in *Williams* itself, being that it was a capital case. *See id.* at 242. Whatever may be said for capital punishment, it can hardly be thought to “aid” the defendant.

¹⁹³ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009).

Process Clause speaks of “witnesses in his favor.”¹⁹⁴ This symmetry suggests that the Amendment “contemplates” *only* “two classes of witnesses.”¹⁹⁵ In Justice Scalia’s words, “there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.”¹⁹⁶ This analysis is confirmed by Founding-era usage. For instance, a leading evidence treatise from the era repeatedly refers to rules prohibiting a person from testifying “for or against” a party synonymously with rules providing that a person “cannot be witness.”¹⁹⁷

Consider also the discussion in *Respublica v. Shaffer*,¹⁹⁸ a prominent Pennsylvania case decided just three years before the Sixth Amendment was ratified. The question in *Shaffer* was whether “testimony in favor of the party charged” could be heard by a *grand* jury in deciding whether to return a presentment.¹⁹⁹ In holding that it could not, Chief Justice McKean observed that, whereas the grand jury was to consider only “the nature and probable grounds of the charge,” the petit jury was to assess guilt “on the whole evidence, for, as well as against,” the defendant.²⁰⁰ Thus, the grand jury could not lawfully “examine the witnesses on both sides.”²⁰¹ By presuming that “the whole evidence” included only evidence “for, as well as against” the defendant, and especially by presuming that there were only two “sides” for which a witness could testify, *Shaffer* confirms the for-against dichotomy.²⁰² Similarly, when the Senate in 1798 considered a bill that would have regulated the procedure for trying impeachments, an amendment was proposed—though ultimately rejected—that specified who should receive a copy of subpoenas for “witnesses against the party impeached” and who should receive a copy of subpoenas for “witnesses in favor of the impeached party.”²⁰³ The proposed amendment made no provision for, or mention of, any other category of witness.²⁰⁴ Later in the antebellum period, Justice Story, in discussing the Compulsory Process Clause, similarly described the consideration of “proofs in favour, as well as against, the party.”²⁰⁵

¹⁹⁴ U.S. CONST. amend. VI.

¹⁹⁵ *Melendez-Diaz*, 557 U.S. at 313–14.

¹⁹⁶ *Id.* at 314.

¹⁹⁷ See GILBERT, THE LAW OF EVIDENCE 119–144 (Philadelphia, Joseph Cruikshank 5th ed. 1788).

¹⁹⁸ 1 U.S. (1 Dall.) 236 (Pa. Ct. Oyer & Terminer 1788).

¹⁹⁹ *Id.* at 236.

²⁰⁰ *Id.* at 237.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ 7 ANNALS OF CONG. 509 (1798).

²⁰⁴ See *id.*

²⁰⁵ 3 STORY, *supra* note 63, § 1786, at 664.

Where in this dichotomy a particular witness fell seems to have hinged on who solicited the witness's testimony.²⁰⁶ In the civil case of *Gilchrist v. Williams*,²⁰⁷ for instance, the defendant deposed a witness but decided not to use the deposition testimony, despite the plaintiff's counsel having waived the right to have the witness testify at trial.²⁰⁸ Instead, the *plaintiff* introduced the deposition testimony, and the defendant objected that the witness had not been brought into court or shown to be unavailable.²⁰⁹ The court dismissed the defendant's claim that the plaintiff should have been required to produce the witness, explaining that "the reason why one party may demand the production in person of his adversary's witness is, that he may be confronted, interrogated and shewn before the jury, in order that his testimony may be critically examined or impeached."²¹⁰ "This," the court reasoned, the defendant "had no need of," because he "had made [the witness] his own"—despite the witness's testimony ultimately being introduced by the plaintiff.²¹¹

It is also worth noting that application of the Confrontation Clause at sentencing harmonizes nicely with the Court's holdings in *Estelle v. Smith*²¹² and *Mitchell v. United States*,²¹³ which held that the Fifth Amendment's Self-Incrimination Clause applies at sentencing.²¹⁴ Given the nearly identical language between the two clauses,²¹⁵ it would only make sense to interpret the phrases in tandem.²¹⁶ However, because this Article does not investigate whether *Estelle* and *Mitchell* were rightly decided as an originalist matter,²¹⁷ this argument's minor premise means it cannot carry great weight.

²⁰⁶ See Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 604 (1978) ("What distinguishes a witness 'against' the accused from a witness 'in his favor' is *not* the *content* of the witness' testimony but the *identity* of the party relying on his evidence.").

²⁰⁷ 10 Ky. (3 A.K. Marsh) 235 (1821).

²⁰⁸ See *id.* at 235–36.

²⁰⁹ *Id.* at 236.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² 451 U.S. 454 (1981).

²¹³ 526 U.S. 314 (1999).

²¹⁴ See *Estelle*, 451 U.S. at 463; *Mitchell*, 526 U.S. at 327.

²¹⁵ Compare U.S. CONST. amend. VI ("witnesses against him"), with *id.* amend. V ("witness against himself").

²¹⁶ See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 792–94 (1999).

²¹⁷ To my knowledge, no academic article or judicial opinion has addressed this question. Justices Scalia and Thomas both dissented in *Mitchell* but, in doing so, did not express a view on whether the Self-Incrimination Clause applies at sentencing, instead attacking the proposition that the Self-Incrimination Clause's original meaning forbade prosecutorial comment on a defendant's silence. See *Mitchell*, 526 U.S. at 332–36 (Scalia, J., dissenting); *id.* at 341–43 (Thomas, J., dissenting); see also *State v. Hoyle*, 2023 WI 24, ¶¶ 39–87, 406 Wis.2d 373, 399–422, 987 N.W.2d 732, 745–56 (Hagedorn, J., concurring) (making the same argument).

D. The Two-Tiered Sixth Amendment

Most of the foregoing discussion—specifically, Sections I.A and I.B—examines language that introduces the entire Sixth Amendment, not just the right to confrontation. It thus might suggest that *all* Sixth Amendment rights, including the right to trial by jury, apply to sentencing. That conclusion would be in tension with the longstanding practice of judges—rather than juries—making final sentencing determinations.²¹⁸ If that tension is irreconcilable, it may undermine this Article's analysis of the phrases "[i]n all criminal prosecutions" and "the accused."²¹⁹

The tension can be resolved in several ways. First, the presence of such a longstanding tradition may itself distinguish the Jury Clause from the Confrontation Clause, given the absence of an analogous historical practice of dispensing with confrontation.²²⁰ But besides the analytically dissatisfying nature of that resolution, it would be on relatively weak footing—as discussed below, the historical practices surrounding confrontation at sentencing are not entirely clear.²²¹ Alternatively, "an impartial jury"—the phrase in the Jury Clause that corresponds to "witnesses against him" in the Confrontation Clause—might provide a textual hook for declining to apply the jury-trial right at sentencing. But, at least on first glance, it is difficult to see how.²²²

²¹⁸ See, e.g., Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) ("American juries at the time of the adoption of the Bill of Rights played a minor role in sentencing. Instead, many—or perhaps most—sentences were set by judges, at their discretion, within broad statutory ranges."); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) ("The Sixth Amendment never has been thought to guarantee a right to a jury determination of [the] issue [of sentencing]."). This practice was not uniform, however, either at the Founding or subsequently. See *Jenia Iontcheva*, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 316–38 (2003) (chronicling the history of jury sentencing). For example, in 1796, Virginia became "the first state to formally adopt jury sentencing for all criminal offenses." *Id.* at 317; see Act of Dec. 15, 1796, ch. 2, § 15, 1796 Va. Acts 4, 5.

²¹⁹ See Bibas, *supra* note 4, at 1125–26 ("These forms of discretion coexisted with the Jury Clauses In other words, colonials treated judicial discretion to enhance misdemeanor sentences within broad ranges, and to reduce felony sentences, as consistent with the jury-trial guarantees. This broad judicial discretion undercuts the suggestion that sentencing was the sacred province of juries alone.").

²²⁰ Cf. *Argersinger v. Hamlin*, 407 U.S. 25, 29 (1972) (distinguishing, for other purposes, between the right to counsel and the right to trial by jury based on the latter's "different genealogy").

²²¹ See *infra* text accompanying notes 337–49.

²²² When juries did have a role at sentencing, such as under Virginia's 1796 statute, they were still known as juries. See § 15, 1796 Va. Acts at 5. For example, St. George Tucker wrote that "[i]n the federal courts, the judges fix the fine; but in the courts of the commonwealth, it is the province of the jury." 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES *380 n.12 (Philadelphia, William Young Birch & Abraham Small 1803). "Impartial" could perhaps mean only impartiality as to the guilt-innocence question. Chief Justice Marshall, for example, wrote that impartiality "is not to be expected . . . where the jurors, before they hear the testimony, have deliberately formed and

An additional textual clue, however, not only provides a ready reconciliation of this tension but also has potentially broader application for determining which Sixth Amendment rights apply at sentencing. Chief Justice Warren hinted at this clue in his concurrence in *Estes v. Texas*²²³:

Significantly, in the Sixth Amendment the words “speedy and public” qualify the term *trial* Thus, the Sixth Amendment, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a *trial*—a word with a meaning of its own.²²⁴

As Chief Justice Warren observed, some rights in the Sixth Amendment do not stand on their own, grammatically speaking. Instead, they modify the right to a “trial.” Frequently, summaries of the Sixth Amendment elide this point, describing the Amendment’s protections as a seven-²²⁵ or eight-fold²²⁶ list. Judge Román’s formulation is representative:

[T]he Sixth Amendment protects the accused’s right to a speedy trial, the right to a public trial, the right to a trial before an impartial jury drawn in a prescribed manner, the right to

delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him.” *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (Marshall, Circuit Justice). But that is a strained interpretation; Marshall also explained that “an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it.” *Id.*; see also Christopher Gore, Speech During Debates in the Convention of the Commonwealth of Massachusetts on the Adoption of the Federal Constitution (Jan. 30, 1788), in 2 ELLIOT’S DEBATES, *supra* note 104, at 112, 112 (“If the jury judge from any other circumstances but what are part of the cause in question, they are not impartial.”). And Blackstone’s discussion of juror partiality was not even limited to criminal cases, let alone to the specific question of guilt or innocence. See 3 BLACKSTONE, *supra* note 70, at *361–64 (discussing partiality requirements in civil cases); 4 BLACKSTONE, *supra* note 70, at *352 (“Challenges may here[—i.e., in criminal cases—]be made . . . for the very same reasons that they may be made in civil causes.”); see also Peña-Rodriguez v. Colorado, 580 U.S. 206, 231 (2017) (Thomas, J., dissenting) (“The Sixth Amendment’s specific guarantee of impartiality incorporates the common-law understanding of that term.”); Douglas Colby, Note, *Death Qualification and the Right to Trial by Jury: An Originalist Assessment*, 43 HARV. J.L. & PUB. POL’Y 815, 824 (2020) (concluding that “the original meaning of an ‘impartial jury’ as seen in early American case law may have been slightly broader than Blackstone’s criteria”).

²²³ 381 U.S. 532 (1965).

²²⁴ *Id.* at 559 (Warren, C.J., concurring).

²²⁵ See, e.g., *Smith v. N.Y. State Dep’t of Corr. Servs.*, No. 15-cv-3455, 2022 WL 17345055, at *5 (S.D.N.Y. Nov. 30, 2022).

²²⁶ See, e.g., *State v. Barry*, 352 P.3d 161, 170–71 (Wash. 2015).

notice, the right of confrontation, the right to compulsory process, and the right to assistance of counsel.²²⁷

Such lists handily and accurately convey the Amendment's protections. However, they lose some of the nuance in the Amendment's sentence structure. In that sentence structure, the Speedy Trial Clause, Public Trial Clause, and Jury Clause are not freestanding provisions, but rather modify the right to a "trial."²²⁸ Some of the Amendment's forebears make this even clearer by separating out the "trial" rights from the "prosecution" rights. For example, the New York ratification convention proposed an amendment providing in one sentence that "[t]rial should be speedy, public, and by an impartial Jury of the County where the Crime was committed" and, in a later sentence, listing rights—including notice, confrontation, compulsory process, and counsel—that applied "in all Criminal Prosecutions."²²⁹ New York's proposed amendment is unwieldy, clocking in at 232 words, and contains ingredients from our Fifth and Sixth Amendments.²³⁰ Congress's more concise version should not be read, however, to obscure the difference between trial and prosecution.²³¹

The Sixth Amendment's text and textual history thus support applying an additional limitation to the Speedy Trial, Public Trial, Jury, and Vicinage Clauses that does not apply to the Arraignment, Confrontation, Compulsory Process, and Counsel Clauses: The former apply only at "trial."²³² That raises the question: What is a "trial"?

²²⁷ *Smith*, 2022 WL 17345055, at *5.

²²⁸ See U.S. CONST. amend. VI. The Vicinage Clause and the requirement that the jury be "impartial," in turn, modify the Jury Clause. See *id.* For a sentence diagram of the Sixth Amendment making these connections clear, see Eugene R. Moutoux, *Sentences from the United States Constitution: Amendment 6*, GERMAN LATIN ENG.: 500 SENTENCE DIAGRAMS ENG. GRAMMAR & USAGE, <https://www.german-latin-english.com/diagramamend6.htm> [<https://perma.cc/D3GA-2TWC>] (last visited Jan. 21, 2026).

²²⁹ Ratification of the Federal Constitution by the State of New York (July 26, 1788), *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 174, 192–93 (Washington, Department of State 1894).

²³⁰ See *id.*

²³¹ For information on the influence of the amendments proposed by the New York convention, and other ratification conventions, see *HELLER*, *supra* note 40, at 28–29.

²³² It is true that "[t]he Court sometimes has referred to a defendant's right of confrontation as a 'trial right.'" *Kentucky v. Stincer*, 482 U.S. 730, 738 n.9 (1987); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) ("The opinions of this Court show that the right to confrontation is a *trial* right . . ."); *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."). In context, however, these statements do not actually limit the Clause to "trial," as that term is used in the Sixth Amendment, but only clarify that the right is to confront the witness before the finder of fact and that the Clause is neither satisfied nor offended by what occurs before the witness's testimony. See *Ritchie*, 480 U.S. at 52 (holding that the Confrontation Clause did not require pretrial discovery of witness's statements); *Barber*, 390 U.S. at 725 (holding that the opportunity for cross-examination at a preliminary hearing was not an adequate substitute for confrontation at trial); see also *California v. Green*, 399 U.S. 149, 157 (1970) ("[I]t is this literal

The Constitution's other uses of the word shed some light. Article I's Impeachment Clause, for instance, provides that an officer who is convicted in the Senate is "subject to Indictment, Trial, Judgment and Punishment, according to Law."²³³ This suggests that "trial" occurs after indictment but before judgment and punishment. Similarly, Blackstone lists "[t]rial, and conviction" as the seventh stage of the criminal process, after plea but before judgment.²³⁴ The Article III Jury Clause refers to "[t]he Trial of all Crimes,"²³⁵ suggesting a close connection between the trial and the underlying criminal offense. And in a similar vein, the first Federal Crimes Act referred to a "trial for proving the said indictment,"²³⁶ reinforcing this inference and tying it to the indictment, which in turn laid out "the time, and place, and nature, and circumstances, of the offence."²³⁷

Exactly which facts must be proved at trial remains intensely controversial.²³⁸ For our purposes, however, it suffices to say that a "trial" within the meaning of the Sixth Amendment is a proceeding that follows indictment but precedes sentencing, at which the truth of the allegation is decided by the finder of fact.²³⁹ The Sixth Amendment rights to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed"²⁴⁰ are limited to such a proceeding. The other Sixth Amendment rights have no such limitation and apply throughout a criminal prosecution.

right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause . . . "); *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) ("The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

²³³ U.S. CONST. art. I, § 3, cl. 7.

²³⁴ 4 BLACKSTONE, *supra* note 70, at *289. Between trial and judgment, Blackstone discussed benefit of clergy. *Id.*

²³⁵ U.S. CONST. art. III, § 2, cl. 3.

²³⁶ Crimes Act of 1790, ch. 9, § 29, 1 Stat. 112, 118.

²³⁷ 3 STORY, *supra* note 63, § 1779, at 658.

²³⁸ *Contrast Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt."), with *United States v. Taylor*, 596 U.S. 845, 874 n.1 (2022) (Alito, J., dissenting) ("It is questionable whether those cases [limiting enhanced sentences based on facts found by a judge] are consistent with the original meaning of the Sixth Amendment.").

²³⁹ *But see* Kristin Saetveit, Note, *Beyond Pollard: Applying the Sixth Amendment's Speedy Trial Right to Sentencing*, 68 STAN. L. REV. 481, 500 (2016) (disputing the historical basis for a trial-sentencing distinction).

²⁴⁰ U.S. CONST. amend. VI.

A fortunate byproduct of this reading is that it harmonizes existing understandings of which rights apply at sentencing. Thus far, the Supreme Court has held the right to counsel applicable to sentencing but the rights to a speedy trial and to trial by jury inapplicable.²⁴¹

Though a critical examination of those holdings is beyond the scope of this Article, each has at least some historical footing.²⁴² The Court has not addressed the applicability of other Sixth Amendment rights at sentencing,²⁴³ though one Founding-era state case intimated that the right to compulsory process applies at sentencing.²⁴⁴ Taken together, this area of Sixth Amendment jurisprudence has “been described as ‘confus[ed],’ ‘inconsistent,’ and ‘ad hoc.’”²⁴⁵ However, each data point fits neatly into the two-tiered reading discussed here. In the Sixth Amendment’s text, the right to a speedy trial and the right to trial by jury modify the right to a “trial,” and therefore can reasonably be limited to trial—as the Supreme Court has done.²⁴⁶ The rights to counsel and compulsory process, however, do not have this textual limitation, explaining why they might be applicable at sentencing when other rights are not.

This broader theory of Sixth Amendment applicability at sentencing is much more tentative than this Article’s narrower thesis about the Confrontation Clause. First, it relies on a contestable understanding of the scope of a “trial,” as that term is used in the Sixth Amendment. Second, it is possible that a close analysis of each Sixth Amendment right’s history—an analysis this Article undertakes only for the Confrontation Clause—would point in a different direction. At minimum, however, it suggests a principled textual distinction between various Sixth Amendment rights and provides a paradigm for future historical research. Moreover, it reinforces the applicability of the Confrontation Clause at sentencing by providing further evidence that the Sixth Amendment extends, at least in part, beyond trial.

* * *

²⁴¹ See *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (holding right to counsel applicable); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (holding right to trial by jury inapplicable); *Betterman v. Montana*, 578 U.S. 437, 439 (2016) (holding right to speedy trial inapplicable).

²⁴² See *supra* note 218 and accompanying text (discussing the long history of judicial sentencing); *infra* notes 471–73 and accompanying text (identifying examples of counsel performing functions typically associated with sentencing); *Betterman*, 578 U.S. at 442 (“Our reading comports with the historical understanding.”).

²⁴³ See Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1809 (2003) (“The Court has never discussed the application of the Sixth Amendment [notice] provision as such at a sentencing proceeding.”); *id.* at 1832 (“The Supreme Court has never held whether the public trial right applies to sentencing.”); *id.* at 1845 (“[N]either the Supreme Court nor the lower courts have directly expressed a view as to whether the Compulsory Process Clause applies at sentencing.”).

²⁴⁴ See *State v. Smith*, 2 S.C.L. (2 Bay) 62, 63 (1796).

²⁴⁵ Saetveit, *supra* note 239, at 496 (alteration in original) (footnotes omitted).

²⁴⁶ See *supra* note 241 and accompanying text.

As this Part has shown, the Sixth Amendment's text affords no basis for excluding sentencing from the Confrontation Clause's scope. Although other rights are limited to "trial," the right to confrontation is not. Nor does any other portion of the Amendment provide a textual hook for denying confrontation to sentencing-phase defendants. The next Part considers whether historical practice suggests any implicit limitation on the seemingly clear text.

II. HISTORICAL PRACTICE

"Scholars have proposed competing and potentially conflicting frameworks for" using historical practice to uncover original meaning.²⁴⁷ Answering those difficult questions is not only beyond the scope of this Article, but likely beyond the ability of any one person—least of all me. Nevertheless, because "[t]he limits on the permissible use of history may vary between these frameworks,"²⁴⁸ it is necessary to lay out a few principles to guide this Article's analysis of historical practice.

Crawford demonstrates two distinct ways in which historical practice can illuminate the Confrontation Clause's original meaning. First, historical practice can "provide evidence of meaning," helping to choose between competing linguistically permissible interpretations.²⁴⁹ This is the approach *Crawford* employed to define "witnesses."²⁵⁰ Second, historical practice can itself *provide* the original meaning. As Professors Barnett and Solum observed, "[s]ome constitutional provisions may point to tradition (or something very similar) as the content or substance of the provision."²⁵¹ If it is true that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law,"²⁵² then historical practice *is* the original meaning. This would justify an approach that treats historical practice as "a method for constitutional construction," rather than mere evidence²⁵³—precisely the sort of test *Crawford* prescribes for identifying exceptions to the Clause's usual requirements.²⁵⁴

²⁴⁷ N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 82 (2022) (Barrett, J., concurring).

²⁴⁸ *Id.*

²⁴⁹ Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 447 (2023).

²⁵⁰ See *Crawford v. Washington*, 541 U.S. 36, 50–53 (2004).

²⁵¹ Barnett & Solum, *supra* note 249, at 447. The most obvious example of this phenomenon is the Seventh Amendment's Preservation Clause, which explicitly incorporates "the rules of the common law." U.S. CONST. amend. VII.

²⁵² *Crawford*, 541 U.S. at 54.

²⁵³ Barnett & Solum, *supra* note 249, at 448.

²⁵⁴ See *Crawford*, 541 U.S. at 50–54.

In her brief but thoughtful concurring opinion in *Samia v. United States*,²⁵⁵ Justice Barrett considered the effects of these principles on historical analysis of the Confrontation Clause.²⁵⁶ She urged the Court to be more “discriminating” in its use of historical evidence, finding two flaws with the majority opinion.²⁵⁷ The first she labeled a “timing problem”: The evidence came from time periods “far too late to inform the meaning of the Confrontation Clause” during the Founding era.²⁵⁸ This echoes Judge Newsom’s famous warning against smuggling “latter-day-but-still-kind-of-old-ish understandings” into purportedly originalist analyses.²⁵⁹ The second was reliance on sources describing the common law of evidence rather than the Confrontation Clause.²⁶⁰ Mindful of these warnings, let us proceed to discuss the historical practice surrounding confrontation at sentencing and analogous proceedings.

A. Misdemeanor Sentencing

Modern sentencing proceedings have no perfect historical analogue. They are “new creatures.”²⁶¹ That is because Founding-era sentencing regimes were largely determinate. The criminal law “prescribed a particular sentence for each offense,” leaving judges “simply

²⁵⁵ 599 U.S. 635 (2023).

²⁵⁶ See *id.* at 655–57 (Barrett, J., concurring in part and concurring in the judgment).

²⁵⁷ See *id.*

²⁵⁸ *Id.* at 655.

²⁵⁹ See *United States v. Jimenez-Shilon*, 34 F.4th 1042, 1051 n.2 (11th Cir. 2022) (Newsom, J., concurring). A related question is which “founding” matters in state criminal cases: the initial Founding in the late eighteenth century that gave us the Bill of Rights, or the so-called “second founding” of Reconstruction, which gave us the Fourteenth Amendment, see generally ERIC FONER, *THE SECOND FOUNDING* (2019) (describing the enactment of the Reconstruction amendments as a “second founding” that fundamentally altered the character of the Constitution), by operation of which the Confrontation Clause applies against the states. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965). Justice Barrett flagged this issue in another thoughtful methodology-focused concurrence but did not attempt to resolve it. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 81–83 (2022) (Barrett, J., concurring). This Article will follow her example and not attempt to resolve the question. Instead, it will focus on the original meaning of the Confrontation Clause as of 1791, noting only that (1) it is possible the “correct” original meaning is the meaning as of 1868, not the meaning as of 1791, see Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1441 (2022) (“When the people adopted the Fourteenth Amendment, they . . . invested those original 1791 texts with new 1868 meanings.”), and (2) the Fourteenth Amendment may protect a right to confrontation independent of the Confrontation Clause, see Bernick, *supra* note 13, at 42–44. However, Professor Lawson has provided a thoughtful—albeit brief—discussion of this issue in the Confrontation Clause context. See Gary Lawson, *Confronting Crawford: Justice Scalia, the Judicial Methods, and the Adjudicative Limits of Originalism*, 84 U. CHI. L. REV. 2265, 2285–86 (2017).

²⁶⁰ See *Samia*, 599 U.S. at 656–57 (Barrett, J., concurring in part and concurring in the judgment).

²⁶¹ See *Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000) (Thomas, J., concurring).

to impose that sentence.”²⁶² In most cases, that sentence was death.²⁶³ Because of this determinate regime, a sentence, “though pronounced or awarded by the judges,” was “not their determination or sentence, but the determination and sentence of *the law*.”²⁶⁴ In many cases, therefore, there was no need for any proceedings or hearings to determine the appropriate sentence; that could be done by simply opening the statute book.

That was not true of all cases, however. In misdemeanor cases, the “species” of punishment was predetermined, but the “quantity or degree” was not.²⁶⁵ Though hanging, whipping, and pillory were among the available punishments, fines were “overwhelmingly the most common.”²⁶⁶ Imprisonment had only recently become a realistic option, having previously been impracticably expensive, and was not yet firmly established.²⁶⁷ When fixing the amount of a fine or the length of imprisonment, judges wielded significant discretion.²⁶⁸ When exercising this discretion, judges considered factors—such as “the aggravations or otherwise of the offence” and “the quality and condition of the parties”²⁶⁹—that would be right at home in modern sentencing.²⁷⁰ Decisions as to the appropriate sentence took place after conviction, at final judgment, and “promises” of particular fines were forbidden.²⁷¹ Misdemeanor sentencing decisions thus mirrored modern sentencing proceedings in both substance and timing, making them the closest Founding-era analogue.

I. The King v. Sharpness

Unfortunately, however, the applicability of confrontation rights at such proceedings is woefully unclear. One oft-cited case is *The King v.*

²⁶² John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 13, 36–37 (Antonio Padoa Schioppa ed., 1987).

²⁶³ See STUART BANNER, *THE DEATH PENALTY* 5 (2002) (“English colonists of the seventeenth and eighteenth centuries came from a country in which death was the penalty for a list of crimes that seems shockingly long today. . . . All became capital crimes in the American colonies as well.”).

²⁶⁴ 3 BLACKSTONE, *supra* note 70, at *396.

²⁶⁵ See 4 BLACKSTONE, *supra* note 70, at *377.

²⁶⁶ Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 350 (1982).

²⁶⁷ See JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 552 (5th ed. 2019).

²⁶⁸ See 4 BLACKSTONE, *supra* note 70, at *378–79 (describing how “unlimited the power of the court may seem” in such cases).

²⁶⁹ *Id.* at *378.

²⁷⁰ See 18 U.S.C. § 3553(a)(1)–(7) (requiring consideration of, inter alia, “the nature and circumstances of the offense[.] . . . the history and characteristics of the defendant,” and “the need to provide restitution to any victims of the offense”).

²⁷¹ 4 BLACKSTONE, *supra* note 70, at *379.

Sharpness,²⁷² a 1786 English decision. In *Sharpness*, the court permitted the prosecution to submit an affidavit in aggravation of the offense.²⁷³ At first blush, this would seem like game, set, match for confrontation rights at misdemeanor sentencing. A closer view, however, shows *Sharpness* to be of questionable authority. First, the affidavit at issue was from a witness who had testified—and, presumably, been subjected to cross-examination—at trial.²⁷⁴ It is unclear whether introducing an out-of-court statement from a witness who faced in-court cross-examination violates the Confrontation Clause. In another context, *California v. Green*²⁷⁵ held that it did not,²⁷⁶ and it is unclear whether *Green*'s holding would extend to a situation like *Sharpness*. Thus, the admission of the affidavit in *Sharpness* does not necessarily constitute a repudiation of the right to confrontation.

Second, two of the three judges in *Sharpness* “doubted” that the affidavit was admissible.²⁷⁷ Although Judges Willes and Ashhurst reportedly believed that *defendants* could offer mitigating evidence after trial via affidavit, “they had always been of opinion that the prosecutor must prove his whole case at the trial, and could not afterwards go into matter of aggravation.”²⁷⁸ After their colleague Judge Buller expressed his emphatic view to the contrary, they acquiesced in his opinion.²⁷⁹ Their concurrence seems to have been the product more of polite deference to their colleague than of their own analysis.

Other reasons to doubt *Sharpness*'s authority are extrinsic. It does not seem to have been influential in America; the earliest recorded citation to it did not occur for more than 220 years,²⁸⁰ and Justice Paterson in 1806 seemingly referred to cases like it as “anomalous.”²⁸¹ The best evidence suggests that the American view aligned with Judges Willes and Ashhurst's initial position, not their reluctant acquiescence. To understand that evidence, however, we must first cross not the Atlantic to America but the Irish Sea to Dublin to delve into a real-life soap opera so scandalizing that it purportedly inspired at least five novels.²⁸²

²⁷² (1786) 99 Eng. Rep. 1066; 1 T.R. 228 (KB).

²⁷³ See *id.* at 1066, 1 T.R. at 228.

²⁷⁴ *Id.*

²⁷⁵ 399 U.S. 149 (1970).

²⁷⁶ *Id.* at 159.

²⁷⁷ *Sharpness*, 99 Eng. Rep. at 1066, 1 T.R. at 228.

²⁷⁸ *Id.*

²⁷⁹ See *id.*, 1 T.R. at 229.

²⁸⁰ See *United States v. Fields*, 483 F.3d 313, 371 (5th Cir. 2007) (Benavides, J., dissenting in part from the judgment).

²⁸¹ *United States v. Smith*, 27 F. Cas. 1192, 1231 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice).

²⁸² See A. ROGER EKIRCH, *BIRTHRIGHT* xxi (2010). The most famous of these novels are *Kidnapped*, by Robert Louis Stevenson, and *Guy Mannering*, by Sir Walter Scott. See *id.*

2. Anglesea's Case

The tale is complicated, so this section will summarize it briefly, touching on only the highlights and most relevant portions. Our story begins with Arthur Annesley, the fourth Baron Altham.²⁸³ In 1715, Arthur fathered a son, James.²⁸⁴ Shortly after his father's death in 1727, twelve-year-old James was kidnapped and sold into indentured servitude on an American plantation, allegedly on the orders of his uncle, Richard.²⁸⁵ With James out of the picture, Richard was next in line for Arthur's estates and titles.²⁸⁶ Twelve years later, James—on his third attempt—escaped the plantation and fled to Jamaica.²⁸⁷ After a year in the Royal Navy,²⁸⁸ he made his way to England,²⁸⁹ where Richard attempted, unsuccessfully, to frame him for murder.²⁹⁰ In 1742, he returned at last to Ireland where he pressed his claim to be his father's true heir in place of his uncle.²⁹¹

James and Richard's feud resulted in several rounds of litigation.²⁹² One of these cases—known as the *Annesley* peerage trial,²⁹³ which was to resolve the dispute over Arthur's title and estates—was to that point “the longest trial ever known, lasting 15 days,” and the jurors were “almost all members of [P]arliament.”²⁹⁴ The litigation relevant for our purposes, which will be referred to as *Anglesea's Case*,²⁹⁵ was a criminal prosecution of Richard and several of his supporters for assaulting James and several of his supporters at a horse race.²⁹⁶ The crucial moment occurred at the beginning of trial when counsel for James and his supporters—acting, as was common at the time, in the role of prosecutor²⁹⁷—proposed to present evidence of Richard's apparent intention to have James killed.²⁹⁸ Defense counsel objected, arguing that this evidence was irrelevant to the crime charged.²⁹⁹ Prosecution

²⁸³ See *id.* at xxvii.

²⁸⁴ See *id.* at 36.

²⁸⁵ See *id.* at 12–13, 73.

²⁸⁶ See *id.* at 60–61.

²⁸⁷ See *id.* at 91–93.

²⁸⁸ See *id.* at 94.

²⁸⁹ See *id.* at 96.

²⁹⁰ See Earnan P. Blythe, *The Annesley Peerage Trial. (A Historical Detective Story)*, 18 DUBLIN HIST. REC. 2, 3–4 (1962).

²⁹¹ See EKIRCH, *supra* note 282, at 122–23.

²⁹² See Blythe, *supra* note 290, at 3.

²⁹³ *Annesley v. Earl of Anglesea (Annesley Peerage Trial)* (1743) 17 How. St. Tr. 1139 (Ir. Exch.).

²⁹⁴ *Id.* at 1139 n*.

²⁹⁵ (1744) 18 How. St. Tr. 197 (Ir. Assize).

²⁹⁶ See Blythe, *supra* note 290, at 4–5.

²⁹⁷ See J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 35 (1986).

²⁹⁸ See *Anglesea's Case*, 18 How. St. Tr. at 198–99.

²⁹⁹ See *id.* at 199.

counsel argued that the evidence should be admitted because of its relevance to the punishment:

I was going on, as I apprehended I had a right to do, and as I have observed to be the constant practice in all cases of this kind, not to confine myself to the bare assault, but to shew it in all its concomitant circumstances, that the whole truth of the fact may appear to the Court; *and the reason why experience justifies every body to do this is, because the fine which the Court is to impose is discretionary, and will be greater or less in proportion to the nature of the offence; and therefore every thing is proper to be laid before the Court, that may be an ingredient in their consideration for the imposing that fine.*³⁰⁰

The court permitted the evidence for this reason but promised to instruct the jury “that the single point they are to consider is the fact of the assault only.”³⁰¹ The testimony was admitted and subjected to extensive cross-examination,³⁰² at the conclusion of which defense counsel complained that such a minor offense had “been heightened into a crime of a most enormous size.”³⁰³ Ultimately, the defendants were convicted of most counts,³⁰⁴ and the court remarked on the “great aggravation” of Richard’s offense.³⁰⁵

3. United States v. Smith

Anglesea’s Case thus provides an example of aggravating evidence being presented by live testimony during trial. Its relevance to the question of aggravating evidence presented via out-of-court statements *after* trial comes from the discussion of it in *United States v. Smith*,³⁰⁶ an American case of an equally high profile.

After years spent seeking American and British support for his dream of leading a military expedition to free his native Venezuela from Spanish rule, General Francisco de Miranda was able at last to secure a series of meetings with President Jefferson and Secretary of State Madison in late 1805.³⁰⁷ The content of these meetings remains “shrouded in controversy,” but Miranda reportedly told friends that the Jefferson

³⁰⁰ *Id.* (emphasis added).

³⁰¹ *Id.* at 200.

³⁰² *See id.* at 244–56.

³⁰³ *Id.* at 257.

³⁰⁴ *Id.* at 267, 274, 280, 287. All defendants were acquitted, however, of the assault on James, on the theory that his injuries were caused by falling from his horse, which was too attenuated from the defendants’ actions. *See id.* at 287; Blythe, *supra* note 290, at 5.

³⁰⁵ *Earl of Anglesea*, 18 How. St. Tr. at 289.

³⁰⁶ 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice).

³⁰⁷ *See* Robert J. Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 310–11 (1975).

Administration supported his campaign, though it could not do so openly.³⁰⁸ With the help of Colonel William S. Smith, a son-in-law of John Adams, and a merchant named Samuel Ogden, Miranda recruited approximately 200 men and set out for Venezuela.³⁰⁹ The expedition was, as one historian put it, “a complete failure”; Spain learned of the plot and intercepted Miranda’s ship before it reached South America.³¹⁰ Whether truthfully or simply to minimize the conflict with Spain—and France, which was allied with Spain—Jefferson and Madison denied all involvement and ordered the United States Attorney to prosecute all Americans involved.³¹¹

In 1806, Smith and Ogden were both indicted for violating the Neutrality Act of 1794,³¹² which made it a “high misdemeanor” to participate in a military expedition against any country “with whom the United States are at peace.”³¹³ Before trial, the defendants subpoenaed four cabinet members: Madison, War Secretary Henry Dearborn, Navy Secretary Robert Smith, and Treasury Secretary Albert Gallatin.³¹⁴ With trial set to begin, however, none were present.³¹⁵ Invoking the constitutional right to compulsory process, defense counsel moved for attachments to compel Secretaries Madison and Smith, along with two other witnesses, to attend.³¹⁶ Justice Paterson ruled, however, that attachment was warranted only if the defendants could “show in what respect the witnesses [were] material.”³¹⁷

To satisfy that burden, Smith executed an affidavit saying that these witnesses’ testimony would show that the expedition was carried on with Jefferson and Madison’s “knowledge and approbation.”³¹⁸ Counsel argued that President Jefferson’s approval was material under either

³⁰⁸ *Id.* at 311.

³⁰⁹ *See id.* at 311–12.

³¹⁰ *Id.* at 312.

³¹¹ *See id.*

³¹² Neutrality Act of 1794, ch. 50, 1 Stat. 381; *see* Reinstein, *supra* note 307, at 312. For a record of the indictments, see THOMAS LLOYD, *THE TRIALS OF WILLIAM S. SMITH, AND SAMUEL G. OGDEN* vi–xi (New York, I. Riley & Co. 1807). Lloyd provides a full stenographic transcript of the trials. Key portions are also reprinted in the Federal Cases reporter. *See* *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice). For ease of reference, this Article will cite primarily to the Federal Cases edition, citing to the full transcript only for material not included in the Federal Cases report.

³¹³ Neutrality Act § 5, 1 Stat. at 384.

³¹⁴ *See* LLOYD, *supra* note 312, at 1–2.

³¹⁵ *Id.*

³¹⁶ *Smith*, 27 F. Cas. at 1192.

³¹⁷ *Id.* at 1195; *see also* *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (holding that to show a violation of the Compulsory Process Clause, a defendant “must at least make some plausible showing of how [the witnesses’] testimony would have been both material and favorable to his defense”).

³¹⁸ *Smith*, 27 F. Cas. at 1196.

of two theories: first, as a “complete justification” of the offense, and second, “in mitigation of the punishment.”³¹⁹ Justice Paterson rejected both arguments,³²⁰ but the portion of his opinion rejecting the second argument—that Jefferson’s alleged approval was relevant to the punishment—is where this Article’s interest lies. Though the government contested the idea that presidential approval could mitigate the punishment,³²¹ the greater part of the argument hinged on whether evidence relevant only to the punishment could be admitted at trial.

In arguing that it could, defense counsel relied heavily on *Anglesea’s Case*, reasoning that “if circumstances in aggravation may be offered on the trial of the issue,” as they were in *Anglesea’s Case*, then “it must be lawful to give in evidence circumstances of mitigation.”³²² The government put forward a different interpretation, arguing that the aggravating evidence in *Anglesea’s Case* was introduced only in “[an] attempt[] to show the nature of the crime charged.”³²³ The defense pointed out that, if that were so, Richard’s counsel would have had no cause to object and that this argument ran headlong into another Irish case,³²⁴ *The King v. Mockler*,³²⁵ in which the defendant was permitted to introduce evidence of his good character because “the punishment was not certain, but discretionary in the court.”³²⁶

Ultimately, Justice Paterson declined to decide which view of *Anglesea’s Case* was correct.³²⁷ Instead, he reasoned that even if the evidence there was admitted purely in aggravation, that did not show that purely *mitigating* evidence could be admitted at trial.³²⁸ Rather, aggravating evidence might be introduced only because “according to the practice of Westminster Hall, matter in aggravation . . . are not usually laid before the court after conviction, in order to increase the punishment.”³²⁹ In drawing this aggravation-mitigation distinction, Justice Paterson showed that the American understanding of British practice aligned with Judges Willes and Ashhurst’s initial understanding in *Sharpness*.³³⁰ He described the inadmissibility of aggravating evidence as “a humane practice, and in favor of the offender,” but described cases

³¹⁹ *Id.* at 1198–99.

³²⁰ *See id.* at 1231.

³²¹ *See id.* at 1204.

³²² *Id.* at 1199.

³²³ *Id.* at 1213–14.

³²⁴ *See id.* at 1221.

³²⁵ LEONARD MACNALLY, *THE RULES OF EVIDENCE ON PLEAS OF THE CROWN* 320 (London, J. Butterworth 1802).

³²⁶ *Id.*

³²⁷ *See Smith*, 27 F. Cas. at 1231.

³²⁸ *See id.*

³²⁹ *Id.*

³³⁰ *See supra* notes 277–79 and accompanying text.

like *Sharpness* that had admitted such evidence as “anomalous cases to the contrary.”³³¹

4. Other Evidence

The other American evidence, though sparse, is consistent with Justice Paterson’s view. In *State v. Johnston*,³³² for example, the court rejected the state’s argument that it was generally permissible for “the character of a defendant to be shewn by affidavits, in order to enhance the fine.”³³³ Though the court left open the possibility of allowing such evidence “relative to the matter for which the defendant ha[s] been convicted”—where it would be admissible at trial—it rejected the notion of allowing such evidence to prove “independent facts.”³³⁴ Until 1846, there was no American decision approving the consideration of affidavits to increase the punishment after trial—and then only in dicta.³³⁵

* * *

Because of the close analogy between Founding-era misdemeanor sentencing and modern sentencing, evidence in this category has a high potential for probative value. Unfortunately, the absence of strong authority as to whether confrontation rights attached to such proceedings—and the conflict between the authorities that do exist—means that potential is largely unrealized. Gleaning any information from this analogy requires weighing *Sharpness* against *Smith*.

As discussed previously, two key considerations in weighing evidence about historical practices are how directly the evidence addresses the provision at issue and how close in time it was to ratification.³³⁶ Neither case addresses the Confrontation Clause directly—and indeed, *Sharpness* (an English case) could not have done so—so they both fare poorly on that prong of the analysis.³³⁷ On the other hand, both are close in time to the adoption of the Sixth Amendment, with *Sharpness* decided five years prior and *Smith* fifteen years after, so both score highly on that prong. *Sharpness*’s slightly closer temporal proximity may be a minor point in its favor.³³⁸ That advantage is undermined, however, by its Britishness. The Confrontation Clause is intimately connected

³³¹ *Smith*, 27 F. Cas. at 1231.

³³² 2 N.C. (1 Hayw.) 293 (1796).

³³³ *Id.* at 294.

³³⁴ *Id.* at 294–95.

³³⁵ See *People v. Taylor*, 3 Denio 91, 97 (N.Y. 1846).

³³⁶ See *supra* notes 257–60 and accompanying text.

³³⁷ See *Smith*, 27 F. Cas. 1192; *The King v. Sharpness* (1786) 99 Eng. Rep. 1066; 1 T.R. 228 (KB).

³³⁸ See *Smith*, 27 F. Cas. at 1192; *Sharpness*, 99 Eng. Rep. at 1066, 1 T.R. at 228.

with the adversary system of criminal procedure.³³⁹ And, as Professor Jonakait has documented, that system did not fully emerge in England until “[w]ell into the nineteenth century,” long after *Sharpness*.³⁴⁰ The American adversary system, however, “was widely in operation before the nineteenth century began,” and fully “entrenched” in New York City, where *Smith* was tried, “at least by 1810.”³⁴¹ England’s time lag, Professor Jonakait warns, “indicates that the focus should not be on English but on American history when Sixth Amendment rights are interpreted.”³⁴²

A point that clearly favors *Sharpness*, by contrast, is that its position was part of its holding, rather than merely dicta, as in *Smith*.³⁴³ But a point against it is that it received little, if any, attention in America, and it was not cited by any American jurist until 2007.³⁴⁴ *Smith*, by contrast, was a *cause célèbre*. The trial “attracted great public attention, and the courtroom was packed each day with notable observers, including the vice-president,”³⁴⁵ and the attorneys called the court’s attention to the immense public intrigue.³⁴⁶ Within a year of the trial, a full transcript was publicly available.³⁴⁷ And even today, Justice Paterson’s opinion is cited in debates over the scope of executive power.³⁴⁸

On balance, *Smith* is slightly more persuasive. After all, “the best sources of American viewpoints and ideas are American cases, not English cases.”³⁴⁹ At the end of the day, however, neither is strong

³³⁹ See generally Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995) [hereinafter Jonakait, *Origins*] (arguing that the American adversarial system developed independently from the English system).

³⁴⁰ Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 323 (2009) [hereinafter Jonakait, *America Before England*].

³⁴¹ *Id.* at 334, 352.

³⁴² *Id.* at 355.

³⁴³ See *Sharpness*, 99 Eng. Rep. at 1066, 1 T.R. at 229; *Smith*, 27 F. Cas. at 1131.

³⁴⁴ See *United States v. Fields*, 483 F.3d 313, 371 (5th Cir. 2007) (Benavides, J., dissenting in part from the judgment).

³⁴⁵ Reinstein, *supra* note 307, at 343.

³⁴⁶ See *Smith*, 27 F. Cas. at 1206 (prosecution describing “[t]he vast concourse of people who have constantly attended these trials in every stage of their progress”); *id.* at 1215 (describing “the interest and anxiety which, from the number and respectability of the audience, it is manifest that this cause has excited in the public mind”).

³⁴⁷ See LLOYD, *supra* note 312.

³⁴⁸ See, e.g., *United States v. Texas*, 599 U.S. 670, 734 (2023) (Alito, J., dissenting); *Texas v. Biden*, 20 F.4th 928, 981 (5th Cir. 2021), *rev’d*, 597 U.S. 785 (2022); Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197, 223–24 (2020); Apr. 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 42 Op. O.L.C. 39, 46 (2018); The President’s Const. Auth. to Conduct Mil. Operations Against Terrorists & Nations Supporting Them, 25 Op. O.L.C. 188, 200–01 (2001); Reinstein, *supra* note 307, at 310.

³⁴⁹ Randolph N. Jonakait, *The (Futile) Search for a Common Law Right of Confrontation: Beyond Brasier’s Irrelevance to (Perhaps) Relevant American Cases*, 15 J.L. & POL’Y 471, 473 (2007) [hereinafter Jonakait, *Futile Search*].

authority, and thus this analogue, though close, sheds little light on the Confrontation Clause's original meaning.

B. *Pardons and Pious Perjury*

Formally, the eighteenth-century Anglo-American sentencing system was determinate and notoriously harsh. The sentence attached to a crime was typically fixed in advance.³⁵⁰ And death was the only authorized punishment “for a list of crimes that seems shockingly long today.”³⁵¹ For many Englishmen and colonists, this proved too much to stomach. Though perhaps more punitive than today's generation, they nevertheless “felt a distinct shock when boys and girls too young to make valid contracts, or wretchedly poor persons[,] were hanged for the theft of a few shillings.”³⁵² As a result, the seemingly highly determinate “Bloody Code” regime was in practice “shot through with discretionary powers.”³⁵³ As one commentator observed, “it could hardly have worked had it not been.”³⁵⁴

“[G]enuinely contested inquiries into guilt or innocence” were rare, occurring in “[o]nly a small fraction of eighteenth-century criminal trials.”³⁵⁵ The remaining trials were, in effect, sentencing hearings, in which the defense's main goal was to present “a sympathetic view of the offender and of the circumstances of the crime that would encourage . . . mitigation.”³⁵⁶ If they were sufficiently motivated—which they often were³⁵⁷—both juries and judges were empowered to interpose between a sympathetic defendant and the harshness of the criminal law.³⁵⁸

³⁵⁰ See *supra* notes 262–64 and accompanying text.

³⁵¹ BANNER, *supra* note 263, at 5.

³⁵² Max Radin, Book Review, 40 J. CRIM. L. & CRIMINOLOGY 494, 495 (1950) (reviewing LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* (1948)).

³⁵³ BEATTIE, *supra* note 297, at 406.

³⁵⁴ *Id.*

³⁵⁵ LANGBEIN, *supra* note 136, at 59; see also John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 279 (1978) [hereinafter Langbein, *Before the Lawyers*] (“[T]he [Old Bailey Sessions Papers] report countless instances in which guilt was only nominally contested . . .”).

³⁵⁶ LANGBEIN, *supra* note 136, at 59.

³⁵⁷ See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 52–55 (1983) [hereinafter Langbein, *Shaping*] (finding that juries departed downward in approximately one quarter of cases, including “all but invariably” in pickpocket cases); Simon Devereaux, *Execution and Pardon at the Old Bailey 1730–1837*, 57 AM. J. LEGAL HIST. 447, 463 (2017) (collecting data comparing the number of capital cases considered for pardon with the number of executions carried out, and demonstrating that approximately 40% of those considered for pardon escaped execution).

³⁵⁸ See BEATTIE, *supra* note 297, at 420–21 (“Jurors and judges were both agents in this manipulation; both possessed discretionary powers that enabled them to temper the application of the law so as to achieve a result that seemed appropriate.”).

For juries, this discretion came in the form of what Blackstone termed “pious perjury.”³⁵⁹ Though the fixed nature of punishments contributed to the harshness of the criminal law, it was also susceptible to manipulation. Consider, for example, a defendant charged with shoplifting goods valued at five shillings. This would have been a capital offense.³⁶⁰ If the value of the goods was just one pence less, however, the defendant would have been eligible to receive the benefit of clergy,³⁶¹ whereby they would be “discharged from the sentence of the law in the king’s courts, and delivered over . . . to be dealt with according to the ecclesiastical canons.”³⁶² Jurors, who were typically aware of this disparity,³⁶³ did not face a binary choice of “guilty” of the charge in the indictment, resulting in a death sentence, and “not guilty,” resulting in no punishment at all. Instead, they had a third option: “guilty of a lesser offense.”³⁶⁴

Juries therefore wielded the enormous power to “mitigate the law by finding the accused guilty of a lesser charge.”³⁶⁵ As Professor Beattie put it, “‘pious perjury’ was a central element of criminal administration throughout the [eighteenth] century.”³⁶⁶ He found such partial verdicts in approximately one-eighth of the cases in his sample from Surrey County in the years 1740–1779, though the frequency fell to approximately one in thirteen cases in the years 1780–1802.³⁶⁷ In a smaller study of cases from London’s Old Bailey in the 1750s, Professor Langbein found partial verdicts in about a quarter of cases.³⁶⁸ As Langbein explained, everyone involved “understood that the value that the jury assigned was fictional, and that the jury was in truth deciding whether to rescue the culprit from the ordinary sanctions of transportation and death by so characterizing the crime that only a lesser sanction could be invoked.”³⁶⁹

Juries did not make these decisions at random. Rather, they “distinguished” — much as a modern sentencing court would — “first, according to the seriousness of the offense, and second, according to the conduct

³⁵⁹ 4 BLACKSTONE, *supra* note 70, at *238. Modern scholars often use the term “partial verdicts.” See, e.g., BEATTIE, *supra* note 297, at 419–30; Langbein, *Shaping*, *supra* note 357, at 52–55.

³⁶⁰ See BEATTIE, *supra* note 297, at 424.

³⁶¹ *Id.*

³⁶² 4 BLACKSTONE, *supra* note 70, at *368.

³⁶³ See BEATTIE, *supra* note 297, at 425 (explaining that, because of “the previous experience of several of the jurors . . . they knew the options in all but the trickiest cases, and they would not need to be told the law”).

³⁶⁴ *Id.* at 419–20.

³⁶⁵ Harriet Evans, *The Bloody Code*, 2 U. MANCH. STUDENT L. REV. 28, 31 (2013).

³⁶⁶ BEATTIE, *supra* note 297, at 424.

³⁶⁷ See *id.* at 419 n.32.

³⁶⁸ See Langbein, *Shaping*, *supra* note 357, at 52.

³⁶⁹ Langbein, *Before the Lawyers*, *supra* note 355, at 303–04 (footnote omitted).

and character of the accused in a particular case.”³⁷⁰ In evaluating that information, they were limited to the information presented at trial.³⁷¹ Indeed, because in many cases a guilty verdict of some sort was “inevitable,” the sole purpose of the trial was to allow the jury to determine whether capital punishment was appropriate.³⁷² And, of course, trial evidence was subject to confrontation; I have not been able to locate any case from this period where uncontroverted trial evidence was permitted on the theory that it was relevant only to the punishment.³⁷³

Judges, too, could mitigate the harshness of the criminal law through their “considerable discretionary power to reprieve a convicted offender and recommend him for a royal pardon.”³⁷⁴ A reprieve was, as Blackstone defined it, “the withdrawing of a sentence for an interval of time; whereby the execution is suspended.”³⁷⁵ Reprieves were often granted “to give room to apply to the crown for either an absolute or conditional pardon.”³⁷⁶ Conditional pardons are particularly relevant to this analysis, because they could be used to impose an alternative sentence, such as imprisonment or transportation.³⁷⁷

Blackstone emphasized that, formally speaking, pardons were the “prerogative of the crown,” and that “no other person hath power to pardon or remit any treason or felonies whatsoever.”³⁷⁸ The crown, however, relied heavily on the recommendation of the presiding judges to determine who should be pardoned absolutely, who should be pardoned conditionally, and who should be left to hang.³⁷⁹ Pardon recommendations were therefore “a regular feature of the criminal procedure” of the eighteenth century.³⁸⁰ They were also almost universally followed; by the middle of the eighteenth century, they had taken on an “automatic character,” and a judge’s “reprieve was almost certain to result in a pardon.”³⁸¹

³⁷⁰ Langbein, *Shaping*, *supra* note 357, at 53.

³⁷¹ See LANGBEIN, *supra* note 136, at 59.

³⁷² *Id.*

³⁷³ Indeed, as noted above, witnesses who gave such evidence falsely were still subject to perjury prosecutions. See *supra* note 190 and accompanying text.

³⁷⁴ BEATTIE, *supra* note 297, at 430.

³⁷⁵ 4 BLACKSTONE, *supra* note 70, at *394.

³⁷⁶ *Id.*; see also BEATTIE, *supra* note 297, at 431 (“Most reprieves were more directly for such a purpose: to allow the king to show mercy if he chose to.”).

³⁷⁷ See 4 BLACKSTONE, *supra* note 70, at *401.

³⁷⁸ *Id.* at *396–97.

³⁷⁹ See BEATTIE, *supra* note 297, at 431–32.

³⁸⁰ LANGBEIN, *supra* note 136, at 60 (footnote omitted); see also BEATTIE, *supra* note 297, at 431 (“By the late seventeenth century pardons had become a fundamental element in the administration of the criminal law.”).

³⁸¹ BEATTIE, *supra* note 297, at 432 & n.49.

Although reprieves were “arbitrary,”³⁸² pardon recommendations were sometimes, though not always, supported by written rationales.³⁸³ From these, we can glean a great deal about the factors judges considered in making these decisions. Broadly speaking, they considered the same “factors that ethical sentencing officers still consult.”³⁸⁴ Professor King studied every surviving report from the years 1787 and 1790, a total of 136, and found that the most prominent mitigating factors were the defendant’s good character, youth, and lack of a prior criminal record.³⁸⁵ By contrast, the most prominent aggravating factors were the need to set an example to the public; the defendant’s previous bad character; and the violence, dishonesty, or other aggravating circumstances present in the commission of the offense.³⁸⁶ Each of these factors would be perfectly at home in a modern sentencing decision.

In deciding whether to grant reprieve and recommend a pardon, judges were limited to the evidence presented at trial.³⁸⁷ Indeed, both Beattie and Langbein have attributed judges’ extreme reticence to accept guilty pleas to their desire for evidence to inform their recommendations.³⁸⁸ In one 1743 case, the defendant asked to change his plea to guilty, in the hope that he would “be recommended to his Majesty’s Mercy.”³⁸⁹ The court “informed him, if there were any favourable circumstances in his Case, if he pleaded guilty, the Court could not take any Notice of them.”³⁹⁰ Even more dramatically, Beattie recounts a judge informing the secretary of state that he had left a convicted defendant to be executed because he had pleaded guilty, thus “shut[ting] out” the judge “from all evidence and circumstances favourable and disfavoured which might have appeared.”³⁹¹ And again, I have found no case

³⁸² 4 BLACKSTONE, *supra* note 70, at *394.

³⁸³ Beattie emphasizes that judges “were not required to justify these decisions, nor to send in explanations.” BEATTIE, *supra* note 297, at 432. Nevertheless, “[a] large number of judge’s reports . . . have survived in the eighteenth-century papers of the department of state.” Peter King, *Decision-Makers and Decision-Making in the English Criminal Law, 1750–1800*, 27 HIST. J. 25, 42 (1984).

³⁸⁴ Langbein, *Shaping*, *supra* note 357, at 30.

³⁸⁵ See King, *supra* note 383, at 43.

³⁸⁶ *Id.*

³⁸⁷ See LANGBEIN, *supra* note 136, at 61 (“In administering the pardon process, the judge depended upon information gleaned at trial for his view of the offender.”).

³⁸⁸ See *id.* at 20, 61; J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 232 (1991).

³⁸⁹ R v. Wright, No. 163, 3 OLD BAILEY PROCS., Feb. 23, 1743, at 115, 115 (Eng. K. Comm’n P.), <https://www.oldbaileyonline.org/record/17430223> [https://perma.cc/SAG2-XLDN].

³⁹⁰ *Id.* For additional discussion of this trial, see Langbein, *Before the Lawyers*, *supra* note 355, at 278.

³⁹¹ J.M. Beattie, *Crime and the Courts in Surrey 1736–1753*, in CRIME IN ENGLAND 1550–1800, at 167, 173 (J.S. Cockburn ed., 1977).

indicating that confrontation was dispensed with when the evidence was only relevant for punishment.³⁹²

Because these *de facto* sentencing decisions by judges and juries happened at trial, they were subject to all of the normal confrontation-related protections—including, once it was adopted, the Confrontation Clause. The question, then, is not how probative this evidence is as to the Confrontation Clause's original meaning, but how meaningful the analogy is. On one front—substance—the analogy is quite strong. As noted above, juries and judges considered information that would not be out of place in modern sentencing decisions.³⁹³ On the other front, however—timing—the analogy begins to limp; pious perjury occurred in the jury's verdict itself, not after, and judicial pardon recommendations did not involve any separate hearing or proceeding.³⁹⁴ Overall, however, this remains highly probative evidence of the Clause's applicability to sentencing, because the Framers would not likely have thought that the Confrontation Clause's protections could be circumvented merely by moving a decision outside of trial.

C. *Motions in Arrest of Judgment*

Unlike pious perjury and pardon recommendations, which were similar in substance to modern sentencing but not in timing, the next relevant analogue—hearings on motions in arrest of judgment—was similar in timing but not in substance. When a jury found a defendant guilty of a felony, the judge would ask, “either immediately, or at a convenient time soon after . . . if [the defendant] ha[d] anything to offer [as to] why judgment should not be awarded against him.”³⁹⁵

One common motion was to plead a defect in the indictment, “as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence.”³⁹⁶ Given the last-second nature of such objections, one might suspect that they were nothing more than formalities or “Hail Marys,” akin to a modern postverdict motion for a judgment of acquittal.³⁹⁷ That was far from the case, however: Instead,

³⁹² See *supra* note 373 and accompanying text. Although “wider sources of evidence often came into play when a case went before the king,” Beattie, *supra* note 391, at 173, a case's consideration by the king was much less akin to modern sentencing than the judge's decision to recommend a pardon. It was driven more by “appeals . . . from the gentry and nobility and other members of the social and political élite” than by the details of the offender and the offense. *Id.* Moreover, this additional evidence was typically “on behalf of convicts,” rather than adverse to them. *Id.*

³⁹³ See *supra* notes 384–86 and accompanying text.

³⁹⁴ See BEATTIE, *supra* note 297, at 420–21, 430–33.

³⁹⁵ 4 BLACKSTONE, *supra* note 70, at *375.

³⁹⁶ *Id.*

³⁹⁷ See FED. R. CRIM. P. 29(c).

“in favour of life, great strictness [was] at all times . . . observed.”³⁹⁸ Hale reported that “more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence.”³⁹⁹ Though in Blackstone’s words, “no man was more tender of life” than Hale,⁴⁰⁰ Hale decried these technicalities as “a blemish and inconvenience in the law,” complaining that “many times gross murders, burglaries, robberies, and other heinous and crying offenses escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonour of God.”⁴⁰¹ Despite Hale’s disgust, Stephen reports that “[s]uch scandals do not seem . . . to have been unpopular,” and indeed were likely quite popular because of their effect of mitigating the severity of the law.⁴⁰² Nevertheless, that Hale was so affronted underscores the point that these motions were an impactful part of common law criminal procedure.

Adjudication of motions in arrest of judgment—unlike pious perjury and pardon recommendations—often involved hearing evidence that was not presented at trial. That was so, for instance, in the *Fries* case discussed above.⁴⁰³ They did not, however, involve unfronted testimony adverse to the defendant. In *State v. Evans*,⁴⁰⁴ for example, the Tennessee Supreme Court noted that cross-affidavits were not permissible in motions for a new trial.⁴⁰⁵ Later in the antebellum period, the Virginia Supreme Court explicitly applied its state confrontation clause to a hearing on a motion in arrest of judgment in *Hooker v. Commonwealth*,⁴⁰⁶ finding a violation when the defendant was not present at the hearing.⁴⁰⁷ Indeed, the court reasoned that the confrontation right

³⁹⁸ 4 BLACKSTONE, *supra* note 70, at *376; accord 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 193 (Sollom Emyln ed., Savoy, E. Nutt et al. 1736) (“That in favour of life great strictnesses have been in all times required in points of indictments . . .”).

³⁹⁹ HALE, *supra* note 398, at 193.

⁴⁰⁰ 4 BLACKSTONE, *supra* note 70, at *376.

⁴⁰¹ HALE, *supra* note 398, at 193. Writing nearly a century-and-a-half after Hale’s treatise was published, Stephen agreed, writing that nothing had “tended more strongly to bring the law into discredit than the importance attached to such technicalities as these,” and that “their tendency was to make the administration of justice a solemn farce.” 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 284 (London, MacMillan & Co. 1883).

⁴⁰² STEPHEN, *supra* note 401, at 284.

⁴⁰³ See *supra* notes 176–80 and accompanying text.

⁴⁰⁴ 1 Tenn. (1 Overt.) 211 (1806).

⁴⁰⁵ See *id.* at 215–16.

⁴⁰⁶ 54 Va. (13 Gratt.) 763 (1855).

⁴⁰⁷ See *id.* at 766. The *Hooker* court concluded, as would a court today applying the Federal Confrontation Clause, that “it is within the scope of this right that [the defendant] be present.” *Id.*; see also *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”); *Sperry v. Commonwealth*, 36 Va. (9 Leigh) 623, 626 (1838) (“An appearance by attorney cannot imply that the prisoner was personally present in court: and therefore the record is deficient in what the law regards as essential . . .”); *Westen*, *supra* note 206, at 569 (“[I]f confrontation

applied “not only when the jury are hearing [the defendant’s] case, but at any subsequent stage when any thing may be done in the prosecution by which he is to be affected.”⁴⁰⁸

Both *Evans* and *Hooker* fare well on one prong of the historical analysis but not the other. *Evans* is close in time to the Founding but does not explicitly reference the constitutional guarantee of confrontation.⁴⁰⁹ *Hooker*, by contrast, is much later in the antebellum period, but is one of only a few early cases interpreting a state confrontation clause.⁴¹⁰ As evidence about sentencing, both involve proceedings that mirror sentencing in timing but not in substance. In sum, therefore, this analogue deserves modest but not determinative weight in the analysis.

D. *New Trials on Appeal*

Modern readers might be shocked to learn that Tennessee’s state confrontation clause applied even on “appeal.”⁴¹¹ That is because the eighteenth-century and early nineteenth-century meaning of “appeal” was quite different from modern usage.⁴¹² Nevertheless, the presence of confrontation rights at such proceedings hints, if only mildly, at the presence of confrontation rights in modern sentencings.

In modern legal parlance, an “appeal” is a mechanism for challenging specific legal errors allegedly made by a lower court.⁴¹³ At the Founding, however, that role was played by a distinct procedural device known as a “writ of error.”⁴¹⁴ In a proceeding by writ of error, “[o]nly questions of law were open to review in the superior court; questions of fact were not subject to review, because of the sanctity of the jury.”⁴¹⁵ As Chief Justice Ellsworth explained, a writ of error “remove[d] nothing for re-examination but the law.”⁴¹⁶

means anything at all, it is that the state cannot prosecute a defendant in absentia.”). Curiously, the court noted that the lack of indication in the record of the defendant’s presence was “probably the result of mere inadvertence in making up the record” but nevertheless felt itself bound to conclude that he was not present. *Hooker*, 54 Va. (13 Gratt.) at 766.

⁴⁰⁸ *Hooker*, 54 Va. (13 Gratt.) at 766.

⁴⁰⁹ See *Evans*, 1 Tenn. (1 Overt.) at 215–16.

⁴¹⁰ As Chief Justice Rehnquist observed in *Crawford*, such cases were not plentiful. *Crawford v. Washington*, 541 U.S. 36, 72 (2004) (Rehnquist, C.J., concurring in the judgment); see also Jonakait, *Origins*, *supra* note 339, at 121 (“[O]nly a few judicial opinions on confrontation from the constitutional generation exist.”).

⁴¹¹ See *State v. Atkins*, 1 Tenn. (1 Overt.) 229, 229 (1807).

⁴¹² WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 66 (Wythe Holt & L.H. LaRue eds., 1990) (“[O]ne must keep in mind the eighteenth-century meaning of the word ‘appeal,’ for thinking of an ‘appeal’ in the modern sense quickly leads to error.”).

⁴¹³ See *Appeal*, BLACK’S LAW DICTIONARY, *supra* note 36.

⁴¹⁴ RITZ, *supra* note 412, at 67.

⁴¹⁵ *Id.*

⁴¹⁶ *Wiscart v. D’Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796) (Ellsworth, C.J.).

While the function of a modern appeal was filled by the eighteenth-century writ of error, an eighteenth-century “appeal” played a much different function. As explained by Professor Ritz:

The “appeal” was the method of superior court review in civil-law jurisdictions, jurisdictions that did not use the jury (such as admiralty). An appeal would, in such a system, open the way to a consideration of the whole case by the superior court. . . . When [an appeal] was taken after the initial trial the result [was] that there was a second trial, *de novo*, in the superior court. On appeals both facts and law were open for consideration, either as an initial proposition or by reconsideration.⁴¹⁷

Although such proceedings are less familiar to modern lawyers, some states still use them to handle minor criminal offenses.⁴¹⁸ They were, however, intensely controversial in the Founding era, and Article III’s grant of “appellate Jurisdiction, both as to Law and Fact”⁴¹⁹ was, as Justice Story later described it, “a subject of no small alarm” precisely because Anti-Federalists read it as authorizing this procedure in civil cases, an innovation viewed as “reduc[ing] to a mere form the right of a trial by jury in civil cases.”⁴²⁰ Nevertheless, as Alexander Hamilton observed in response to such arguments, it was common in some states, including all of New England.⁴²¹

⁴¹⁷ RITZ, *supra* note 412, at 67; *see also* *Wiscart*, 3 U.S. (3 Dall.) at 327 (Ellsworth, C.J.) (“An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and re-trial . . .”). To be sure, this was not the universal usage of “appeal,” and the word was sometimes used to describe proceedings by writ of error. *See, e.g.*, Letter from David Sewell, J., Mass. Sup. Jud. Ct., to Caleb Strong, U.S. Sen. (May 2, 1789), *reprinted in* RITZ, *supra* note 412, app. at 201, 202 [hereinafter Sewell Letter] (describing “[a]ppeals . . . in the nature of a Writ of Error”).

⁴¹⁸ *See* Binny Miller, *Visibility and Accountability: Shining a Light on Proceedings in Misdemeanor Two-Tier Court Systems*, 63 ST. LOUIS U. L.J. 191, 192 (2019) (describing the “vast number of criminal cases” handled by such systems). In three cases from the 1970s, the Supreme Court rejected a series of constitutional challenges to these systems. *See* *Colten v. Kentucky*, 407 U.S. 104, 119 (1972); *North v. Russell*, 427 U.S. 328, 339 (1976); *Ludwig v. Massachusetts*, 427 U.S. 618, 632 (1976).

⁴¹⁹ U.S. CONST. art. III, § 2.

⁴²⁰ 3 STORY, *supra* note 63, § 1757, at 628; *see, e.g.*, *Extract of a Letter from a Gentleman in New-York to his Friend on the Present Assembly, dated October 26, 1787*, VA. INDEP. CHRON., Nov. 14, 1787, *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 103 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (“[I]n its appellant function it is expressly said the court shall judge both of *law* and *fact*. This of course renders the finding of a jury below, totally nugatory.”); *see also* THE FEDERALIST No. 81, at 488–89 (Alexander Hamilton) (Clinton Rossiter ed., Cignet Classic 2003) (responding to these concerns). Brutus feared a similar innovation in criminal cases. *See* Brutus, *Essay XIV*, N.Y. J., Feb. 28, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 431, 432.

⁴²¹ *See* THE FEDERALIST No. 81, *supra* note 420, at 489 (Alexander Hamilton); Sewell Letter, *supra* note 417, at 202 (“We in Massachusetts have been used to various Trials of the same Facts by different Juries of Course.”).

Though not among the original states, Tennessee achieved statehood in 1796.⁴²² Its original constitution—which Thomas Jefferson purportedly called “the least imperfect and most republican” of the state constitutions⁴²³—had two features of relevance here. First, it had a state confrontation clause.⁴²⁴ Second, it had a superior court with both appellate and original jurisdiction.⁴²⁵ In many cases, appeal to this superior court—which would include a new trial by jury—was “both as to law and fact, [a] matter of right.”⁴²⁶ The rationale was that “the injustice of a decision made by an inferior tribunal” was best remedied “by a review in a superior tribunal, as to fact as well as law.”⁴²⁷

In criminal cases, “inferior” offenses followed this rule, and in *State v. Atkins*,⁴²⁸ an 1807 petit larceny case arriving at the superior court via this procedure, the court considered an objection based on the state’s confrontation clause.⁴²⁹ In a brief per curiam opinion, the court held that it could not receive the prior testimony, given at the trial in the inferior court, of a now-deceased witness.⁴³⁰ Insofar as it held that prior testimony of a deceased witness violated the state confrontation clause, this was a minority view, and it would not prevail under *Crawford*.⁴³¹ But for our purposes, the key fact is not *how* the court applied the state confrontation clause, but *that* it applied it—and that it did so *after* trial in the inferior court had concluded.

As evidence about the applicability of the Confrontation Clause to sentencing, *Atkins* fares well on one front but poorly on the other. As evidence of the Clause’s original meaning, it scores highly on the historical rubric. First, though it does not date to the eighteenth century, it was decided within two decades of the adoption of the Sixth Amendment.⁴³² Second, although it did not deal with the *federal* Confrontation Clause, neither did it deal with general rules of evidence. Instead, it is one of the few cases directly examining a state confrontation clause. Although

⁴²² See Act of June 1, 1796, ch. 47, 1 Stat. 491.

⁴²³ J.G.M. RAMSEY, THE ANNALS OF TENNESSEE 657 (Charleston, John Russell 1853); accord Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772–1972*, 6 MEM. ST. U. L. REV. 563, 582–83 (1976).

⁴²⁴ See TENN. CONST. of 1796, art. 11, § 9 (“That in all criminal prosecutions the accused hath a right . . . to meet the Witnesses face to face . . .”).

⁴²⁵ See *id.* art. V, §§ 4, 6–7; Laska, *supra* note 423, at 590.

⁴²⁶ Beck v. Knabb, 1 Tenn. (1 Overt.) 55, 58 (1799) (opinion of Overton, J.).

⁴²⁷ *Id.* at 58–59.

⁴²⁸ 1 Tenn. (1 Overt.) 229 (1807).

⁴²⁹ See *id.* at 229.

⁴³⁰ See *id.*

⁴³¹ See *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (“Most courts rejected that view . . .”). As Professor Jonakait notes, another Tennessee court rejected this view fourteen years later. Jonakait, *Origins*, *supra* note 339, at 123 (citing Johnston v. State, 10 Tenn. (2 Yer.) 58 (1821)).

⁴³² See *Atkins*, 1 Tenn. (1 Overt.) at 229.

it is not quite as probative as, say, a federal case from 1792, it is perhaps the next best thing.

Atkins is of only limited value, however, as evidence about sentencing, because de novo trials in superior courts are not especially analogous to modern sentencing. First, the issues being considered differ greatly. As retrials of the whole case, appeals focused on the appropriate punishment only to the extent that all criminal trials did.⁴³³ Second, although they sometimes occurred after a conviction in an inferior court⁴³⁴—and thus line up temporally with modern sentencing—they were perhaps better seen as a redo than as a new proceeding.

At bottom, therefore, *Atkins* is of only slight probative value on the question this Article addresses. However, the probative value it does have is in accord with other historical analogues supporting application of the Confrontation Clause at sentencing.

* * *

As this Part has demonstrated, no historical analogue serves as a “smoking gun.” Although Founding-era misdemeanor sentencing most closely mirrors modern sentencing, it is unclear whether confrontation rights applied at such proceedings. The other historical analogues are even more imperfect, failing to match either the offense-plus-offender substance or the postverdict timing of modern sentencing. However, the fact that confrontation rights applied to each at least suggests that neither feature of modern sentencing can justify exempting sentencing from the Confrontation Clause’s scope—especially in light of the text’s seemingly categorical reach.

III. ADVERSARIAL STRUCTURE

The Confrontation Clause was not “developed in quarantine apart from other rights.”⁴³⁵ Instead, it arose as part of a broader Sixth Amendment ecosystem “designed to elicit truth and protect innocence.”⁴³⁶ Taken as a whole, the Amendment creates “an adversary system of criminal justice that was much more than the sum of the specified parts.”⁴³⁷ Indeed, that very adversary system distinguished Founding-era American criminal procedure from its counterpart across the pond;

⁴³³ See *supra* Section II.B.

⁴³⁴ See RITZ, *supra* note 412, at 67.

⁴³⁵ Jonakait, *Origins*, *supra* note 339, at 166; see also Randolph N. Jonakait, “Witnesses” in the Confrontation Clause: *Crawford v. Washington*, *Noah Webster*, and *Compulsory Process*, 79 TEMP. L. REV. 155, 157 (2006) [hereinafter Jonakait, *Witnesses*] (criticizing the *Crawford* Court for “interpret[ing] confrontation as if it could be isolated from its context”).

⁴³⁶ Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 643 (1996).

⁴³⁷ Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 210 (2005).

England did not embrace the adversarial revolution until a generation later.⁴³⁸ No individual component of that system should be “segregated from related provisions.”⁴³⁹ The modern legal community must view the Amendment as the Framers did: “holistically.”⁴⁴⁰

This suggests a structural argument in favor of sentencing-phase confrontation. The Sixth Amendment’s “internal architecture” contains several smaller “clusters” of rights.⁴⁴¹ One trio—confrontation, compulsory process, and counsel—is particularly adversarial.⁴⁴² It makes sense to view the three as rising and falling together. If the sentencing-phase defendant enjoys the rights to counsel and compulsory process, why should the defendant not likewise enjoy the third right in the triumvirate? Although America *could* have chosen a nonadversarial sentencing process—just as it *could* have chosen a nonadversarial guilt-phase process—it chose a different path.

A. *The Adversarial Sixth Amendment*

In the Confrontation Clause’s traditional origin story, Sir Walter Raleigh is the leading man.⁴⁴³ As the conventional account goes, the right to confrontation became entrenched in English law because of backlash against various Tudor-era abuses, of which Raleigh’s trial is the most infamous.⁴⁴⁴ The American Framers, in turn, codified this traditional right of Englishmen in the Confrontation Clause.⁴⁴⁵ Modern historians, however, have criticized this account as a “romantic myth”⁴⁴⁶ that “little evidence supports.”⁴⁴⁷ Some go so far as to claim that no common

⁴³⁸ See generally Jonakait, *America Before England*, *supra* note 340 (documenting the time delay between the rise of adversarial criminal procedure in the American colonies and in England).

⁴³⁹ Jonakait, *Futile Search*, *supra* note 349, at 493.

⁴⁴⁰ Graham, *supra* note 437, at 210.

⁴⁴¹ Amar, *supra* note 436, at 642 (identifying three such clusters); see also Jonakait, *Witnesses*, *supra* note 435, at 157 (“[C]onfrontation is part of a bundle of rights that help to guarantee an accused the ability to present a defense . . .”).

⁴⁴² See Amar, *supra* note 436, at 643 (describing counsel, confrontation, and compulsory process “as great engines by which an innocent man can make the truth of his innocence visible to the jury and the public”).

⁴⁴³ See Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 FLA. L. REV. 1669, 1680 (2012) (noting that *Crawford* “invoked Raleigh’s name nineteen times”). As Professor Graham notes, the *Crawford* Court seemingly got this history from an amicus brief filed by a group of law professors. See Graham, *supra* note 437, at 209 n.2.

⁴⁴⁴ See, e.g., HELLER, *supra* note 40, at 104–05.

⁴⁴⁵ See *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (arguing that the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law”).

⁴⁴⁶ Graham, *supra* note 437, at 209.

⁴⁴⁷ Bernadette Meyler, *Common Law Confrontations*, 37 LAW & HIST. REV. 763, 768 (2019); see also Jonakait, *Witnesses*, *supra* note 435, at 157 (“While *Crawford* assumed that the Confrontation Clause constitutionalized a common law right, [Professor Jonakait] concludes that that

law right to confrontation ever existed,⁴⁴⁸ while others claim more modestly that the traditional account is “distorted and incomplete.”⁴⁴⁹ It is not necessary to resolve that debate here. Instead, it suffices to say that the traditional story is not the whole story. Although the English history “may have affected the development of American constitutional rights,” the “prime” objective of the adversarial triumvirate was “to constitutionalize criminal procedure as it then existed *in the states*.”⁴⁵⁰

In the decades surrounding the Founding, Anglo-American criminal procedure underwent a dramatic metamorphosis. It shifted from what Professor Langbein calls an “accused speaks” model—the “logic” of which was “to pressure the accused to speak in his own defense”—to a deeply adversarial, “lawyer-dominated” model.⁴⁵¹ In England, the transformation was not complete until about the middle of the nineteenth century, when defense counsel was finally permitted to appear in ordinary felony trials.⁴⁵² In America, however, it happened about a generation earlier.⁴⁵³ Thus, the two best-documented criminal trials in Founding-era America—the Boston Massacre trials and the murder trial of Levi Weeks—bore all the accoutrements of a full-blown adversary system.⁴⁵⁴ American criminal procedure had “diverged significantly from” its English counterpart.⁴⁵⁵

During the ratification debates, Anti-Federalists expressed anxiety that federal courts would backslide to the “accused speaks” model that was still influential in England. As part of a broader attack on the Constitution for failing to include a bill of rights, a Virginian Anti-Federalist writer known as “the Impartial Examiner” warned that there was nothing to prevent the new Congress from “pass[ing] a law that persons charged with capital crimes shall not have a *right to demand the cause*

assertion is dubious since much of the Sixth Amendment clearly rejected the common law and constitutionalized new rights.”).

⁴⁴⁸ See, e.g., Graham, *supra* note 437, at 209.

⁴⁴⁹ Meyler, *supra* note 447, at 765.

⁴⁵⁰ Jonakait, *Origins*, *supra* note 339, at 81 (emphasis added).

⁴⁵¹ LANGBEIN, *supra* note 136, at 2. Professor Langbein’s book documents this transformation on the other side of the pond in meticulous detail. See generally *id.* (detailing the evolution of the adversarial system in England).

⁴⁵² See Jonakait, *America Before England*, *supra* note 340, at 326.

⁴⁵³ See *id.* at 327–29.

⁴⁵⁴ See Jonakait, *Origins*, *supra* note 339, at 142–43 (“The Boston Massacre trials were adversarial proceedings with a developing concern about hearsay. The defendants had been granted tools—a full right to counsel, compulsory process, and the opportunity to cross-examine the witnesses against them—so that they could meaningfully test the prosecution’s case.”); *id.* at 162–63 (“Even with some differences, however, *Weeks* was a modern trial.”).

⁴⁵⁵ *Id.* at 81.

*or nature of the accusation, shall not be confronted with the accusers or witnesses, or call for evidence in their own favor.*⁴⁵⁶

At the Massachusetts ratifying convention, Abraham Holmes similarly complained that the Philadelphia plan contained “no constitutional check”—other than the Article III jury provision⁴⁵⁷—on “the mode of criminal process” in federal court.⁴⁵⁸ Lest he leave any doubt that he was referring, at least in part, to the adversarial system, he clarified that he meant the “mode of trial,” namely, “whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination.”⁴⁵⁹ His speech then took an alarmist turn, warning that the lack of even “the smallest constitutional security” for adversarial criminal procedure empowered Congress to create a system “little less inauspicious” than the “diabolical institution” of the Spanish Inquisition.⁴⁶⁰

Congress proposed the Sixth Amendment against this backdrop, as part of a Bill of Rights designed to placate Anti-Federalists like the Impartial Examiner and Holmes.⁴⁶¹ And the best evidence suggests that the Amendment “constitutionalized the criminal procedure that Americans had developed,” whereby a defendant could—through counsel, confrontation, and compulsory process—“truly test and challenge the government’s case.”⁴⁶²

With this in mind, let us briefly explore confrontation’s relationship with these other rights.

B. Confrontation and Counsel

First, consider the well-documented interplay between confrontation and counsel. The two come together most dramatically in cross-examination, which is both “the heart of the [Confrontation] Clause”⁴⁶³ and “an essential function of counsel.”⁴⁶⁴ Although English

⁴⁵⁶ The Impartial Examiner, *Essay I Continued*, VA. INDEP. CHRON., Mar. 5, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 183, 185.

⁴⁵⁷ See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .”).

⁴⁵⁸ Holmes, *supra* note 104, at 110.

⁴⁵⁹ *Id.* at 110–11.

⁴⁶⁰ *Id.* at 111.

⁴⁶¹ See Brutus, *Essay II*, N.Y. J., Nov. 1, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 370, 374–75.

⁴⁶² Jonakait, *Origins*, *supra* note 339, at 164.

⁴⁶³ United States v. Campbell, 986 F.3d 782, 794 (8th Cir. 2021).

⁴⁶⁴ United States v. Petty, 982 F.2d 1365, 1371 (9th Cir. 1993) (Noonan, J., dissenting).

law originally forbade defense counsel in felony cases,⁴⁶⁵ a judge-made exception to this rule emerged in the mid-eighteenth century, allowing counsel “for the limited purpose of examining *and especially cross-examining* witnesses.”⁴⁶⁶ But the initial relaxation of the traditional ban on counsel went “no farther” than examination of witnesses.⁴⁶⁷ Thus, “probing prosecution testimony on cross-examination” was originally not only the “primary purpose” of defense counsel,⁴⁶⁸ it was their *only* purpose. As one commentator put it, counsel “had ‘either to cross-examine or do nothing.’”⁴⁶⁹

Although modern defense attorneys have a much broader portfolio than their eighteenth-century forebears, cross-examination remains a crucial part of their stock-in-trade. Numerous cases have held that lawyers who failed to adequately cross-examine government witnesses were “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”⁴⁷⁰

The Supreme Court has held that the right to counsel applies at sentencing.⁴⁷¹ That holding seems to have at least some historical footing: Early American cases depict counsel performing functions akin to what modern counsel might play at sentencing, including making legal objections to proposed sentences⁴⁷² and presenting arguments in mitigation.⁴⁷³

Why, then, would the Framers have allowed counsel at sentencing but forbade them from fulfilling one of their primary functions? The right to counsel is part and parcel of “the crucible of meaningful

⁴⁶⁵ See WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 9 (1955). For a discussion of this prohibition, see DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800–1865*, at 25–55 (A.W. Brian Simpson ed., 1998).

⁴⁶⁶ LANGBEIN, *supra* note 136, at 106 (emphasis added).

⁴⁶⁷ Trial of Barbot (1753) 18 How. St. Tr. 1229, 1231 (Gr. Brit. Ct. Oyer & Terminer) (argument of solicitor general).

⁴⁶⁸ LANGBEIN, *supra* note 136, at 148.

⁴⁶⁹ CAIRNS, *supra* note 465, at 47 (quoting *On the Profession of the Bar, March 1, 1825*, 1 LOND. MAG. & REV. (n.s.) 323, 328 (1825)).

⁴⁷⁰ Strickland v. Washington, 466 U.S. 668, 687 (1984); see JOHN M. BURKOFF & NANCY M. BURKOFF, *INEFFECTIVE ASSISTANCE OF COUNSEL* § 7:20, Westlaw (database updated Apr. 2025) (collecting cases); *cf. id.* § 7:21 (collecting cases where counsel was held ineffective for inadequately impeaching a prosecution witness).

⁴⁷¹ See *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

⁴⁷² See, e.g., *Commonwealth v. Andrews*, 2 Mass. (1 Tyng) 14, 24–26 (1806).

⁴⁷³ See *State v. Van Houten*, 3 N.J.L. 700, 700–01 (1810); *cf. United States v. Worrall*, 28 F. Cas. 774, 780 (C.C.D. Pa. 1798) (No. 16,766) (counsel present during mitigation). Relatedly, defendants typically made their motions in arrest of judgment through counsel. See, e.g., *Commonwealth v. Drew*, 4 Mass. (3 Tyng) 391, 399 (1808); *Commonwealth v. Hardy*, 2 Mass. (1 Tyng) 303, 303 (1807); *State v. Gilbert*, 2 S.C.L. (2 Bay) 355, 359 (1802); *State v. Oldham*, 2 N.C. (1 Hayw.) 450, 450 (1796); *United States v. Maunier*, 26 F. Cas. 1210, 1211 (C.C.D.N.C. 1792) (No. 15,746); *State v. Fuller*, 1 S.C.L. (1 Bay) 245, 245 (1792).

adversarial testing.”⁴⁷⁴ For the Founding generation, so was confrontation. As Professor Jonakait explains, the adversarial revolution occurred precisely “because defense counsel were increasingly allowed to cross-examine.”⁴⁷⁵ One should not assume lightly that the Founding generation would have allowed counsel at sentencing but forbidden confrontation. Why split the adversarial atom?

C. *Confrontation and Compulsory Process*

Even within the adversarial triumvirate, “[t]he interrelationship of confrontation and compulsory process is particularly close.”⁴⁷⁶ Confrontation and counsel may be brothers,⁴⁷⁷ but confrontation and compulsory process “are conceptual twins.”⁴⁷⁸ As the Supreme Court explained, “[j]ust as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.”⁴⁷⁹ Neither right “can be meaningfully understood without reference to the companion provision.”⁴⁸⁰ This symmetry was not unknown to the Founding generation: Judge Griffith, for example, noted it within a decade of the Sixth Amendment’s adoption.⁴⁸¹

Modern doctrine gives no clear answer on whether the Compulsory Process Clause applies at sentencing.⁴⁸² In part, that is because it gives no clear answers on when the Compulsory Process Clause applies at all.⁴⁸³ In cases involving the right to present evidence, the Court is notoriously reticent to specify whether compulsory process or due process is doing the work.⁴⁸⁴ But in *Green v. Georgia*,⁴⁸⁵ the Court reversed a death sentence on the ground that the defendant was not permitted to present favorable testimony at sentencing.⁴⁸⁶ Though *Green*’s brief

⁴⁷⁴ *United States v. Cronin*, 466 U.S. 648, 656 (1984).

⁴⁷⁵ Jonakait, *America Before England*, *supra* note 340, at 326.

⁴⁷⁶ Jonakait, *Witnesses*, *supra* note 435, at 172.

⁴⁷⁷ *See supra* Section III.B.

⁴⁷⁸ Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1197 (1979).

⁴⁷⁹ *Washington v. Texas*, 388 U.S. 14, 19 (1967).

⁴⁸⁰ Westen, *supra* note 206, at 569.

⁴⁸¹ *See United States v. Moore*, 26 F. Cas. 1308, 1308–09 (C.C.D. Pa. 1801) (No. 15,805) (Griffith, J.).

⁴⁸² *See Michaels*, *supra* note 243, at 1845–47.

⁴⁸³ *See id.* at 1844.

⁴⁸⁴ *See id.* (“At present, the relative role of the two clauses in the defendant’s right to present evidence at trial . . . is muddled at best.”); *see also, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986))).

⁴⁸⁵ 442 U.S. 95 (1979) (per curiam).

⁴⁸⁶ *See id.* at 96–97.

per curiam opinion brings no greater clarity than most right-to-present-evidence cases, Professor Douglass notes that both of the authorities on which *Green* principally relies focus on the Compulsory Process Clause.⁴⁸⁷ In 1796, South Carolina's high court held that compulsory process rights are applicable to sentencing.⁴⁸⁸ This provides strong evidence that, as an original matter, the Compulsory Process Clause applies at sentencing—though, of course, a more thorough study would be required to confirm that conclusion. As with counsel, it is strange to imagine the Framers trying to separate the inseparable.

D. Other Related Rights

Of course, the particularly close relationship between confrontation, counsel, and compulsory process does not cordon off confrontation from other Sixth Amendment rights. Most significantly, the Arraignment Clause⁴⁸⁹ is often listed among the adversarial rights⁴⁹⁰ and connected with the Confrontation Clause.⁴⁹¹ It is better, however, to treat the Arraignment Clause as the opening act rather than another member of the band. By putting the defendant on notice of the charge he must meet, the Arraignment Clause sets the table for the other three rights. But it never shares the stage with them, because it has run its course by the time trial begins. Confrontation, counsel, and compulsory process, by contrast, actively interact *during trial*. Although it is perfectly true that the Arraignment Clause helps protect the adversarial criminal process, it does not relate to the other rights in the same way they relate to each other. It is best seen as preparing the way, not walking side by side. Thus, it would not provide a useful guidepost, even if we knew whether it applied at sentencing.⁴⁹²

Some have also connected the Public Trial Clause⁴⁹³ with confrontation.⁴⁹⁴ It is not clear which direction this comparison would cut,

⁴⁸⁷ See Douglass, *supra* note 14, at 1989 n.136.

⁴⁸⁸ See *State v. Smith*, 2 S.C.L. (2 Bay) 62, 63 (1796).

⁴⁸⁹ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . .”).

⁴⁹⁰ See, e.g., Jonakait, *Witnesses*, *supra* note 435, at 172; Amar, *supra* note 436, at 642; *Faretta v. California*, 422 U.S. 806, 818 (1975).

⁴⁹¹ See Amar, *supra* note 436, at 688–89 (“In this respect, the Confrontation Clause echoes and amplifies the themes of its ‘nature and cause’ neighbor . . .”).

⁴⁹² See Michaels, *supra* note 243, at 1809 (“The Court has never discussed the application of the Sixth Amendment [notice] provision as such at a sentencing proceeding.”).

⁴⁹³ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . .”).

⁴⁹⁴ See Amar, *supra* note 436, at 688–90 (describing the “obvious linkages between public trial and confrontation”).

because it is not clear whether the Public Trial Clause applies at sentencing.⁴⁹⁵ Even if it did, the analogy would be attenuated: While the Confrontation Clause protects factual innocence—i.e., “I didn’t do it”—the Public Trial Clause primarily protects normative innocence—i.e., “I did it, but what I did wasn’t wrong.”⁴⁹⁶

Analogy to the Jury Clause—which, if persuasive, would be a strong point against sentencing-phase confrontation—encounters a similar problem because “[t]he role of the criminal jury . . . involves normative judgment.”⁴⁹⁷ Moreover, although some have made this connection,⁴⁹⁸ Professor Friedman—one of the architects of the *Crawford* revolution—persuasively argues that any historical connection is in rhetoric rather than substance.⁴⁹⁹

Though the right to confrontation is connected with other rights outside the adversarial triumvirate, those rights simply do not shed the same light on confrontation-stage sentencing as do the rights to counsel and compulsory process.

* * *

It goes without saying that the perfunctory analyses conducted above are not rigorous enough to establish, as a historical matter, that the rights to counsel and compulsory process apply to sentencing. Future scholarship can and should investigate those claims further. The limits of those analyses necessarily limit this argument’s value. Nevertheless, the brief discussions above interlock with and buttress the arguments advanced in Parts I and II above. Accordingly, they provide further support for this Article’s thesis: that confrontation rights apply to sentencing.

⁴⁹⁵ See Michaels, *supra* note 243, at 1832 (“The Supreme Court has never held whether the public trial right applies to sentencing.”).

⁴⁹⁶ Amar, *supra* note 436, at 642–43 (noting that fair trial rights like “[c]ounsel, confrontation, and compulsory process” “highlight factual innocence . . . more than normative innocence” but that “passing judgment on a defendant’s normative guilt or innocence[] is an especially important part of the public trial idea”).

⁴⁹⁷ *Id.* at 685.

⁴⁹⁸ See, e.g., Graham, *supra* note 437, at 218 (“In other words, failure to confront means more than denial of cross-examination—it means a denial of trial by jury.”); cf. Letter from the Federal Farmer No. IV (Oct. 12th, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 245, 249 [hereinafter Fed. Farmer IV] (connecting cross-examination with the right to a jury of the vicinage in civil cases).

⁴⁹⁹ See Richard D. Friedman, *No Link: The Jury and the Origins of the Confrontation Right and the Hearsay Rule*, in “THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND” 93, 93–100 (John W. Cairns & Grant McLeod eds., 2002). Even the Federal Farmer, who made this connection perhaps the most directly, see Fed. Farmer IV, *supra* note 498, at 249, elsewhere spoke of a defendant’s right “to have witnesses face to face, and to confront their adversaries *before the judge*.” Letter from the Federal Farmer No. VI (Dec. 25, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 100, at 256, 262 (emphasis added).

IV. UNDERSTANDING THE *WILLIAMS* DECISIONS

In light of these textual, historical, and structural data points, it is worth asking why the conventional view—that confrontation rights do not apply to sentencing—became conventional in the first place. The lower courts generally acknowledge that the Supreme Court has not “squarely resolved” the issue.⁵⁰⁰ Nevertheless, many rely on *Williams v. New York* and, to a lesser extent, *Williams v. Oklahoma*, as if they had held that the Clause does not apply.⁵⁰¹ Judge Easterbrook even went so far as to claim that *Williams v. New York* “held that the Confrontation Clause . . . applies through the finding of guilt, but not to sentencing.”⁵⁰² In *Williams v. New York*, the Court rejected a constitutional attack on what it called the “age-old practice of seeking information from out-of-court sources to guide [judges’] judgment toward a more enlightened and just sentence.”⁵⁰³ And in *Williams v. Oklahoma*, the Court reaffirmed *Williams v. New York*’s holding that:

[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may . . . consider responsible unsworn or “out-of-court” information relative to the circumstances of the crime and to the convicted person’s life and characteristics.⁵⁰⁴

At first blush, these decisions seem like resounding rejections of confrontation rights at sentencing. In a sense, they were. But interpretation of precedents must “rely not on ‘isolated statements’ from the opinion but [rather] on its analysis and holding.”⁵⁰⁵ Neither *Williams* case controls the confrontation-at-sentencing issue for a very simple reason:

⁵⁰⁰ See, e.g., *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 917 (10th Cir. 2019); *United States v. Kikumura*, 918 F.2d 1084, 1103 n.19 (3d Cir. 1990) (“We hope therefore that the Supreme Court in the near future will decide whether confrontation clause principles are applicable at sentencing hearings . . .”).

⁵⁰¹ See, e.g., *United States v. Powell*, 650 F.3d 388, 393 (4th Cir. 2011) (relying on *Williams v. New York*, 337 U.S. 241 (1949)); *United States v. Bras*, 483 F.3d 103, 108–09 (D.C. Cir. 2007) (relying on both *Williams* decisions, *Williams v. New York* and *Williams v. Oklahoma*, 358 U.S. 576 (1959)); *United States v. Littlejohn*, 444 F.3d 1196, 1198–1200 (9th Cir. 2006) (relying on *Williams v. New York*); see also *Harris*, *supra* note 13, at 1459 n.113 (collecting cases that relied on *Williams v. New York*).

⁵⁰² *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002).

⁵⁰³ 337 U.S. 241, 250–51 (1949).

⁵⁰⁴ *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959).

⁵⁰⁵ *Lee v. Kemna*, 534 U.S. 362, 378 (2002) (citation omitted); see also *Maggie Gardner, Dangerous Citations*, 95 N.Y.U. L. Rev. 1619, 1621 (2020) (warning against the danger that “judges engaged in analogical reasoning may reduce the reasoning of prior cases to oversimplified heuristics, a risk compounded by decontextualized legal research”).

Both construed only the Fourteenth Amendment Due Process Clause, not the Sixth Amendment Confrontation Clause.⁵⁰⁶

In its procedural history, the *Williams v. New York* Court described the appellant's argument below as a "contention that . . . the controlling penal statutes are in violation of the *due process clause* of the Fourteenth Amendment of the Constitution of the United States."⁵⁰⁷ Later, the Court described appellant's argument that the statute requiring consideration of out-of-court statements was "in irreconcilable conflict with the underlying philosophy of a second procedural policy grounded in the *due process of law clause* of the Fourteenth Amendment."⁵⁰⁸ In response, the Court acknowledged that "the *due process clause* does provide these salutary and time-tested protections"—namely, "reasonable notice of the charges against him" and "an opportunity to examine adverse witnesses"—"where the question for consideration is the guilt of a defendant."⁵⁰⁹ In a footnote, it again referred to these protections as "*due process* requirements."⁵¹⁰ However, it viewed historical distinctions between guilt- and sentencing-phase procedures as "admonish[ing] . . . against treating the *due process clause* as a uniform command" forbidding out-of-court information.⁵¹¹ Later in the same paragraph, it reiterated that "[t]he *due process clause* should not be treated as a device for freezing the evidential procedure of sentencing" because "to treat the *due process clause* [as such] would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice."⁵¹² The Court thus could not "say that the *due process clause* renders a sentence void merely because a judge gets additional out-of-court information to assist him."⁵¹³ It held, therefore, "that appellant was not denied *due process of law*."⁵¹⁴ In another footnote, however, it emphasized that sentencing procedures do receive some "scrutiny under the *due process clause*."⁵¹⁵

Similarly, *Williams v. Oklahoma* described the question presented as whether "the sentence was imposed in violation of the *Due Process Clause* of the Fourteenth Amendment of the United States Constitution."⁵¹⁶ After describing the facts, it reiterated that "petitioner's broad claim is that . . . the death sentence was determined and imposed in

⁵⁰⁶ See *Williams v. New York*, 337 U.S. at 252; *Williams v. Oklahoma*, 358 U.S. at 584.

⁵⁰⁷ *Williams v. New York*, 337 U.S. at 243 (emphasis added).

⁵⁰⁸ *Id.* at 245 (emphasis added).

⁵⁰⁹ *Id.* (emphasis added).

⁵¹⁰ *Id.* at 245 n.3 (emphasis added).

⁵¹¹ *Id.* at 250 (emphasis added).

⁵¹² *Id.* at 251 (emphasis added).

⁵¹³ *Id.* at 252 (emphasis added).

⁵¹⁴ *Id.* (emphasis added).

⁵¹⁵ *Id.* at 252 n.18 (emphasis added).

⁵¹⁶ 358 U.S. 576, 577 (1959) (emphasis added).

violation of the *Due Process Clause* of the Fourteenth Amendment.”⁵¹⁷ Next, it considered the precedent set by *Williams v. New York*, which it described as “deal[ing] with very similar contentions” and holding that unsworn and out-of-court statements could be considered “consistently with the *Due Process Clause* of the Fourteenth Amendment.”⁵¹⁸ The Court also rejected the petitioner’s non-confrontation-related arguments by reference to the *Due Process Clause*, before “hold[ing] that petitioner was not denied *due process of law*.”⁵¹⁹

In total, the two cases mention due process eighteen times—or an even twenty if you include Justice Murphy’s dissent in *Williams v. New York*.⁵²⁰ Not once does either case mention the Sixth Amendment or the Confrontation Clause. To be sure, both make passing references to a right of confrontation.⁵²¹ But, as *Williams v. New York* explained, it “seems entirely clear” that the *Due Process Clause* itself provides its own right of confrontation in some cases.⁵²² That neither *Williams* decision regarded itself as a Sixth Amendment case is strong evidence that neither was one.⁵²³ Even if the cases can be read as implicitly rejecting a Confrontation Clause argument, however, there is an obvious explanation: Both cases were decided before the Confrontation Clause—or any other portion of the Sixth Amendment, for that matter—was incorporated against the states.⁵²⁴

Under the Supreme Court’s 1833 decisions in *Barron v. Mayor of Baltimore*⁵²⁵ and *Livingston’s Lessee v. Moore*,⁵²⁶ the Bill of Rights as originally adopted did “not extend to the states.”⁵²⁷ Today, most of its protections are incorporated against the states by operation of the Fourteenth Amendment.⁵²⁸ But, although many understand that to be part

⁵¹⁷ *Id.* at 581 (emphasis added).

⁵¹⁸ *Id.* at 584 (emphasis added).

⁵¹⁹ *Id.* at 587 (emphasis added).

⁵²⁰ See *Williams v. New York*, 337 U.S. at 252–53 (Murphy, J., dissenting).

⁵²¹ See *Williams v. Oklahoma*, 358 U.S. at 581, 583, 584; *Williams v. New York*, 337 U.S. at 243, 245.

⁵²² *Williams v. New York*, 337 U.S. at 245; see also *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

⁵²³ Cf. *Hill v. Colorado*, 530 U.S. 703, 753 (2000) (Scalia, J., dissenting) (“The First Amendment was not at issue, and was not so much as mentioned in the opinion, so the case is scant authority for the point the Court wishes to make.”).

⁵²⁴ Harris, *supra* note 13, at 1481 (“*Williams v. New York* could not have been decided on Confrontation Clause grounds because that Sixth Amendment right did not apply to the states at the time *Williams* was decided.”).

⁵²⁵ 32 U.S. (7 Pet.) 243 (1833).

⁵²⁶ 32 U.S. (7 Pet.) 469 (1833).

⁵²⁷ *Id.* at 551–52. There was, however, a strong minority during the antebellum period who rejected the *Barron–Livingston’s Lessee* doctrine. See AMAR, *supra* note 144, at 137–56; Mazzone, *supra* note 170, at 7–55.

⁵²⁸ E.g., *Timbs v. Indiana*, 586 U.S. 146, 150 (2019).

of the Fourteenth Amendment's original meaning,⁵²⁹ the Court did not immediately recognize it as such.⁵³⁰ Rather, under the so-called "*Twining* doctrine," if any right enumerated in the Bill of Rights happened also to be protected by the Court's interpretation of the Fourteenth Amendment, it was "not because those rights are enumerated in the first eight Amendments but because they are of such a nature that they are included in the conception of due process of law."⁵³¹

Constitutional criminal procedure in state courts thus looked dramatically different from today. Justice Cardozo described it as follows:

Consistently with [the Fourteenth] amendment, trial by jury may be abolished. Indictments by a grand jury may give way to informations by a public officer. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it.⁵³²

In 1904, the Court in *West v. Louisiana*⁵³³ applied this principle to hold that the Confrontation Clause—along with the rest of the Sixth Amendment—did not apply to state prosecutions.⁵³⁴ The Court did not begin to incorporate the Sixth Amendment until *Gideon v. Wainwright*,⁵³⁵ in 1963.⁵³⁶ It did not incorporate the Confrontation Clause until

⁵²⁹ See, e.g., RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT* 41–260 (2021); McDonald v. City of Chicago, 561 U.S. 742, 813–50 (2010) (Thomas, J., concurring in part and concurring in the judgment); Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443, 443–49 (1996); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 61 (1993); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE* 57–130 (1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 22–30 (1980); Adamson v. California, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting). But see, e.g., ILAN WURMAN, *THE SECOND FOUNDING* 104–20 (2020); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361, 365 (2009); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 134–56 (1977); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949).

⁵³⁰ See, e.g., *Hurtado v. California*, 110 U.S. 516, 538 (1884) (rejecting incorporation of Fifth Amendment Grand Jury Clause via Due Process Clause); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (rejecting incorporation of Second Amendment via Privileges or Immunities Clause). For alternative readings of *Cruikshank* and *Hurtado*, see Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 712–21, 723–26 (2000).

⁵³¹ *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

⁵³² *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (citations omitted).

⁵³³ 194 U.S. 258 (1904).

⁵³⁴ See *id.* at 261–62.

⁵³⁵ 372 U.S. 335 (1963).

⁵³⁶ *Id.* at 342.

two years later, in *Pointer v. Texas*.⁵³⁷ *Williams v. New York* was decided in 1949,⁵³⁸ and *Williams v. Oklahoma* was decided ten years later, in 1959.⁵³⁹ Between the two cases, the Court in *Stein v. New York*⁵⁴⁰ reaffirmed its holding in *West* that the Confrontation Clause did not apply to the states.⁵⁴¹ Thus, even to the extent the *Williams* Courts rejected Confrontation Clause arguments *sub silentio*, they did so not because the challenged evidence was presented at a *sentencing*, but because it was presented at a *state* sentencing.

Against this backdrop, the actual holdings of the *Williams* cases become apparent. The Sixth Amendment was not then—and is not now—the sole source of a right to confrontation.⁵⁴² It is merely one “expression” of such a right.⁵⁴³ Where the Court issues a decision limiting the right to confrontation provided by another source of law—such as due process—it is intuitively understood that it is not thereby limiting the Sixth Amendment right. Where the Court wants to address both the Confrontation Clause and the Due Process Clause, it does so explicitly.⁵⁴⁴ That understanding would be particularly clear where the due process case arose in a context to which the Sixth Amendment does not apply. For example, when the Court held that cross-examination is not required in prison disciplinary proceedings, no one understood this as limiting the Sixth Amendment right of confrontation—only the due process right.⁵⁴⁵ That is precisely what happened in both *Williams* cases: The Sixth Amendment clearly did not apply under *West* and *Stein*, so the Court issued decisions regarding the scope of the due process right of confrontation.⁵⁴⁶

Not coincidentally, once *West* and *Stein* were overruled by *Pointer*,⁵⁴⁷ the Court quickly began to recognize confrontation rights at sentencing. In *Specht v. Patterson*,⁵⁴⁸ the Court held that a defendant had a right to confront witnesses at a proceeding to determine whether he “constitute[d] a threat of bodily harm to members of the public, or

⁵³⁷ 380 U.S. 400, 407–08 (1965).

⁵³⁸ 337 U.S. 241, 241 (1949).

⁵³⁹ 358 U.S. 576, 576 (1959).

⁵⁴⁰ 346 U.S. 156 (1953).

⁵⁴¹ See *id.* at 195.

⁵⁴² See *Michigan v. Bryant*, 562 U.S. 344, 370 n.13 (2011) (noting that due process and state evidentiary rules protect rights to confrontation).

⁵⁴³ See *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959).

⁵⁴⁴ See, e.g., *Kentucky v. Stincer*, 482 U.S. 730, 744, 747 (1987) (separately rejecting arguments under the Confrontation Clause and the Due Process Clause that a defendant has a right to be present at a child witness’s competency hearing).

⁵⁴⁵ See *Wolff v. McDonnell*, 418 U.S. 539, 567–68 (1974).

⁵⁴⁶ See *supra* notes 506–19 and accompanying text.

⁵⁴⁷ See 380 U.S. 400, 406 (1965).

⁵⁴⁸ 386 U.S. 605 (1967).

[was] a[] habitual offender and mentally ill.”⁵⁴⁹ The *Specht* opinion is remarkably unclear as to whether it was construing the Confrontation Clause or the Due Process Clause, and lower courts have taken conflicting positions.⁵⁵⁰ At least three features of the opinion, however, indicate that it is best read as a Confrontation Clause case. First, the Court used the Clause’s language almost verbatim, referring to a defendant’s right to “be confronted with witnesses against him.”⁵⁵¹ Second, the Court indicated that the petitioner was “entitled to the full panoply” of procedural protections,⁵⁵² whereas due process alone does not “implicate the entire panoply of criminal trial procedural rights.”⁵⁵³ Third, although the Court described itself as holding that the proceeding violated “due process as measured by the requirements of the Fourteenth Amendment,” it cited only *Pointer* as the source of the due process rights at issue.⁵⁵⁴ Because *Pointer*, in turn, considered due process only as the means for incorporating the Sixth Amendment—rather than as an independent concept⁵⁵⁵—this reference must mean that *Specht* was likewise referencing the Sixth Amendment right *as incorporated by* due process.

That inference is reinforced by Justice Harlan’s one-sentence opinion concurring in the result. In its entirety, it reads as follows: “Mr. Justice Harlan agrees with the conclusions reached by the Court, but upon the premises set forth in his opinion concurring in the result in *Pointer v. Texas*.”⁵⁵⁶ In *Pointer*, Justice Harlan had decried incorporation as “discredited” and thus refused to join the Court’s application of the Sixth Amendment.⁵⁵⁷ Instead, he concurred on pure due process grounds.⁵⁵⁸ In subsequent Confrontation Clause cases arising out of state criminal trials, he reiterated this view in opinions almost identical to his *Specht* concurrence: short, one- or two-sentence concurrences directing the reader to his *Pointer* concurrence.⁵⁵⁹ By contrast, he apparently joined

⁵⁴⁹ *Id.* at 607, 610.

⁵⁵⁰ *Contrast Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (reading *Specht* as a Confrontation Clause case), *with United States v. Wise*, 976 F.2d 393, 398 n.2 (8th Cir. 1992) (reading *Specht* as a due process case).

⁵⁵¹ *Specht*, 386 U.S. at 610.

⁵⁵² *Id.* at 609–10 (quoting *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1966)).

⁵⁵³ *Gardner v. Florida*, 430 U.S. 349, 358 n.9 (1977).

⁵⁵⁴ *Specht*, 386 U.S. at 611 (citing *Pointer v. Texas*, 380 U.S. 400 (1965)).

⁵⁵⁵ *See Pointer*, 380 U.S. at 403.

⁵⁵⁶ *Specht*, 386 U.S. at 611 (Harlan, J., concurring).

⁵⁵⁷ *Pointer*, 380 U.S. at 408 (Harlan, J., concurring in the result).

⁵⁵⁸ *See id.*

⁵⁵⁹ *See, e.g., Douglas v. Alabama*, 380 U.S. 415, 423 (1965) (Harlan, J., concurring in the result); *Barber v. Page*, 390 U.S. 719, 726 (1968) (Harlan, J., concurring); *see also California v. Green*, 399 U.S. 149, 184 (1970) (Harlan, J., concurring) (noting his disagreement with the incorporation of the Confrontation Clause as part of a longer opinion).

the majority in *Williams v. Oklahoma* without reservation.⁵⁶⁰ That he wrote separately in *Specht* but joined *Williams* strongly suggests that he viewed the former as a Confrontation Clause case—like the others in which he wrote separately—and the latter as a pure due process case.

Admittedly, even if *Specht* is read as a Confrontation Clause case, it does not resolve the applicability of the Clause at all sentencing proceedings. The Court emphasized that the sentence in *Specht* required “a new finding of fact that was not an ingredient of the offense charged.”⁵⁶¹ Thus, *Specht* can be read as “a precursor of *Apprendi v. New Jersey*”⁵⁶² and its progeny,⁵⁶³ which hold that the rights to trial by jury and proof beyond a reasonable doubt—which are typically limited to the guilt phase—apply to any fact-finding that could increase the minimum or maximum sentence.⁵⁶⁴ If that is correct, *Specht* stands not for the proposition that the Confrontation Clause applies at sentencing but for the proposition that the “sentencing” at issue there was not really a sentencing but an extension of the guilt phase. Nevertheless, the fact that *Specht* began the extension of confrontation rights to convicted defendants so soon after *Pointer* underscores the point that the *Williams* decisions were driven by the inapplicability of the Confrontation Clause to states, not to sentencing.

The prevailing view in the lower courts—that the Confrontation Clause does not apply to sentencing—rests almost entirely on the *Williams* decisions.⁵⁶⁵ Yet as the above analysis shows, those decisions provide little support for that proposition, even assuming their correctness.

CONCLUSION

Although American criminal procedure was heavily influenced by England, it was infused with its own adversarial flavor—a flavor England would not recreate until years after the American Founding. The Sixth Amendment was adopted to assuage fears of backsliding into the more inquisitorial procedures still prevalent across the pond. Justice Story decried those procedures as “crimsoned with the blood of persons, who

⁵⁶⁰ See 358 U.S. 576, 587 (1959) (noting that only Justice Douglas dissented from the opinion). Justice Harlan did not join the Court until 1955, six years after the *Williams v. New York* decision. See *Appointment of Mr. Justice Harlan*, 348 U.S. ix (1955).

⁵⁶¹ *Specht*, 386 U.S. at 608 (citation omitted).

⁵⁶² 530 U.S. 466 (2000).

⁵⁶³ *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002).

⁵⁶⁴ See *Apprendi*, 530 U.S. at 476. After initially declining to do so, see *Harris v. United States*, 536 U.S. 545, 557 (2002), the Court eventually extended *Apprendi* to facts that could increase the minimum sentence. See *Alleyne v. United States*, 570 U.S. 99, 103 (2013).

⁵⁶⁵ See sources cited *supra* note 501.

were condemned to death . . . against the clearest rules of evidence.”⁵⁶⁶ And he praised the “wisdom” of the Amendment in “mak[ing a] matter of constitutional right” the adversarial system that “the common law had left in a most imperfect and questionable state.”⁵⁶⁷

The right of confrontation was a cornerstone of that adversarial system. Chief Justice Marshall put it best:

I know not . . . why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.⁵⁶⁸

Our criminal justice system has changed drastically since the First Congress proposed the Sixth Amendment and the states ratified it. But some of its lessons remain timeless. Among them is the commitment to adversarialism embodied by the Confrontation Clause—a commitment that, as we have seen, applies with full force at sentencing. It is time for the Clause to be honored as much in the observance as in the breach.

⁵⁶⁶ 3 STORY, *supra* note 63, § 1786, at 664.

⁵⁶⁷ *Id.* § 1788, at 655.

⁵⁶⁸ *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) (Marshall, Circuit Justice).